The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who were administratively suspended from the practice of law on April 1, 2009, under Rule 419(b)(2), SCACR, and remain suspended as of June 1, 2009. Pursuant to Rule 419(e)(2), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by July 1, 2009.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date of this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
June 11, 2009

ATTORNEYS SUSPENDED FOR NON-COMPLIANCE
FOR THE 2008-2009 REPORTING PERIOD
AS OF JUNE 2, 2009

David A. Braghirol
Law Offices of David A. Braghirol
1720 Main St., Ste 301
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Interim Suspension 6/24/08

James M. Brown
J. Michael Brown Attorney at Law, LLC
PO Box 2402
Columbia, SC 29202
Interim Suspension 8/19/08

Jeffrey H. Gray
Troutman Sanders, LLP
222 Central Park Ave., Ste 2000
Virginia Beach, VA 23462

Jeffrey S. Holcombe
229 Wes Bickley Road
Irmo, SC 29063

Gregory G. Holland
1231 Aster Drive
Glen Burnie, MD 21061

Lawrence E. Judice
Elle & Company, LC
PO Box 1734
Columbia, SC 29202

Jason T. Kellett
Jason T. Kellett, PA
714 E. McBee Avenue
Greenville, SC 29601

Eric P. Kelley
5109 Bay Overlook Drive
Hermitage, TN 37076
Suspended by Bar 2/1/09

Nina Kilbride
741 W. Johnson Street
Raleigh, NC 27607

Christine Latona
Campbell & Associates, PA
717 East Boulevard
Charlotte, NC 28203
Suspended by Bar 2/1/09

William M. Maloof, Jr.
Maloof & Hendrick, LLC
215 N. McDonough Street
Atlanta, GA 30030
Suspended by Bar 2/1/09

Joseph P. Mizzell, Jr.
700 Greenlawn Dr., Apt. 2003
Columbia, SC 29209
Suspended by Bar 2/1/09

Patrick H. Moore
2125 Woodmere Drive
Columbia, SC 29204

Terry T. Moyer
Milliken Research Corp.
PO Box 1927 (M-495)
Spartanburg, SC 29304
Suspended by Bar 2/1/09

Mitzi A. Presnell
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Wellington, FL 33414
Suspended by Bar 2/1/09

Steven M. Rubinstein
Steven M. Rubinstein, PA
6 Stallion Court
Charleston, SC 29407
Suspended by Bar 2/1/09

Laura L. Rummans
Ruden McClosky Smith Schuster
& Russell, PA
222 Lakeview Ave., Ste 800

W. Palm Beach, FL 33401
Suspended by Bar 2/1/09

Sheryl S. Schelin
730 Main St., #358
North Myrtle Beach, SC 29582
Interim Suspension 4/3/09

William R. Sims
PO Box 645
Kershaw, SC 29067
Definite 90-Day Suspension 10/13/08

Howard R. Smith
3231 Sunset Blvd. Ste D
West Columbia, SC 29169
Suspended by Bar 2/1/09

Christine B. Stump
CLO, Mountaintop Dev., LLC
295 Seven Farms Dr., Ste C-138
Charleston, SC 29492
Suspended by Bar 2/1/09

Samuel O. Thompson II
115 Lockleven Drive
Columbia, SC 29229

Steven E. Williford
The Williford Law Firm, PC
3674 Express Drive
Shallotte, NC 28470

Wyatt B. Willoughby
PO Box 14369
Myrtle Beach, SC 29587
Suspended by Bar 2/1/09

The Supreme Court of South Carolina

In the Matter of Steven E. Solomon, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Commission Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Solomon and the interests of Mr. Solomon's clients.

IT IS ORDERED that Michael H. Sartip, Esquire, is hereby appointed to assume responsibility for Mr. Solomon's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Solomon may have maintained. Mr. Sartip shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Solomon's clients and may make disbursements from Mr. Solomon's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Steven E.

Solomon, Esquire, shall serve as notice to the bank or other financial institution that Michael H. Sartip, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael H. Sartip, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Solomon's mail and the authority to direct that Mr. Solomon's mail be delivered to Mr. Sartip's office.

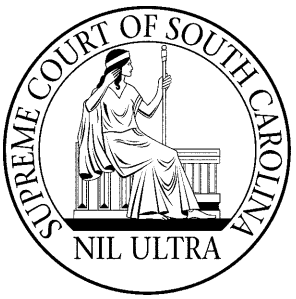
Mr. Sartip's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

June 10, 2009



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
June 15, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Timothy Mark Hopper, Employee/Claimant,

v.

Terry Hunt Construction, Employer, Uninsured, South Carolina Uninsured Employers Fund, Kajima USA, Inc., Statutory Employer, and Zurich American Insurance Company, Carrier, Defendants,

of whom Kajima USA, Inc., Statutory Employer, and Zurich American Insurance Company, Carrier are, Petitioners,

and South Carolina Employers' Fund is, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Howard P. King, Circuit Court Judge

Opinion No. 26665
Heard February 19, 2009 – Filed June 15, 2009

AFFIRMED

Steven Michael Rudisill and Bradley Horace Smith, both of Rudisill, White & Kaplan, of Charlotte, for Petitioners.

Amy V. Cofield, of Lexington, and Latonya Dilligard Edwards, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this workers' compensation case, the court of appeals held that Petitioner Kajima USA, Inc. ("Kajima") and Petitioner Zurich American Insurance Company ("Zurich") could not transfer liability to Respondent South Carolina Employers' Fund ("Fund"). *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007). This Court granted a writ of certiorari to review that decision. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Kajima hired Terry Hunt Construction ("Hunt") as a subcontractor to install pipe at a jobsite in Greenwood, South Carolina. On February 19, 2004, Claimant Timothy Mark Hopper suffered an injury while working for Hunt at the Greenwood jobsite. Hunt had worked for Kajima on a previous project and had presented an Acord Form 25-S Certificate of Insurance indicating that Hunt had a workers' compensation policy. The Certificate indicated that the policy was effective from May 2, 2002 through December 31, 2002, and the block labeled "DESCRIPTION OF OPERATIONS/ LOCATIONS" on the Certificate provided certain "Workers Comp Information" including the project number, the subcontract number, and the claim deductible amount. Before beginning work on the Greenwood project, Hunt presented another Certificate to Kajima. This Certificate showed that the policy was effective from January 1, 2003 through December 31, 2003, but unlike the previous Certificate of Insurance, the "DESCRIPTION OF

OPERATIONS/ LOCATIONS" on this Certificate was blank. At the time of Claimant's accident, Hunt did not have workers' compensation insurance, and Kajima therefore remained liable to pay benefits.

The single commissioner found that the Claimant suffered a compensable injury, but ruled that Kajima and Zurich could not shift liability pursuant to S.C. Code Ann. § 42-1-415 (Supp. 2008) because the Certificate of Insurance did not indicate that Hunt had coverage in South Carolina.[1] The full commission adopted the single commissioner's order in its entirety. The circuit court reversed and found that there was no evidence that the Certificate of Insurance showed that there was coverage only in Georgia and no coverage in South Carolina. The court of appeals reversed the circuit court, and held that Petitioners could not transfer liability because substantial evidence in the record showed that Kajima did not comply with the requirements of § 42-1-415.

This Court granted Petitioners' request for a writ of certiorari to review the court of appeals' decision, and Petitioner presents the following issue for review:

> Did the court of appeals err in holding that Petitioners could not transfer liability to the Fund pursuant to § 42-1-415?

STANDARD OF REVIEW

This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). However, the appellate court may reverse the full commission's decision if it is based on an error of law. *Therrell v. Jerry's Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-95 (2006). The

[1] The single commissioner found that the Certificate of Insurance reflected a Georgia workers' compensation policy and that the Certificate did not indicate that the policy had an all-states endorsement.

issue of interpretation of a statute is a question of law for the Court. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

LAW/ANALYSIS

Petitioners argue that the court of appeals erred in holding that they could not transfer liability. We disagree.

Generally, a higher tier contractor is considered the statutory-employer of an employee of a lower tier contractor, and thus, the high tier contractor remains liable to pay benefits to an employee if he sustains a compensable injury. S.C. Code Ann. § 42-1-400 (Supp. 2008). Section 42-1-415(A), however, provides a narrow exception to this rule:

> [U]pon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section.

Liability may only be transferred from the higher tier contractor to the Fund after the higher tier contractor has properly documented the lower tier contractor's claim that it retains workers' compensation insurance. *See Barton v. Higgs*, 381 S.C. 367, 371, 674 S.E.2d 145, 147 (2009) (holding liability could not be transferred to the Fund where the Certificate of Insurance was not signed).

We find substantial evidence in the record to support the commission's finding that Kajima failed to comply with the requirements of § 42-1-415(A). The Description of Operation box on the Certificate of Insurance was left blank and unlike the previous Certificate of Insurance that Kajima accepted, this Certificate contained no information regarding the coverage that the

policy provided, the deductible amount, or the project to which the policy applied. In failing to fill out the entire Acord Form, Hunt essentially submitted an incomplete document purporting to show that it had a workers' compensation policy, which Kajima accepted. In our view, accepting an incomplete Acord Form does not constitute proper documentation.

Furthermore, even if Hunt had submitted a completed Certificate, we find an additional sustaining ground in the record to affirm the commission's decision. We have held that "engaged to perform work" means "each time a subcontractor is actually hired to perform work." *See Hardee v. McDowell*, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (explaining the definition of "engaged to perform work" and overruling *South Carolina Uninsured Employer's Fund v. House*, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004) to the extent it was inconsistent with the opinion). In addition to this definition, we now hold that the statute's language that the "subcontractor has represented himself . . . as having workers' compensation insurance" in conjunction with "at the time the contractor or subcontractor was engaged to perform work" encompasses a continuous spectrum and includes the complete time frame in which the subcontractor is engaged to perform the work. In other words, in order to transfer liability to the Fund, a general contractor may not rely upon a Certificate reflecting an expired policy as documentation of workers' compensation insurance.[2] To interpret the language in the statute otherwise would allow a general contractor to turn a blind eye to information which is readily evident upon a cursory inspection of the Certificate. Such an interpretation would lead to an absurd result not possibly intended by the legislature. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (recognizing that the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention).

