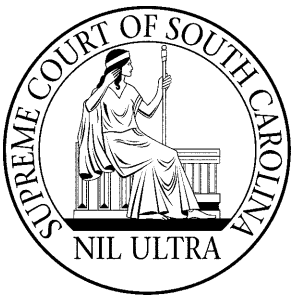

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37
October 24, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thomas Maurice Gagne, Respondent.

Opinion No. 27056
Submitted September 13, 2011 – Filed October 24, 2011

DEFINITE SUSPENSION

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

Desa A. Ballard, of Ballard Watson & Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent 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 imposition of an admonition, public reprimand, or definite suspension not to exceed sixty (60) days. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

On or about April 21, 2005, Complainant A retained respondent to represent her in relation to injuries suffered in an automobile accident. Respondent received a proposed settlement check from the insurance company in the amount of $5,500.00 payable to Complainant A and respondent. Respondent endorsed his name on the check and someone in respondent's office endorsed Complainant A's name on the check. The check was negotiated and the proceeds deposited into respondent's trust account. After a subsequent meeting with Complainant A during which Complainant A informed respondent of her decision not to accept the proposed settlement and to pursue litigation, respondent returned the funds to the insurance company and withdrew as counsel for Complainant A.

There is a dispute as to whether Complainant A authorized respondent to settle the case. However, there is no dispute that respondent did not have Complainant A's express authority to endorse her name on the settlement check.

Matter II

Complainant B worked as an associate in respondent's law office. On or about July 8, 2008, Complainant B ceased working with the firm.

On July 14, 2008, Complainant B and respondent met in respondent's office and reached a verbal agreement that the two of them would work together in a "loose association" on the remaining cases which they shared. This agreement eliminated the clients' rights to choose who would serve as counsel.

On July 15, 2008, respondent sent selection letters to the shared clients. Complainant B was not informed respondent sent the letters.

On July 16, 2008, Complainant B arrived at respondent's office to attend a recorded statement of one of their clients. Respondent met with Complainant B and informed him that respondent would be handling the case alone. Complainant B was directed to leave the office. When Complainant B asked about their earlier verbal agreement to handle the cases together, respondent replied that the agreement was not in writing. Respondent did not inform Complainant B that he had already sent selection letters to the clients with whom Complainant B had been working while an associate in respondent's office.

By letter dated July 18, 2008, respondent asked several clients who had already notified him in writing that they wished their files to be transferred to Complainant B to reconsider their decision.

Respondent represents that, through subsequent litigation and mediation, he and Complainant B reached an agreement to share the fees on cases that were transferred from respondent's office and completed by Complainant B. The division of fees was in compliance with Rule 1.5(e), RPC, Rule 407, SCACR.

Matter III

Respondent represented the claimant in a worker's compensation matter. Complainant C is an attorney who represented the opposing party. On May 19, 2009, Complainant C arrived at respondent's office to depose the claimant. Respondent was not present.

Respondent had directed his paralegal to be present at the deposition on his behalf. The paralegal failed to disclose to Complainant C that he was not an attorney prior to the deposition. Complainant C began the deposition and questioned respondent's client for approximately thirty (30) minutes before, in response to a direct question, the paralegal revealed he was not an attorney. Complainant C

immediately ceased the deposition. By letter dated May 19, 2009, respondent apologized for the misunderstanding and offered to reschedule the deposition at Complainant C's earliest convenience.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(a) (lawyer shall abide by client's decision whether to accept an offer of settlement); Rule 4.2 (lawyer shall not communicate about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer); Rule 5.3 (lawyer shall make reasonable efforts to ensure firm has in effect measures giving reasonable assurance conduct of non-lawyer retained by lawyer is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer retained by the lawyer if that conduct would be a violation of the Rules of Professional Conduct if engaged in by lawyer and lawyer ratifies the conduct); and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct). Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it is ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). We further find that, by directing his paralegal appear at a deposition on behalf a client, respondent also violated Rule 5.5(b), RPC, Rule 407, SCACR (lawyer shall not assist a person who is not a member of the bar in the unauthorized practice of law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period. 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., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Amanda Graham Steinmeyer, Respondent.

Opinion No. 27057
Submitted September 26, 2011 – Filed October 24, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Amanda Graham Steinmeyer, of West Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent 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 the imposition of a definite suspension not to exceed two (2) years or disbarment. She requests that the suspension or disbarment be made retroactive to the date of her interim suspension, December 2, 2010. In the Matter of Steinmeyer, 390 S.C 437, 702 S.E.2d 558 (2010). Respondent further agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter. She agrees to complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to reinstatement and, as set forth further in

this order, to reimburse the complainants and/or Lawyers' Fund for Client Protection (Lawyers' Fund) prior to seeking reinstatement or returning to the active practice of law.