[2] In our view, the plain language of § 42-1-415(A) is clear that a subcontractor must represent that he has workers' compensation coverage while he is engaged to perform work. Therefore, we disagree with the dissent in looking to section § 42-1-415(C) to clarify § 42-1-415(A).

In the instant case, in an attempt to establish its right to transfer liability for an accident occurring on February 19, 2004, Kajima relied on a document explicitly providing that the workers' compensation coverage expired on December 31, 2003. Thus, on January 1, 2004 and any time thereafter, Kajima no longer had documentation showing that Hunt had workers' compensation insurance at the time Hunt was engaged to perform work. Accordingly, we hold that Kajima could thus not transfer liability to the Fund.

Section 42-1-415 is a very narrow exception to the general rule that a general contractor, as the statutory employer, remains liable to pay benefits if a subcontractor's employee sustains an injury. In order to protect the privilege to transfer what would otherwise be the general contractor's responsibility, the statute requires the general contractor to take minimal steps to properly document that the subcontractor has workers' compensation insurance. We hold that an incomplete Acord Form does not constitute proper documentation and that a general contractor may not rely upon a Certificate showing an expired workers' compensation policy to show "documentation" of the subcontractor's workers' compensation insurance. Therefore, we uphold the commission's order finding Kajima could not transfer liability to the Fund.[3]

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

KITTREDGE, J. and Acting Justice Timothy M. Cain, concur. PLEICONES, J. dissenting in a separate opinion in which WALLER, J. concurs.

[3] Although the commission found that Petitioners could not transfer liability based on a separate reason, we may affirm the commission's decision for any ground appearing in the record. *See* Rule 220(c), SCACR.

JUSTICE PLEICONES: I respectfully dissent. In September 2003, Kajima entered a contract with Hunt Construction for work that commenced in November 2003. Hunt gave Kajima an Acord 25-S Certificate of Liability Insurance indicating Hunt had workers compensation coverage through December 31, 2003. Pursuant to S.C. Reg. 67-415, this form, if issued by the carrier for the insured and dated, signed, and issued by an authorized representative of the carrier, "shall serve as documentation of insurance" for purposes of S.C. Code Ann. § 42-1-415 (Supp. 2008). See Barton v. Higg, 381 S.C. 367, 674 S.E.2d 145(2009) (majority holds compliance with reg.'s four requirements are necessary to constitute statutory documentation). Here, the form was issued, dated, and signed by an authorized representative and thus met § 42-1-415's documentation requirement. Id. Nothing in either the statute or the regulation requires, as would the majority here, that the form's block nominated "DESCRIPTION OF OPERATIONS/LOCATIONS" be filled in, nor that the form contain coverage information or the amount of the deductible. In my opinion, there is no evidence in the record to support the ruling of the Full Commission, upheld by the Court of Appeals, that Kajima accepted an incomplete form and therefore did not have "documentation of insurance" "at the time the contractor or subcontractor was engaged to perform work", i.e., in September 2003.

I also dissent from the additional sustaining ground found by the majority. Section 42-1-415 (A) provides in relevant part:

> Notwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section.

The statute only requires that the lower tier contractor represented himself as having workers' compensation insurance (not that it actually has such

coverage) "at the time the contractor or subcontractor was engaged to perform work." The majority interprets that term to mean that the general contractor is under a continuing duty to assure itself of coverage during "the complete time frame in which the subcontractor is engaged to perform the work." I disagree.

In South Carolina Uninsured Employer's Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004) *modified on other grounds* Hardee v. McDowell, 381 S.C. 445, 673 S.E.2d 813(2009), the Court of Appeals held that § 42-1-415 does not require the general contractor to continue to collect proof of insurance after the initial documentation. As Judge Stilwell wrote for the court:

> We are loath to read such a requirement into a statute that otherwise contains such straightforward language.
>
> Subsection (C) of section 42-1-415 is directed toward the subcontractor, places upon it the duty to notify the higher-tier contractor of any lapse in coverage, and sets forth the consequences of the subcontractor's failure to do so when it provides, in relevant part:
>
> > Knowing and willful failure to notify, by certified mail, the higher tier…contractor…who originally was provided documentation of workers' compensation coverage of a lapse in coverage within five days after the lapse is considered fraud and subjects the…subcontractor who represented himself as having workers' compensation insurance to the penalties for fraud provided by law.
> >
> > S.C. Code Ann. § 42-1-415(C).
>
> The use in subsection (C) of the word "originally" lends support to the reasoning that the information given at the inception of the engagement is the controlling factor,

> negating any statutory requirement on the part of the higher-tier contractor to continue collection proof of insurance.
>
> House, 360 S.C. at 472, 602 S.E.2d at 83.

I agree with the Court of Appeals in House and would hold that Kajima is relieved of liability under § 42-1-415 because it received an Acord form which complied with the regulatory requirements of Reg. 67-415 at the time Hunt was engaged to perform the work.

For the reasons given above, I respectfully dissent.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John J. McCrosson, Respondent,

v.

Kimberly Paige Tanenbaum, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Jack Alan Landis, Family Court Judge

Opinion No. 26666
Heard May 12, 2009 – Filed June 15, 2009

AFFIRMED IN PART AND VACATED IN PART

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia, Marie-Louise Ramsdale, of Mt. Pleasant, and Susan T. Kinard and W. Robert Kinard, both of Kinard and Kinard, of Mt. Pleasant, for Petitioner.

Donald B. Clark, of Charleston, and Mark O. Andrews, of Andrews & Shull, of Mt. Pleasant, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *McCrosson v. Tanenbaum*, 375 S.C. 225, 652 S.E.2d 73 (Ct. App. 2007). We affirm the court of appeals decision. However, we vacate the following sentence from the court of appeals' opinion:

> While the family court is generally in the better position to determine a party's credibility, where there are numerous confirmed instances of a party's dishonesty, as there are here, we believe a reviewing court may have the advantage because it can consider the facts of a case without being distracted by an emotionally charged trial.

McCrosson, 375 S.C. at 242, 652 S.E.2d at 82. Although we affirm the court of appeals' decision on the merits, we vacate the sentence above because it improperly implies that the family court was "distracted by an emotionally charged trial" and could be read to alter the well-established standard of review applicable to an appellate court's review of a family court's child custody determination.[1]

TOAL, C.J., WALLER, PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

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[1] When reviewing a decision of the family court, an appellate court may find the facts in accordance with its own view of the preponderance of the evidence. *Ex parte Morris*, 367 S.C. 56, 61, 624 S.E.2d 649, 652 (2006). The standard of review applicable to an appellate court's review of a family court order does not require that court to completely disregard the findings of the family court. *Wooten v. Wooten*, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). However, although the standard of review in such cases is broad, an appellate court should be reluctant to substitute its own judgment for that of the family court. *Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frank W. Kerr, as personal representative for the Estate of Marta Butler Kerr, deceased, Appellant,

v.

Richland Memorial Hospital, Respondent.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26667
Heard April 8, 2009 – Filed June 15, 2009

AFFIRMED

Charles L. Henshaw, Jr., of Furr, Henshaw & Ohanesian, of Columbia, for Appellant.

William H. Davidson, II and Andrew F. Lindemann, both of Davidson, Morrison & Lindemann, of Columbia, for Respondent.

JUSTICE KITTREDGE: This medical malpractice case turns on whether the six-year statute of repose in section 15-3-545(A) of the South

Carolina Code (2005) applies to causes of action arising under the Tort Claims Act. We hold that it does and affirm.

I.

In 1996, Marta Kerr's excised mole was allegedly misdiagnosed as benign by a pathologist at Richland Memorial Hospital (Hospital). In 2001, Kerr learned the 1996 specimen, upon reexamination, contained evidence of melanoma. This misdiagnosis allegedly contributed to Kerr's death in 2002 due to complications of melanoma cancer. Kerr's estate brought suit in 2003 against Hospital, more than six years after the alleged misdiagnosis.

The trial court granted summary judgment to Hospital after holding the statute of repose bars such a case and the Tort Claims Act shields a governmental entity from liability for an independent contractor's actions. The case is before this Court via Rule 204(b), SCACR, certification.

II.

The threshold issue is whether the statute of repose affects actions against government entities under the Tort Claims Act. S.C. Code Ann. § 15-78-10 to -220 (Supp. 2008). We hold the statute of repose applies.

This Court previously held, "the six-year repose provision in [section] 15-3-545 'constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered.'" *Harrison v. Bevilacqua*, 354 S.C. 129, 137-38, 580 S.E.2d 109, 113 (2003) (quoting *Hoffman v. Powell*, 298 S.C. 338, 339-40, 380 S.E.2d 821, 821 (1989)). In *Harrison*, this Court rejected the continuous treatment rule as such a rule would "run afoul of the absolute limitations policy the Legislature has clearly set . . . ." 354 S.C. at 138, 580 S.E.2d at 114.

Specifically, section 15-3-545(A), which has not been amended since *Harrison*, states:

> *In any action*, . . . to recover damages for injury to the person arising out of any medical . . . treatment . . . by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, *not to exceed six years from date of occurrence*, or as tolled by this section.

(emphasis added). Accordingly, the statute of repose provision within section 15-3-545(A) applies as an absolute outer limit applicable in *any* medical malpractice action.

Additionally, the statute of repose portion of section 15-3-545(A) is substantive law, unlike a statute of limitations, which is procedural law. *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time."). Further, when the Legislature enacted the Tort Claims Act, the Legislature knew of the absolute time limit imposed by the statue of repose. *Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) (citation omitted) ("A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.").

Next, we turn to the Tort Claims Act itself. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (citation omitted). The General Assembly indicated its intent in the Tort Claims Act by stating, "[t]he provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) (2005).

When reading the Tort Claims Act as a whole, which we must, we hold the above unambiguous expression of intent pervades the entire act. *Mid-State Auto*, 324 S.C. at 69, 476 S.E.2d at 692 ("In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole."). Specifically, section 15-78-40 of the South Carolina Code (2005) states, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." Similarly, section 15-78-50(b) of the South Carolina Code (2005) provides, "[i]n no case is a governmental entity liable for a tort of an employee where that employee, if a private person, would not be liable under the laws of this State." Accordingly, the Legislature clearly intended to limit government liability through the Tort Claims Act, and at no time did the Legislature intend government liability to exceed that of a private entity.

Conversely, Kerr is inviting this Court to contravene the unambiguous intent of the Legislature and expand liability for a government hospital beyond a private hospital's potential liability. In fact, Kerr's counsel conceded the statute of repose bar in a private action when stating, "by the time this client came to see me, [the estate] had clearly lost [its] right under [section] 15-3-545(A), the right to pursue any private entity because of the medical malpractice statute of repose. Six years had transpired." To permit this medical malpractice action to proceed beyond the statute of repose would be to disregard the Tort Claims Act, particularly sections 15-78-40 and 15-78-50(b).

Having found Hospital was entitled to summary judgment based on the statute of repose, we need not reach the additional ground relied upon by the trial court. *Wilson v. Moseley*, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997) (holding if one ground proves dispositive, then this Court need not address the remaining grounds relied on by a trial court when it granted summary judgment).

III.

As the six-year statute of repose in section 15-3-545(A) applies as an absolute outer limit applicable in *any* medical malpractice, the grant of summary judgment to the Hospital is

AFFIRMED.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James O. Grant, Individually and as Personal Representative of the Estate of Lessie Mae P. Grant, Respondent,

v.

Magnolia Manor-Greenwood, Inc; THI of South Carolina at Greenwood, LLC; THI of South Carolina, LLC; THI of Baltimore Management, Inc.; THI Holdings, LLC; Trans Healthcare, Inc; ABE Briarwood Corporation; and Jane Doe 1-10, Appellants.

Appeal From Greenwood County
James E. Lockemy, Circuit Court Judge

Opinion No. 26668
Heard January 8, 2009 – Filed June 15, 2009

AFFIRMED

Perry D. Boulier and Ginger D. Goforth, both of Holcombe Bomar, of Spartanburg, for Appellants.

Fred Thompson, III and Kimberly D. Barone, both of Motley Rice, LLC, of Mount Pleasant, for Respondent.

CHIEF JUSTICE TOAL: In this case, the circuit court denied Appellants' motion to enforce arbitration on the grounds that the designated arbitrator had become unavailable and that the unavailability voided the arbitration agreement. Appellants appealed, and we certified this case pursuant to Rule 204(b), SCACR.

FACTUAL/PROCEDURAL BACKGROUND

Respondent James O. Grant ("Respondent") is the surviving husband of Lessie Mae P. Grant ("Grant") and the personal representative of her estate. On December 4, 2003, at the age of 72, Grant was admitted to the Magnolia Manor-Greenwood nursing home. Upon admission, Respondent executed an admission contract as a "fiduciary party" on behalf of Grant, who was unable to sign the contract herself. The admission contract contained an arbitration provision, which states as follows:

> **VI: Arbitration**
>
> Pursuant to the Federal Arbitration Act, any action, dispute, claim, or controversy of any kind (*e.g.*, whether in contract or in tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with the provision of health care services, any agreement between the parties, the provision of any other goods or service by the Health Care Center or other transactions, contracts or agreements of any kind whatsoever, any past, present, or future incidents, omission, acts errors, practices, or occurrence causing injury to either party whereby the other party or its agents, employees or representatives may be liable, in whole or in part, or any other aspect of the past, present, or future relationships between the

parties shall be resolved by binding arbitration administered by the National Health Lawyers Association (the "NHLA").[1]

On January 1, 2004, the AHLA amended its rules for arbitrating health care liability claims. Under the new rules, the AHLA would only arbitrate claims pursuant to arbitration agreements entered into after the alleged injury occurred. The parties did not modify the admission contract to reflect the AHLA policy change.

On January 11, 2005, Grant fell and sustained a large hematoma above her left eye. Five days later, Grant died as a result of this injury. Respondent instituted this action against Appellants for survival, wrongful death, and loss of consortium.

Appellants filed a motion to enforce arbitration and stay the proceedings. Respondent contested Appellants' motion on the grounds that the AHLA no longer arbitrated personal injury claims arising under pre-injury arbitration agreements and that the arbitration clause was therefore unenforceable. Appellants argued in reply that Section 5 of the Federal Arbitration Act ("FAA") allowed for the appointment of a replacement arbitrator when the designated arbitrator became unavailable. Following oral arguments, the circuit court entered an order denying Appellants' motion to enforce arbitration and stay the proceedings. In reviewing the arbitration agreement, the circuit court found that the AHLA had become unavailable as an arbitrator, found that the designation of the AHLA as arbitrator was a material term of the agreement, and declined to appoint a new arbitrator because "there would no longer be a meeting of the minds between the parties." Appellants present the following questions for review:

I. Did the circuit court err in finding the arbitration agreement void and unenforceable because of the unavailability of the designated arbitrator?

[1] The NHLA has since become the American Health Lawyers Association (the "AHLA") and hereinafter will be referred to by that name.

II. Did the circuit court err in failing to appoint a substitute arbitrator or in failing to allow the parties to consent to a substitute arbitrator in accordance with Section 5 of the Federal Arbitration Act?

STANDARD OF REVIEW

Determinations of arbitrability are subject to *de novo* review. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002). However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999).

LAW/ANALYSIS

Appellants argue that the circuit court erred in denying their motion to enforce arbitration due to the AHLA's unavailability to act as arbitrator. We disagree.

We observe at the outset that it is the policy of this state to favor the arbitration of disputes. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 506, 612, 583 S.E.2d 581, 585 (2003). Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. *Id.* at 597, 553 S.E.2d at 118-119.

Nevertheless, arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). In order to have a valid and enforceable contract, there must be a meeting of the

minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The parties' arbitration agreement provides that the arbitration shall be administered pursuant to the FAA. Section 5 of the FAA states in part:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein . . . .

9 U.S.C. § 5 (2007).

Appellants argue that the unavailability of AHLA has created a "lapse . . . in filling a vacancy" that Section 5 was designed to remedy. We disagree.

There is a dispute in the case law as to whether Section 5 applies in cases where, as here, the parties have specified an exclusive arbitral forum, but that forum is no longer available. Some courts, particularly the United States Court of Appeals for the Second Circuit, have held that Section 5 does not apply in such instances. *See In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 560 (2d Cir. 1995) (defining the term "lapse" in Section 5 to mean "a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process" and holding that Section 5 is therefore inapplicable to cases where the specifically designated arbitrator becomes unavailable); *Dover Ltd. v. A.B. Watley, Inc.*, No. 04-7366, 2006 WL 2987054, *6 (S.D. N.Y Oct. 18, 2006) (recognizing that "Section 5 . . . is

inapplicable when the parties have specified an exclusive arbitral forum, but that forum is no longer available").

Other jurisdictions have interpreted Section 5 so as to generally allow for the appointment of new arbitrators when the named arbitrator could not or would not proceed. *See Ex parte Warren*, 718 So.2d 45, 48 (Ala. 1998) (expressing the general rule that, "where the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator."); *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990) (same). However, these cases have also identified an exception to this rule, which provides that "[o]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration." *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220 (11th Cir. 2000). Importantly, "[n]one of these cases . . . stand for the proposition that district courts may use § 5 to circumvent the parties' designation of an exclusive arbitral forum." *In re Salomon Inc.*, 68 F.3d at 561.

We see great merit in the Second Circuit's view that Section 5 does not apply in cases where a specifically designated arbitrator becomes unavailable. However, we may assume without deciding that Section 5 applies in the present case and reach the same result because, in our view, the specific designation of the AHLA as arbitrator is an integral term of this arbitration agreement.

To determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the "essence" of the arbitration agreement. *Warren*, 718 So.2d at 49 (citing *Zechman*, 742 F.Supp. at 1364). Under the AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHLA "has wide-ranging substantive

implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." *Singleton v. Grade A Market, Inc.*, No. 08-1385, 2009 WL 996015, *6 (D. Conn. April 13, 2009). Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither "logistical" nor "ancillary." *See Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858, 862 (4th Cir. 2000) ("It is far better to interpret the agreement based on what is specified, rather than attempt to incorporate other remote rules by reference."); *Wall Street Associates v. Becker Paribas, Inc.* 818 F.Supp. 679, 683 (S.D. N.Y. 1993), affd. 27 F.3d 845 (2d Cir. 1994) ("[A]n agreement to arbitrate before a particular forum is as integral a term of a contract as any other, which courts must enforce."). Accordingly, we hold that the arbitration agreement is unenforceable and that the circuit court did not err in refusing to appoint a substitute arbitrator pursuant to Section 5.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court and remand for further proceedings.

WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George G. Reaves, Respondent.

Opinion No. 26669
Submitted May 4, 2009 – Filed June 15, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

George G. Reaves, of Florence, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the issuance of an admonition, public reprimand, or definite suspension not to exceed ninety (90) days. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent pled guilty to Failure to Pay Tax or File Return in violation of S.C. Code Ann. § 12-54-44(B)(3) (2000). On October 8, 2008, he was sentenced to eight (8) months imprisonment and a fine of $1,000, provided that, upon payment of $500 plus costs and restitution in the amount of $8,410, the balance was suspended upon service of one (1) year of probation. On May 6, 2009, a circuit court judge found respondent had violated several conditions of his probation, continued respondent's probation until October 7, 2013, and reduced the restitution payments to $50.00 per month beginning June 8, 2009. Respondent has been cooperative and forthright with ODC throughout its investigation

LAW

Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of crime of moral turpitude or serious crime). Further, he admits he has violated the Rules of Professional Conduct, Rule 407, SCACR, specifically Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct), Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. Respondent shall fulfill all obligations of his sentence,

including probation and payment of restitution, before he may file a Petition for Reinstatement under Rule 32, RLDE. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Marvin Lee Robertson, Jr., Respondent.

Opinion No. 26670
Submitted May 19, 2009 – Filed June 15, 2009

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

M. Baron Stanton, of Stanton Law Offices, PA, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR. In addition, respondent agrees to pay full restitution to clients, banks, and other persons and entities who have incurred losses as a result of his misconduct and to reimburse the Commission on Lawyer Conduct (the Commission) and ODC for costs incurred in this matter. We accept the agreement and disbar respondent from the practice of law in this state. Further, respondent shall pay full restitution to clients, banks, and other persons and entities who have incurred losses as a result of his misconduct and reimburse the

Commission and ODC for costs incurred in this matter. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent admits he failed to close this case and disburse the client's share of the funds for a period of approximately eighteen (18) months after receiving the settlement proceeds. He further admits he did not safeguard the client's funds and that the funds were not available on deposit in his trust account for at least the last twelve (12) months prior to disbursement.

Matter II

Respondent admits he closed the real estate transaction in this matter but did not make the first mortgage payoff of $350,366.10 as shown on the closing statement. Instead, for some months after the closing, respondent made monthly mortgage payments on the unsatisfied mortgage from various accounts under his control. Further, respondent admits that no title insurance policy was issued after the closing despite fees of $791.70 being shown on the closing statement as withheld for the policy. Respondent admits he cannot account for the funds shown on the closing statement as received and reserved for the first mortgage payoff and title insurance policy and that the funds were not available on deposit in his trust account at the time of his interim suspension on February 22, 2008. Respondent acknowledges he was the closing attorney for the first mortgage in a separate much earlier transaction and failed to record that mortgage.

Matter III

In March 2007, respondent received a $42,000 settlement check. Respondent admits he negotiated the settlement check but did not disburse the client's share of the funds. Respondent admits he failed to safeguard the funds and the funds were not available on

deposit in his trust account at the time of his February 22, 2008 interim suspension.

Matter IV

Respondent admits he undertook to represent a client in a domestic matter seeking to negotiate a child support reduction and the modification of an agreement. On January 29, 2008, he was paid a flat fee of $2,500 for the representation. As a result of his interim suspension, respondent did not serve the opposing party.

Matter V

Respondent admits he undertook to represent a client in an expungement and was paid $500. He did not complete the work on the matter.

Matter VI

Respondent admits he received a $6,000 settlement check. He negotiated the settlement check but did not disburse the client's share of the funds to the client. Respondent admits he failed to safeguard the funds and that the funds were not available on deposit in his trust account at the time of his February 22, 2008 interim suspension.

Matter VII

Respondent admits he received a $10,000 settlement check. He negotiated the settlement check but did not disburse the client's share of the funds to the client. Respondent admits he failed to safeguard the funds and that the funds were not available on deposit in his trust account at the time of his February 22, 2008 interim suspension.

Matter VIII

Respondent admits he received a $6,000 settlement check in October 2007. He admits he negotiated the settlement check without his client's signature. Respondent did not disburse the client's share of the funds until after his interim suspension on February 22, 2008. Respondent agrees he initially failed to safeguard the funds and that he neglected to promptly remit the client's share of the funds.

Matter IX

In June 2005, respondent admits he received a $75,000 settlement check. He admits he negotiated the check but did not disburse the client's share of the funds to the client. Respondent admits he failed to safeguard the funds and that the funds were not available on deposit in his trust account at the time of his February 22, 2008 interim suspension.

Matter X

In March 2007, respondent received a settlement check in the amount of $1,419. Respondent negotiated the check but did not disburse the client's share of the funds to his client or disburse the funds to the medical providers. Respondent admits he failed to safeguard the funds and that the funds were not available on deposit in his trust account at the time of his February 22, 2008 interim suspension.

Matter XI

In March 2004, respondent received two personal injury protection (PIP) checks totaling $1,000 from a client. Respondent admits he negotiated the checks but did not disburse the client's share of the funds to his client or disburse funds to the medical providers. Respondent admits he failed to safeguard the funds and that the funds were not available on deposit in his trust account at the time of his February 22, 2008 interim suspension.

Matter XII

In 2004, respondent undertook to represent a client in a personal injury case. He admits he failed to act with reasonable diligence on the matter and failed to obtain a written settlement agreement from opposing counsel. Further, respondent admits that, in May 2007, he mistakenly told the court that the case was settled. Ultimately, the case was dismissed by the court.

Matter XIII

Respondent admits that, in October 2006, he obtained two medical payment checks in the amount of $3,000 from a client. Respondent admits he negotiated the checks but did not disburse the funds to the client or medical providers. Respondent admits he failed to safeguard the funds and that the funds were not available on deposit in his trust account at the time of his February 22, 2008 interim suspension.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he violated Rule 417, SCACR.

Further, respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Further, we order respondent to pay full restitution to all clients, banks, and other persons and entities, including the Lawyers' Fund for Client Protection, who have incurred losses as a result of his misconduct and to reimburse the Commission and ODC for costs incurred in this matter. Within thirty (30) days of the date of this opinion, ODC and respondent shall enter into a restitution plan which complies with this opinion and includes a timeline for reimbursement of the Commission's and ODC's costs. Under no circumstances shall respondent be permitted to file a Petition for Reinstatement until full restitution and payment of costs have been made.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mikal D. Mahdi, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Calhoun County
Clifton Newman, Circuit Court Judge

Opinion No. 26671
Heard February 18, 2009 – Filed June 15, 2009

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

JUSTICE PLEICONES: Petitioner[1] pleaded guilty to murder, second degree burglary, and grand larceny. The trial judge imposed a death sentence for murder finding two aggravating circumstances,[2] and consecutive sentences of fifteen years (burglary) and ten years (larceny). This opinion combines the issue raised on certiorari and the sentencing review mandated by S.C. Code Ann. § 16-3-25 (2003). We affirm.

FACTS

On July 15, 2004, petitioner killed an employee while robbing a gas station in North Carolina. Petitioner shot the North Carolina victim twice in the face at point blank range using a gun he had stolen from his grandmother's neighbor. He was driving a vehicle stolen from Virginia, on which he had placed stolen license plates. Two days later, petitioner car-jacked a man in Columbia at 3:30 a.m. using the same weapon. Early that same morning, petitioner pulled into the Wilco Travel Plaza located off Interstate 26 in Calhoun County. Employees at the Travel Plaza became suspicious when petitioner was repeatedly unable to purchase gasoline from the pumps, while attempting to use stolen credit and/or check cards. The employees called law enforcement, and when officers arrived, petitioner fled on foot. He ran to a nearby farm property owned by Captain and Mrs. Myers.[3] The Myers did not reside on the rural property, but there was a shed in which they kept equipment and in which Mrs. Myers had an office.

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[1] The Court agreed to issue a writ of certiorari to consider this case since no timely notice of appeal was served. See Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998).

[2] Murder in the commission of a burglary, S.C. Code Ann. § 16-3-20(C)(a)(1)(c) (Supp. 2008) and in the commission of larceny involving the use of a deadly weapon, § 16-3-20(C)(a)(1)(e).

[3] Captain Myers was a captain with the Orangeburg Department of Public Safety.

Petitioner found a .22 caliber semi-automatic rifle in the shed where he apparently spent the day. When Captain Myers stopped by the farm that evening, petitioner shot him nine times with the .22: three bullets struck the victim in the head. Petitioner then poured diesel fuel over the body and lit it. He stole Myers' truck and various firearms from the shed and drove to Florida, where he was arrested three days later after a chase.

After a jury was selected but before it was sworn, petitioner elected to enter a guilty plea to the charges of murdering Captain Myers, burglarizing the shed, and stealing the personal property. The trial judge conducted a sentencing hearing, following which he issued an eleven and a half page sentencing order.

ISSUE

> Whether petitioner's capital sentence should be reversed because the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right?

ANALYSIS

Petitioner's argument relates to the following passage from the sentencing order, which is the last paragraph in the section of the order titled "Mitigating Circumstances:"

> The defense further argues as non-statutory mitigating circumstance that the Court should consider the Defendant's guilty plea in determining the appropriate sentence to be imposed. The Defendant's guilty plea occurred during the fourth day of his trial, following jury selection but prior to the jury being sworn. This was one day following his attempted escape through the use of the homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time

> known to the Court. Therefore, I conclude that no significant weight should be given to this non-statutory mitigating circumstance in the Court's ultimate decision as to the sentence to be imposed.

Petitioner contends this paragraph, specifically the second sentence, "The Defendant's guilty plea occurred during the fourth day of his trial, following jury selection but prior to the jury being sworn," demonstrates the judge improperly punished petitioner for initially exercising his right to a jury trial. See e.g. State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995) (judge cannot consider defendants exercise of right to jury trial sentencing). The State maintains, to the contrary, that this sentence is merely a factual recitation, or at most a partial explanation why the judge declined to consider the plea as a significant mitigator, but that it is not indicative of any punitive intent. Since, as petitioner conceded at oral argument, there was no objection to this passage at trial, no issue has been preserved for this Court's review. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008) (strict error preservation rules apply to capital cases).

PROPORTIONALITY REVIEW

Pursuant to § 16-3-25(c), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that petitioner's sentence is neither excessive nor disproportionate. See e.g. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (capital sentence upheld where aggravators were burglary and armed robbery).

CONCLUSION

Petitioner's conviction and sentences are

AFFIRMED.

WALLER, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: Although I concur with the majority, I write separately to record the facts of this particularly heinous case.

On July 14, 2004, Petitioner, then a resident of Virginia, embarked upon a crime spree that would span four states. Petitioner stole a .380 caliber pistol from his neighbor, a set of Virginia license plates, and a station wagon. Petitioner left Virginia and headed to North Carolina.

On July 15, Petitioner entered an Exxon gas station in Winston-Salem, North Carolina armed with the .380 pistol. Petitioner took a can of beer from a cooler and placed it on the counter. The store clerk, Christopher Jason Boggs, asked Petitioner for identification. As Boggs was checking Petitioner's identification, Petitioner fatally shot him at point-blank range. Petitioner fired another shot into Boggs as he lay on the floor. Petitioner then attempted unsuccessfully to open the store's cash register. Petitioner left the store with the can of beer, and headed to South Carolina.

Early in the morning of July 17, Petitioner approached Corey Pitts as he sat at a traffic light in downtown Columbia, South Carolina. Petitioner stuck his gun in Pitts' face, forced him out of his car, and stole Pitts' Ford Expedition. Petitioner replaced the Expedition's license plates with the plates he had stolen in Virginia, and headed southeast on I-26.

About thirty-five minutes down the road, Petitioner stopped at a Wilco Hess gas station in Calhoun County and attempted to buy gas with a credit card. The pump rejected the card, and Petitioner spent forty-five minutes to an hour attempting to get the pump to work. Due to his suspicious behavior, the store clerks called the police. Aware that the clerks' suspicions had been alerted, Petitioner left the Expedition at the station and fled on foot through woods behind the station.

About a quarter to half mile from the station, Petitioner came upon a farm owned by Captain James Myers, a thirty-one year veteran law enforcement officer and fireman. Petitioner broke into a work shop on the Myers property. Once inside the work shop, Petitioner watched television and examined Myers' gun collection. Petitioner found Myers' shotgun and

used the tools in the shop to saw off the barrel and paint it black. Petitioner also took Myers' .22 caliber rifle and laid in wait for Myers.

That day, Myers had been at the beach celebrating the birthdays of his wife, sister, and daughter. Myers had visited with his father before returning to his farm. Upon arriving at the farm, Myers stopped by the work shop, where he was confronted by Petitioner. Petitioner shot Myers nine times with the .22 rifle. Petitioner then poured diesel fuel on Myer's body and set the body on fire. Petitioner stole Myers' police-issued truck, and left with Myers' shotgun, his .22 rifle, and Myers' police-issued assault rifle.

Later that evening, Myers' wife, also a law enforcement officer, became worried when Myers did not return home. Mrs. Myers drove to the work shop and discovered Myers' burned body lying in a pool of blood.

Petitioner escaped to Florida, where he was spotted by police on July 21 driving Myers' truck. Fleeing the police, Petitioner abandoned the truck on foot in possession of the assault rifle. When cornered by police, Petitioner abandoned the rifle and was eventually taken into custody.

I recite these facts to emphasize the egregious nature of Petitioner's crimes. In my time on this Court, I have seen few cases where the extraordinary penalty of death was so deserved. I therefore concur with the majority and vote to affirm Petitioner's conviction and sentence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brian Major # 176677, Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, Appellant.

John D. Geathers, Administrative Law Court Judge

Opinion No. 26672
Heard February 5, 2009- Filed June 15, 2009

AFFIRMED AS MODIFIED

Deputy Director of Legal Services Teresa A. Knox, Assistant Chief Legal Counsel J. Benjamin Aplin, Legal Counsel Tommy Evans, Jr., all of S.C. Department of Probation, Parole and Pardon Services, of Columbia, for Appellant.

W. Gaston Fairey, of Columbia, for Respondent.

JUSTICE BEATTY: In this case, the South Carolina Department of Probation, Parole and Pardon Services (the Department) appeals the Administrative Law Court's (ALC's) decision that the

Department erred in its interpretation of section 16-23-490[1] of the South Carolina Code of Laws regarding the implementation of the sentence imposed by the trial court and Brian Major's eligibility for parole. This Court granted the request of the Court of Appeals for certification pursuant to Rule 204(b), SCACR. We affirm as modified.

FACTS

On February 8, 1996, Major was convicted of murder and possession of a weapon during the commission of a violent crime. The trial judge sentenced Major to a term of life imprisonment for murder and five years imprisonment for the weapons charge. The sentencing sheet for the weapons offense merely stated "consecutive."

On May 8, 2002, the South Carolina Department of Corrections (DOC) informed Major that he was no longer eligible for parole on his life sentence[2] because he could not begin serving the five-year weapons charge sentence until he completed his life sentence for murder. The DOC's notification was based on the Department's interpretation of section 16-23-490.

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[1] Although the code provision in effect at the time Major committed the offenses in 1990 has since been amended, we cite to the current version of section 16-23-490 given there have been no substantive changes that would affect the decision in this case. Act No. 184, 1993 S.C. Acts 3292.

Section 16-23-490 provides for additional punishment for persons possessing a weapon during the commission of a violent crime. Persons who are in possession of a firearm or knife during the commission of a violent crime, and are convicted of the underlying violent crime, must additionally be sentenced to five years in prison. S.C. Code Ann. § 16-23-490(A) (2003). The five-year sentence is mandatory and non-parolable. S.C. Code Ann. § 16-23-490(B), (C) (2003). The statute further provides that a sentencing court may make the additional five years consecutive or concurrent. S.C. Code Ann. § 16-23-490(B) (2003).

[2] At the time Major committed the murder, the applicable statute provided for parole eligibility after the service of twenty years on a sentence of life imprisonment. S.C. Code Ann. § 16-3-20(A) (1985).

In a PCR application, Major challenged the Department's interpretation of his sentence and the denial of parole eligibility. The PCR judge dismissed the application without prejudice so that the issues could be properly raised in the ALC in accordance with Al-Shabbaz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).[3] Major timely filed a petition for a writ of certiorari for this Court to review the PCR judge's order.

While awaiting a hearing before the ALC and a decision by this Court, Major filed a motion for clarification of his sentence. Relying on this Court's decision in Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999),[4] Major challenged the sequence in which he was to serve his

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[3] Al-Shabbaz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (holding inmate was entitled to seek judicial review under Administrative Procedures Act after Department reached its final decision).

[4] In Tilley, the defendant pled guilty to kidnapping, first-degree criminal sexual conduct, and possession of a firearm during the commission of a violent crime. He was sentenced to life imprisonment for kidnapping, eighteen years for first-degree CSC, and five years for possession of a weapon during the commission of a violent crime. The sentences were to be served consecutively. Tilley, 334 S.C. at 26, 511 S.E.2d at 690.

Tilley filed a PCR application after the Department informed him by letter that he was ineligible for parole due to the consecutive nature of the sentencing structure. Even though, in theory, Tilley was eligible for parole he was essentially ineligible because he was required to serve out his life term before serving the mandatory five-year term. Id. at 27, 511 S.E.2d at 691.

The PCR judge granted Tilley relief on this issue. Because the sentencing judge did not order that Tilley's sentences be served in a particular sequence, only that they be served consecutively, the PCR judge ordered that Tilley's sentences be served in a way that corrected the Department's interpretation of his sentence. Id. at 28-29, 511 S.E.2d at 692.

This Court agreed with the PCR judge's decision to rearrange the order of Tilley's sentences, placing the mandatory weapons sentence first, then the eighteen-year sentence for CSC, and finally the life sentence for kidnapping. The Court reasoned that the order would still effectuate the intent of the sentencing court, but the consecutive, mandatory five-year sentence on the weapons charge

sentences. Specifically, Major claimed that he had already served the five-year weapons charge sentence given he was awarded almost five years of credit for time served since his conviction. Thus, in light of Tilley, Major asserted that he should only be serving a life sentence which would make him eligible for parole. Under the Department's interpretation, Major averred that he would never be eligible for parole because he must serve his life term before serving the mandatory, five-year sentence.

Without a hearing, the trial judge denied Major's motion, explaining the sentence needs no clarification.

Following the circuit court judge's decision, Major sought another review by the Department of his parole eligibility. The Department issued a "final decision" and informed Major that he was not eligible for parole. As part of this notification, the Department informed Major that he had the right to appeal its decision to the ALC. Major moved for rehearing by the Department.

In the interim, having granted Major's petition for a writ of certiorari to review the PCR judge's dismissal of his PCR application, this Court issued an opinion on December 11, 2006 in which it affirmed the decision of the PCR judge. Major v. State, Op. No. 2006-MO-042 (S.C. Sup. Ct. filed Dec. 11, 2006). Citing Al-Shabazz, this Court explained that "Major must pursue his requested relief through the procedures provided in the Administrative Procedures Act in order to have his sentence reordered in accordance with our decision in Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (holding that the consecutive nature of the sentence does not mandate that the sentence be served in a specific order absent the sentencing court's clear articulation that the sentence be served in a specific order)."

Because of the procedural posture of Major's case, the Department delayed its final "rehearing" of Major's challenge to the

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would not affect parole eligibility on the other offenses. Id. at 29, 511 S.E.2d at 692.

agency's determination of his parole eligibility until after this Court issued its decision. On February 16, 2007, the Department sent Major a "final decision" letter, affirming its prior determination that he was ineligible for parole and directing him to file an appeal with the ALC.

Major filed his notice of appeal with the ALC. In his notice of appeal, Major argued that the Department incorrectly interpreted section 16-23-490 to require him to complete his life sentence on his murder conviction before beginning his five-year sentence on the weapons charge. Because the sentencing judge did not make any statement at the time of sentencing that the sentences were to be served in a specific order, Major claimed that his sentences should be "reordered" to comply with this Court's decision in Tilley.

The ALC issued an order reversing the Department's determination that Major was ineligible for parole. The ALC prefaced its decision by stating that criminal sentences must be interpreted in light of the sentencing judge's intent. In view of this principle, the ALC concluded that substantial evidence would not support the Department's finding "that the sentencing court intended for the five-year sentence to commence after [Major] completes his life sentence."

Ultimately, the ALC held that the Department erred in sequencing the sentences such that Major would never be eligible for parole. In so holding, the ALC reasoned "[t]here is no basis in logic or in the law for the intent to require an offender to serve an additional sentence after the completion of a life sentence." The ALC further stated "[t]he imposition of such a sentence would be a meaningless act absent the specific intent to preclude that individual from ever becoming eligible for parole. Further, the inference of such [ ] intent presumes that the sentencing judge was willing to invade the province of the legislature by circumventing its parole eligibility laws."

The Department appealed the ALC's decision to the Court of Appeals. This Court granted the Court of Appeals' request for certification.

DISCUSSION

The Department asserts the ALC erred in reversing its determination that Major is not parole eligible. Based on the terms of section 16-23-490 and the sentence structure imposed by the sentencing judge, the Department claims that Major is effectively serving a life sentence without eligibility for parole. The Department contends the sentencing judge's initial order indicated a clear intention for Major to serve the five-year mandatory term after completion of his life sentence. However, even if the original sentence could be construed as ambiguous, the Department avers that the sentencing judge clarified any question regarding his intention in the written order denying Major's motion for sentence clarification.

Essentially, the Department claims the sentencing judge definitively ordered that Major was to serve the five-year weapons sentence at the conclusion of his life sentence for murder thereby denying Major an opportunity for parole.

The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. S.C. Code Ann. § 1-23-610(B) (Supp. 2008); Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008) ("[T]his court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion."). The ALC's order should be affirmed if supported by substantial evidence in the record. Olson, 379 S.C. at 63, 663 S.E.2d at 501.

At least facially, our decision in Tilley supports a finding that the ALC properly reordered the sequence of Major's sentences to ensure parole eligibility given the sentencing sheets do not clearly articulate a particular order for which Major's sentences were to be served other than that they were to be "consecutive." This position is also bolstered

by this Court's order affirming the PCR judge's dismissal of Major's PCR application, wherein we stated "Major must pursue his requested relief through the procedures provided in the Administrative Procedures Act in order to have his sentence reordered in accordance with our decision in Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999)." Major v. State, Op. No. 2006-MO-042 (S.C. Sup. Ct. filed Dec. 11, 2006).

Because our decision in Tilley left some questions unanswered, we take this opportunity to expound on the decision in Tilley and address fundamental issues concerning the role of the General Assembly, the authority of a sentencing judge, and the discretion of the Department with respect to an inmate's parole eligibility when a defendant is convicted of multiple offenses resulting in consecutive sentences.

We preface our analysis with the general principle that parole is a privilege, not a matter of right. State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008); Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4 (2003). Parole is a creature of statute and is exclusively in the province of the legislative branch of government. The General Assembly empowers the Department to administer the parole program.

The General Assembly established this parole privilege and identified which criminal offenses are parole-eligible by statute. See Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (discussing parole eligibility of certain offenses established by the General Assembly's enactments); State v. De La Cruz, 302 S.C. 13, 16, 393 S.E.2d 184, 186 (1990) (noting that the penalty established for a particular crime is purely a matter of legislative prerogative, and that "[i]f the legislature so chooses, parole may not be made available to those who commit certain offenses").

Confined by these legislative enactments, and the doctrine of separation of powers, a sentencing court is not authorized to determine parole eligibility. Instead, a court's final judgment in a criminal case is

the pronouncement of the sentence which includes the ability to designate whether sentences run concurrent or consecutive, subject to statutory restrictions. State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989); see De La Cruz, 302 S.C. at 15, 393 S.E.2d at 186 ("Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction.").

In effectuating a sentencing court's order, the Department has the sole authority to look to the statutes to determine whether a defendant is eligible for parole separate and apart from the court's authority to sentence a defendant. See Dingle, 376 S.C. at 649, 659 S.E.2d at 104-05 (noting that the Department has the sole authority to determine parole eligibility separate and apart from the court's ability to sentence); Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) (same).

Nevertheless, a court may order the Department to structure a sentence in such a way as to carry out the intent of the parties with regard to parole. Tilley, 334 S.C. at 28-29, 511 S.E.2d at 692 (ordering the Department to consider the consecutive, five-year mandatory term for possession of a firearm as being served first such that the prisoner would be considered eligible for parole as the parties had intended).

Our law, however, is well-established that a sentencing judge does not have the authority to determine parole eligibility through sentencing. McKay, 300 S.C. at 115, 386 S.E.2d at 623. A sentencing court only has the ability to order whether a sentence is consecutive or concurrent. See S.C. Code Ann. § 16-23-490(B) (2003) (providing that a sentencing court may make the additional five years consecutive or concurrent). In other words, a sentencing judge has the authority to structure a sentence but this authority is specifically limited by the intention of the General Assembly in its legislative enactments concerning parole-eligible offenses and an inmate's service of a sentence. The General Assembly has not statutorily authorized the courts or the Department to nullify its power to grant parole or determine parole-eligible offenses.

The General Assembly has specifically identified certain crimes where the sentence must be consecutive and must be served last in time. See, e.g., S.C. Code Ann. § 16-15-395(D) (Supp. 2008) (providing that the sentence of a person convicted of first-degree criminal exploitation of a minor "must run consecutively with and commence at the expiration of another sentence being served") (emphasis added). Clearly, the General Assembly does not intend to define consecutive to mean last in time. Significantly, the General Assembly has not indicated that a consecutive sentence on a weapons charge must be served last. S.C. Code Ann. § 16-23-490(B) (2003).

With these principles in mind, we turn to the facts of the instant case. Initially, we note that it is not entirely clear what the sentencing judge intended as the sequence for Major's sentence given there was no clear pronouncement in the sentencing sheets.[5]

However, even if the items in this case are construed as expressing a clear intent by the sentencing judge for Major to serve his murder sentence before the weapons sentence, we find the judge was not authorized to make Major's normally parole-eligible sentence ineligible for parole. An order to this effect would essentially create a *de facto* life without parole sentence which would defeat the parole privilege created by the General Assembly for Major's murder charge. Clearly, this would be a violation of the separation of powers doctrine.

Moreover, the Department's construction of the sentencing judge's intent and interpretation of the law contradicts this Court's pronouncement and rationale announced in State v. Atkins, 303 S.C. 214, 399 S.E. 2d 760 (1990). In Atkins, this Court said "for purposes

[5] Although not done in this case, we believe a sentencing judge can clearly articulate his or her intent by listing the indictment numbers of the offenses and specifically identifying the sequence in which these offenses are to be served. Thus, we caution the bench that where a particular sequence of service is intended, there should be a clear pronouncement in the record regarding a particular order of the sentences.

of parole eligibility, consecutive sentences should be treated as one general sentence by aggregating the periods imposed in each sentence." Id. at 219, 399 S.E.2d at 763 (citing Mims v. State, 273 S.C. 740, 259 S.E. 2d 602 (1979)). More importantly, for purposes of this case, the Atkins Court concluded that "[m]ultiple life sentences cannot be aggregated in the imposition of prison time. Accordingly, they are to be considered as one general sentence, the parole eligibility for which is 20 years."[6] Id. This Court recognized its limitations and refused to invade the province of the General Assembly.

Adopting the reasoning of the Atkins' Court, it follows that if a consecutive life sentence could not nullify parole eligibility on a parolable life sentence, then a five-year consecutive sentence cannot either.

The question now becomes what is the efficacy of a consecutive sentence? The answer is two fold. First, following the guidance of Mims, the time is aggregated and parole eligibility is calculated on the aggregated sentence. Secondly, if the consecutive sentence is a non-parolable offense then its sentence must be served and credited first against the aggregated sentence. This is necessary to give effect to the legislative grant of parole eligibility on the parole-eligible offense.[7]

Considering the above discussion, the meaning of "consecutive" needs further attention. Because this term is not defined in our code of laws, we must employ the rules of statutory construction to ascertain and effectuate the intent of the General Assembly. See Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (stating

[6] Atkins, like Major, was charged under the old law. The old law allowed parole after service of twenty years. Atkins, 303 S.C. at 219, 399 S.E.2d at 763.

[7] The argument that this approach is contrary to prior practice was made in part by the dissent in Atkins to no avail.

the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation); Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.").

"Consecutive" means sentences run successively and the service of the sentence cannot run at the same time as the other sentences. See Black's Law Dictionary 304 (6th ed. 1990) (noting that "consecutive" means successive, succeeding one another in regular order, to follow in uninterrupted succession); Webster's Concise Dictionary 150 (2003) ("Following in uninterrupted succession; successive."); see generally R.P.D., Annotation, When Sentences Imposed by the Same Court Run Concurrently or Consecutively; and Definiteness of Direction with Respect Thereto, 70 A.L.R. 1511 (1931 & Supp. 2008) (outlining cases and discussing question of whether sentences on different counts or different offenses were intended to be served concurrently or consecutively and whether the sentence or sentences were sufficiently definite for the purpose intended).

Thus, a notation that a sentence is "consecutive," for sentencing purposes, does not necessarily delineate that the particular sentence has to run last. It merely indicates that all the sentences are to run successively, and not to run at the same time. See Atkins, 303 S.C. at 219, 399 S.E.2d at 763 (noting that "for purposes of parole eligibility, consecutive sentences should be treated as one general sentence by aggregating the periods imposed in each sentence"). Therefore, despite the fact that the weapons sentence was the last one imposed and it was denoted as "consecutive" there was no indication that the weapons sentence was to be the last sentence to be served. See Tilley, 334 S.C. at 28-29, 511 S.E.2d at 692 (ordering the Department to treat the consecutive weapons sentence as being served first such that the inmate could be considered for parole).

The General Assembly has specifically noted several crimes with limits on parole, and it has not indicated that a mandatory weapons

conviction will affect parole eligibility. See, e.g., S.C. Code Ann. § 16-3-20(A) (Supp. 2008) (holding a person convicted of murder with aggravating circumstances is not eligible for parole); S.C. Code Ann. § 16-11-330(A) (2003) (providing that a person convicted of committing a robbery while armed with a deadly weapon must be sentenced to a mandatory minimum of ten years up to a maximum of thirty years, and the person will not be parole eligible until he or she has served at least seven years).

Because there is no indication in section 16-23-490 that the General Assembly intended the mandatory five-year sentence to completely negate any possibility of parole on other parolable offenses, we conclude the Department's interpretation of section 16-23-490 was erroneous given its decision amounts to a denial of parole eligibility for an offense the General Assembly has determined is eligible for parole.[8]

CONCLUSION

Based on the terms of section 16-23-490 and the respective roles of the General Assembly, the sentencing court, and the Department, we hold the ALC correctly concluded that the Department erred in its determination of Major's parole eligibility. We modify the ALC's order to the extent the ALC based its decision solely on the Department's erroneous interpretation of the sequence of Major's sentences. Accordingly, the decision of the ALC is

[8] Interestingly, service of the five-year mandatory, no-parole sentence is not always required. See S.C. Code Ann. § 16-23-490(B) (2003) ("Service of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime. The court may impose this mandatory five-year sentence to run consecutively or concurrently."). Major received a mandatory-minimum sentence which exceeded five years. Thus, he is not necessarily required to serve the no-parole, five-year sentence. If he is not required to serve it, then we question why it should prevent parole eligibility on an otherwise parolable offense.

AFFIRMED AS MODIFIED.

WALLER, J., concurs. TOAL, C.J., concurring in a separate opinion. PLEICONES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: Although I concur with the majority opinion, I write separately to address the dissent's interpretation of *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990). The dissent is correct to observe that we recognized in *Atkins* the logical impossibility of aggregating multiple life sentences. However, the dissent errs in failing to extend that logic to the present case. It is just as much a logical impossibility to aggregate multiple life sentences as it is to aggregate a life sentence with *any* other sentence. Moreover, the lesson from *Atkins* as applied to the present case is that there is no sentence greater than life. Whether aggregated to a five year sentence or a second life sentence, the ultimate time served remains the same. Accordingly, I believe *Atkins* controls the inquiry in the present case, and stands for the proposition that a life sentence may not be aggregated with another sentence so as to affect parole eligibility where statute does not so provide.

JUSTICE PLEICONES: I respectfully dissent. In my view, the sentence at issue here is unambiguous and not subject to interpretation. Where a trial judge imposes two sentences, only one of which is denominated "consecutive," it of necessity follows the other. Moreover, while I agree that a judicial officer is not empowered to determine whether parole will be granted, I fundamentally disagree with the suggestion that a judge cannot structure a sentence in such a way that the defendant is never eligible to be considered for parole. In order to find that the Legislature intended such a result where a defendant is convicted of both a violent offense and of using a weapon in the commission of that offense, one need look no further than S.C. Code Ann. § 16-23-490(B) (2003), which specifically authorizes the judge to make the five year weapons sentence consecutive.

In interpreting sentences, the Department looks to the sentences imposed, not to the statutes. Moreover, only if there is an ambiguity in the sentences, must the Department or the court ascertain the intent of the judge, not, as the majority suggests, the intent of the parties. Finally, while certain parole eligibility determinations are statutorily committed to the Department,[9] as is the decision whether to grant parole,[10] there is no authority for the statement that a judge violates the separation of powers doctrine when he structures a sentence so that an otherwise parole-eligible defendant will never receive a hearing before the Board. See cases collected in People v. Montgomery, 669 P.2d 1387 (Colo. 1983) (no separation of powers issue in sentence structuring).

Finally, I read Mims v. State, 273 S.C. 740, 259 S.E.2d 602 (1979) to hold that where a defendant receives consecutive sentences, they are to be "aggregated," i.e. added together, in order to determine the date upon which the defendant first becomes parole eligible. In State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990), the Court simply

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[9] E.g., whether multiple violent offenses are part of a continuous course of conduct. S.C. Code Ann. § 24-21-640 (2003); State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1984).

[10] S.C. Code Ann. § 24-21-30 (2003).

recognized the logical impossibility of aggregating multiple life sentences. Here, we are asked to aggregate a life sentence and a consecutive five year sentence, a sentence which the General Assembly specified could, in the sentencing judge's discretion, be made consecutive. The result is admittedly harsh,[11] and perhaps not desirable, however, it is not an unlawful sentence.

I would reverse the order of the ALC.

KITTREDGE, J., concurs.

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[11] Respondent committed murder in 1990, at which time the possible sentences for murder were death, life with twenty year parole eligibility, or life with thirty year eligibility where an aggravating circumstance is found but a death sentence not imposed. § 16-3-20 (Supp. 1990). He received a "twenty-year" life sentence. In the weapons statute, the General Assembly has specified that the five year weapons sentence "does not apply" in only three situations: where the defendant is sentenced to death or to life without the possibility of parole, § 16-23-490(A), or where a mandatory minimum sentence in excess of five years is required for the violent offense itself. § 16-23-490(B). A person convicted of murder under the current statute would not be subject to the five year weapons sentence since the three sentencing choices currently are death, life without the possibility of parole, or a mandatory minimum thirty year sentence. § 16-3-20(A). Respondent, however, is not subject to the "mandatory minimum" exemption.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wanda Fishburne, Appellant,

v.

ATI Systems International, Employer, and Continental Casualty Company, Carrier, Respondents.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4559
Heard April 21, 2009 – Filed June 11, 2009

AFFIRMED

Kathryn Williams, of Greenville, for Appellant.

Weston Adams, III, and Ashley B. Stratton, of Columbia, for Respondents.

SHORT, J.: Wanda Fishburne appeals the circuit court's order affirming the Appellate Panel of the Workers' Compensation Commission, arguing the court erred in finding (1) she sustained only ten percent loss of use of her back; (2) she was not entitled to an award of permanent partial disability to her right lower extremity; (3) she was only entitled to additional medical treatment needed to wean her from unnecessary narcotics; and (4) she did not provide credible testimony at the hearing. We affirm.

FACTS

In January 1999, Fishburne began working for ATI Systems International (ATI), an armored transport company. Fishburne worked as a money room manager, which involved unloading money from the transport trucks, counting the money, and entering the amounts on balance sheets. On January 22, 2002, Fishburne injured her back while attempting to unload a bag of coins from a cart. The next day, she went to Doctor's Care for treatment and was given permission to return to work with a five-pound weight limitation. As a result of her weight limitation, ATI terminated her employment in March because they did not have any jobs that met her restrictions.

Dr. H. Stanley Reid, a neurosurgeon at the Carolina Orthopaedic Center, saw Fishburne in April 2002,[1] and noted she had no abnormal spine alignment, but ordered a magnetic resonance image (MRI), which showed mild degenerative disc disease. Dr. Reid recommended Fishburne attend physical therapy and have an epidural steroid injection. In July, Dr. Reid discharged Fishburne as having reached maximum medical improvement (MMI) and rated her at medium work capacity. He restricted her work to avoid frequent bending or lifting, but stated she could lift up to thirty-five pounds occasionally, up to twenty pounds frequently, and carry twenty pounds one-hundred feet. He also gave her an impairment rating of five percent for the whole person. During a visit in December, Dr. Reid noted

[1] From the record on appeal, it appears Fishburne was treated at Doctor's Care from the day after her accident until she began seeing Dr. Reid.

Fishburne's subjective complaints far outweighed his objective findings, and the radiographic report showed her lumbar spine had normal disc height and normal alignment. He told her exercise and trunk strengthening would have significant benefits; however, Dr. Reid stated this suggestion was discounted by Fishburne and her husband. In January 2003, Dr. Reid noted Fishburne exhibited four out of five Waddell's non-organic physical signs[2] and had non-organic pain behaviors which affected her gait. He also restated her subjective complaints of pain far outweighed his objective findings, and he did not see any necessity in continuing narcotic medication given his findings. Again, he discharged her at MMI and gave her an impairment rating of five percent for the whole person and entire spine.

In July of 2002, Fishburne underwent a functional capacity evaluation, which found she was able to frequently sit, stand, walk, grasp, stack, static trunk bend, kneel, crouch, stoop, repetitively squat, and push and pull a

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[2] Waddell's non-organic physical signs are a group of physical signs that may indicate a non-organic or psychological component to chronic low back pain. Gordon Waddell, MD, et al., Nonorganic Physical Signs in Low-Back Pain, Spine, March/April 1980, at 117. If more than three out of the five signs are present, there is high probability the patient has non-organic pain. Id. Doctors have used these signs to detect "malingering" patients with back pain. See Gordon Waddell, MD, et al., Behavioral Responses to Examination: A Reappraisal of the Interpretation of "Nonorganic Signs", Spine, Nov. 1, 1998, at 2367; Torres v. Astrue, 2009 WL 873995, at *2 n.1 (D.S.C. March 30, 2009) ("Waddell's criterion consists of a standardized group of five types of physician signs used by examiners to detect malingering or pretending."). Malingering is a medical term that refers to the act of intentionally feigning or exaggerating physical or psychological symptoms for personal gain. Robert Scott Dinsmoor, Malingering, Gale Encyclopedia of Medicine (2002), available at http://www.healthline.com/galecontent/malingering?utm_term=malinger&utm_medium=mw&utm_campaign=article; see Taber's Cyclopedic Medical Dictionary 1160 (17th ed. 1993).

weighted cart; occasionally lift a maximum of thirty-six-and-a-half pounds from floor to knuckle level; lift thirty-one-and-a-half pounds from knuckle to shoulder; frequently lift twenty-four-and-a-half pounds from floor to knuckle level and from knuckle to shoulder level; and frequently carry twenty-four-and-a-half pounds for one-hundred feet. Based on the findings, the evaluator determined Fishburne was lifting in the medium category of work based on the United States Department of Labor (USDL) Standards and met the physical demands to perform medium work for an eight-hour day based on the USDL Standards; however, she did not meet the physical demands required to lift a maximum of fifty pounds as required by her job at ATI. The evaluator also noted Fishburne exhibited some Waddell signs, indicating she had moderate magnified illness behavior, and although she did not take pain medicine before the test, no spikes in Fishburne's heart rate were noted with the increased reports of pain.

Dr. Philip C. Latourette, a pain management specialist at the Carolina Center for Advanced Management of Pain, saw Fishburne in June of 2003. He noted her electromyogram (EMG), MRI, computerized tomography (CT) myelogram, and nerve conduction velocity tests were all negative. He also noted that Fishburne did not find physical therapy, epidural shots, and discography to be helpful. Dr. Latourette ordered a sacroiliac joint injection and right side facet joint injection; however, they also did not provide Fishburne with relief. A selective nerve root injection gave her some short-term relief. Dr. Latourette referred Fishburne to Dr. C. David Tollison for further treatment. Dr. Tollison, a psychologist at the Carolina Center for Advanced Management of Pain, first saw Fishburne in February of 2004. She complained of lower back and right leg pain from her work injury. He diagnosed her with an adjustment disorder with mixed depressive and anxiety features and somatoform pain disorder with psychological factors.[3] At his deposition, Dr. Tollison stated he had just seen Fishburne the day before, and she told him the "pain was not all the way down her leg and in her foot like it

[3] Somatoform pain disorder is a psychological disorder in which there are symptoms of a disease, but there is no evidence of a physical disorder to explain the symptoms. Taber's Cyclopedic Medical Dictionary 1827 (17th ed. 1993).

was when she was first injured." Fishburne also told Dr. Tollison she was exercising, spending time with her family, fishing, maintaining a positive attitude overall, and learning to do other things. Dr. Tollison prescribed Wellbutrin and Zoloft for Fishburne's depression and said he believed she would need treatment five or six times a year because of her medications and continued therapy. He also stated he believed she had reached a level of psychological MMI. However, in October of 2005, Dr. Tollison signed a statement that Fishburne was permanently and totally disabled as a result of the combination of her physical and psychological problems related to her work injury.

In February of 2004, Fishburne saw Dr. William B. Evins, an orthopedic surgeon at Oakwood Orthopaedic, for an independent medical evaluation. Dr. Evins found no indication of any disc disease that would cause all of her symptoms and she was at MMI with an impairment rating of fifteen to twenty percent of the lumbar spine. In January of 2006, Fishburne was given two independent medical evaluations and one vocational evaluation. Dr. George R. Bruce, an orthopedic surgeon at Oconee Orthopaedic Clinic, found in his independent medical examination that Fishburne had a physical impairment of twenty-four percent for the whole person and twenty-seven percent of the lumbar spine. He also noted she would not benefit from any surgery and had reached MMI. Dr. Charles B. Thomas, of Palmetto Disability Evaluations, found in his independent medical examination that Fishburne demonstrated four of Waddell's five signs, suggesting a non-organic source for her pain, and noted she grimaced and sighed with all movement. Dr. Thomas also noted the degenerative changes shown on Fishburne's MRI predated her work injury, and he believed she could return to her previous level of work if she were off narcotics. In his vocational evaluation of Fishburne, Randy L. Adams, M.Ed., determined she was permanently and totally disabled from any work.

At the hearing before the Single Commissioner, Fishburne was the sole witness to testify on her behalf. Fishburne testified she suffered from pain in her low back, right side, right heel, right leg, and right foot. As a result, she claimed it was hard for her to get out of bed in the morning, and she came to the hearing using her mother's cane that no doctor had prescribed for her.

Fishburne testified she was not able to sit or stand for long periods of time, wash a sink of dishes, or remove wet clothes from the washer. Fishburne also asserted she cried for no reason because she could no longer do things she used to be able to do, and the pain medicine eased her pain, but the pain never went away completely. In July of 2004, Fishburne was involved in a car accident, but maintained she only injured her neck. Fishburne testified she sought a lump sum payment for total disability to buy a house, and she had not worked since she was let go from ATI, but she had not applied for any jobs since that time.

The Single Commissioner found Fishburne sustained a ten percent permanent partial disability to her back including any right lower extremity radiculopathy. The Commissioner determined the greater weight of the evidence did not support a finding that Fishburne was permanently and totally disabled under South Carolina Code sections 42-9-10 or 42-9-30(19). In February of 2007, the Commission's Appellate Panel affirmed the Single Commissioner, and in July of 2007, the circuit court affirmed the Appellate Panel. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The substantial evidence rule governs the standard of review in a workers' compensation decision. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005). However, an appellate court can reverse or modify the Appellate Panel's

decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6) (2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004).

> "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark, 276 S.C. at 135, 276 S.E.2d at 306 (citation omitted).

"[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. Bass v. Kenco Group, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).[4]

[4] The South Carolina General Assembly recently overhauled South Carolina's Workers' Compensation laws. These statutory changes affect claims for injuries occurring on or after July 1, 2007. See 2007 S.C. Acts 111, Part IV, Section 2 ("Except as otherwise provided for in this act, this act takes effect July 1, 2007, or, if ratified after July 1, 2007, and except [as] otherwise stated, upon approval by the Governor and applies to injuries that

LAW/ANALYSIS

I. Permanent Total Disability

Fishburne argues the Appellate Panel erred in finding she sustained only a ten percent loss of use of her back because she asserts she was permanently and totally disabled from the combination of her injuries. We disagree.

The extent of an injured workman's disability is a question of fact for determination by the Appellate Panel and will not be reversed if it is supported by competent evidence. Colvin v. E.I. DuPont de Nemours Co., 227 S.C. 465, 468, 88 S.E.2d 581, 582 (1955). "While an impairment rating may not rest on 'surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness.'" Sanders v. MeadWestvaco Corp., 371 S.C. 284, 291, 638 S.E.2d 66, 70 (Ct. App. 2006) (quoting Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)). "The Appellate Panel is not bound by the opinion of medical experts and 'may find a degree of disability different from that suggested by expert testimony.'" Id. at 292, 638 S.E.2d at 70 (quoting Lyles v. Quantum Chem. Co., 315 S.C. 440, 445, 434 S.E.2d 292, 295 (Ct. App. 1993)). "Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341, 513 S.E.2d at 847.

Fishburne asserts substantial evidence exists to prove she was entitled to permanent total disability because she sustained complete loss of earning

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occur on or after this date.") (emphasis added.) The injuries in this case began on January 22, 2002.

capacity from the injuries to her back and the related effect in her right leg and psyche. The substantial evidence, however, supports the Appellate Panel's decision. Dr. Reid, Fishburne's treating physician, determined she could return to medium work capacity in July of 2002. Also, in July, a functional capacity evaluation determined Fishburne met the physical demands to perform medium work for an eight-hour day based on the United States Department of Labor Standards. In January of 2006, Dr. Thomas stated he thought Fishburne could return to her previous level of work if she were off narcotics. In contrast, Dr. Tollison signed a statement that Fishburne was permanently and totally disabled as a result of the combination of her physical and psychological problems related to her work injury. The Single Commissioner, however, stated she gave less weight to Dr. Tollison's opinion "because of the objective evidence and [her] own observations and impression at the hearing." Also, the vocational evaluator, Adams, determined Fishburne was permanently and totally disabled from any work, but he cited only the opinions of Dr. Bruce and Dr. Tollison in reaching his conclusion, causing the Single Commissioner to give his opinion little weight. Furthermore, Fishburne testified she had not even applied for any jobs since her injury; thus, she did not make any reasonable efforts to secure employment and was unable to do so because of her work-related injury.

The objective medical evidence also does not support Fishburne's claim that she suffers from a serious medical condition that entitles her to permanent total disability. Fishburne underwent many tests and none revealed any serious problems: her EMG and nerve conduction velocity tests were negative; her CT myelogram and neurological exam were benign; her discography was non-diagnostic; and her MRIs showed only mild disc degenerative disease. None of Fishburne's physicians recommended she have any surgery. Furthermore, at least three different health care providers noted Fishburne exhibited either symptom magnification or Waddell signs, indicating there was a non-organic or psychological component to Fishburne's back pain. Dr. Tollison also diagnosed Fishburne with somatoform pain disorder, a condition where physical symptoms are caused by psychological factors, rather than an identifiable physical cause. The Single Commissioner also determined Fishburne's psychological condition was not disabling because Dr. Tollison's reports stated her mood was stable

and the drugs were controlling her depression. The reports also stated her crying spells and irritability had ceased; she was walking for exercise; visiting with grandchildren; attending birthday parties; and seeing friends socially.

Fishburne also argues the Appellate Panel erred in finding she sustained only a ten percent loss of use of her back. However, this finding was within the evidence presented to the Single Commissioner. Dr. Reid gave Fishburne an impairment rating of five percent for the whole person and entire spine; Dr. Evins gave Fishburne an impairment rating of fifteen to twenty percent of the lumbar spine; and Dr. Bruce gave Fishburne a physical impairment of twenty-four percent for the whole person and twenty-seven percent of the lumbar spine. Therefore, the Appellate Panel's decision awarding Fishburne a permanent partial disability benefit of ten percent loss for her back, including her right lower extremity, was within the medical evidence and testimony presented to the Commission.

II. Right Leg

Fishburne argues the Appellate Panel erred in finding she was not entitled to an award of permanent partial disability to her right leg. We disagree.

Fishburne claims her back injury negatively affected her right leg and she was limited in her ability to sit or stand for an extended period of time; thus, she asserts she is entitled to a separate award for the loss of the use of her right leg. The Single Commissioner's order specifically stated the ten percent permanent partial disability award for Fishburne's back injury encompassed any right lower extremity radiculopathy. Also, Fishburne presented no evidence that she had sustained a specific injury to her right lower extremity, and Dr. Evins noted he did not see indication of any disc disease that would cause all of her symptoms. Furthermore, at his deposition, Dr. Tollison stated he had just seen Fishburne the day before and she told him the pain was not all the way down her leg and in her foot like it had been. Thus, the Appellate Panel's decision, finding Fishburne was not entitled to a

separate award for permanent partial disability benefits for her right lower extremity, was supported by the evidence presented to the Commission.

III. Medical Treatment

Fishburne argues the Appellate Panel erred in finding she was only entitled to additional medical treatment to wean her from unnecessary narcotics. We disagree.

Dr. Reid noted in his records that Fishburne exhibited four out of the five Waddell's non-organic physical signs and had non-organic pain behaviors that affected her gait; her subjective complaints of pain far outweighed the objective findings; and he did not see any necessity for Fishburne to continue taking narcotic medication. Dr. Thomas wrote that Fishburne could return to her previous level of work if she were off narcotics. Dr. Thomas also noted Fishburne grimaced and sighed with all movement; determined she demonstrated four out of the five Waddell's signs; and the degenerative changes noted on her MRI predated her work injury. Additionally, Dr. Evins noted he did not see indication of any disc disease that would cause all of Fishburne's symptoms. Dr. Tollison and Dr. Bruce stated they believed Fishburne needed to be maintained on medication; however, the Single Commissioner declared she gave little weight to the opinions of Drs. Tollison and Bruce. Consequently, the Appellate Panel's order finding Fishburne was only entitled to medical treatment for the purpose of weaning her from unnecessary narcotic medication is supported by sufficient evidence.

IV. Witness Credibility

Fishburne argues the Appellate Panel erred in finding she did not provide credible testimony at the hearing. We disagree.

"[T]he Commission is the sole fact-finder in workers' compensation cases, and . . . any questions of credibility must be resolved by the Commission." Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 501, 494 S.E.2d 630, 638 (Ct. App. 1997). "It is logical for the [Appellate Panel],

which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion." Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967).

Fishburne was the only witness to testify on her behalf. The reliability of the documents and Fishburne's statements were matters of credibility for the Appellate Panel, which, in upholding the Single Commissioner's order, discounted Fishburne's credibility because she exaggerated her symptoms and made inconsistent statements at the hearing and to her treating physicians. Additionally, the Single Commissioner's order stated Fishburne "ambulated into the hearing room with a cane that no doctor prescribed. . . . [P]resented herself as continually wiping tears [the] Commissioner never observed, and constantly made loud sniffling sounds from a nose that . . . never 'ran'." This conduct, in addition to her inconsistent statements, caused the Single Commissioner to question Fishburne's credibility. Therefore, substantial evidence supports the Appellate Panel's decision that Fishburne's testimony was not credible.

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.