We accept the agreement and disbar respondent from the practice of law in this state, retroactive to the date of her interim suspension, December 2, 2010. Within thirty (30) days of the date of this order, respondent shall enter into a payment plan with the Commission setting forth the terms for repayment of costs. Prior to petitioning for reinstatement, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School. Further, as set forth in this order, respondent shall reimburse the complainants and/or Lawyers' Fund prior to seeking reinstatement or returning to the active practice of law.

The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In 2007, respondent self-reported witnessing her former employer, a lawyer, violate several provisions of the Rules of Professional Conduct. Respondent reported that the lawyer's violations occurred as early as 2004 and admits that her self-report in 2007 was untimely.

Matter II

While employed with Complainant A's law firm, respondent settled an underinsured claim for a client. Respondent did not deposit the settlement draft in the law firm's escrow account, but, instead, deposited the settlement in her personal bank account and paid the client the entire share of the settlement from her personal account.

Matter III

Respondent's office served a legal notice entitled "Application for Ejectment (Eviction)" on Complainant B's client. The document appeared to be under the signature of a magistrate. Thereafter, respondent brought a Rule to Show Cause for ejectment based on the document. The court verified the document was neither issued by the court nor the magistrate.

Respondent represents the document was her draft copy and that she had instructed her secretary to prepare a proposed order with the information contained on the draft copy. Respondent represents she was out of town for a funeral when the document was executed. Respondent further represents that the document was signed by her secretary and then notarized and executed in her absence.

Matter IV

Respondent had a trust account with BB&T Bank. Respondent admits that, in early June 2010, checks in the amount of $149.00 and $177.51 were presented against the account. The trust account lacked sufficient funds to honor the checks. Respondent admits the checks were issued to pay non-client related expenses.

On June 15, 2010, a check in the amount of $1,400.00 was presented against respondent's trust account. The trust account lacked sufficient funds to honor the check. Respondent admits the check was issued to pay a client, but the $1,400.00 used to pay the client belonged to a different client.

ODC served respondent with a subpoena requesting copies of all of her trust account records required to be maintained pursuant to Rule 417, SCACR, for the period between June 1, 2009, and June 31, 2010. By letter dated February 24, 2011, ODC again requested the documents. To date, respondent has not furnished any trust account records.

Respondent represents she failed to maintain records as required by Rule 417, SCACR. In particular, respondent failed to maintain receipt and disbursement journals, ledger records, bills, disbursement sheets, checkbook registers or check stubs, bank statements, records of deposit, and monthly reconciliation statements. Further, respondent admits that she failed to reconcile her trust account and, in that regard, also failed to comply with the requirements of Rule 417, SCACR.

Matter V

Respondent represented Complainant C in a Workers' Compensation action that was settled in March 2009. The agreement was approved by the Workers' Compensation Commission. The terms of the agreement provided that Complainant C would receive a lump sum payment of $20,000.00 and weekly payments of $533.44 for one hundred and eleven (111) weeks directly from the State Accident Fund, in addition to other payments for a total award of $120,000.00.

In error, the State Accident Fund issued a check to respondent for the total amount of $120,000.00. Respondent deposited the $120,000.00 check directly into her checking account and paid Complainant C the $20,000.00 lump sum as outlined in the Workers' Compensation Agreement. Respondent retained the $100,000.00 balance in her checking account. From April 2009 until February 2010, respondent made weekly deposits into Complainant C's bank account. Many of the weekly payments were untimely.

Beginning in March 2010, respondent began making monthly deposits into Complainant C's bank account. The monthly payments were inconsistent in date paid and in amount paid. One payment in the amount of $1,400.00 was returned by the bank for insufficient funds. The check was written on respondent's trust account and was paid using funds belonging to another client.

Respondent led Complainant C to believe the payments into Complainant C's bank account were coming directly from the State Accident Fund when in fact it was respondent who was depositing the payments into Complainant C's account. Ultimately, respondent paid $56,448.90 of the $58,778.50 owed to Complainant C.

Respondent provided false information and testimony to ODC regarding this matter. In respondent's written response to the complaint, respondent stated:

> [Respondent] denies that each week Complainant C has to call her about a payment but does acknowledge that some weeks the payments were late as customarily happens with worker's comp carriers sending payments to claimants and [respondent] further states that each week she did everything possible to assist claimant in getting her payment received as expeditiously as possible.

Respondent also stated:

> The carrier did decide to go to a monthly schedule in April 2010 and I understand some months they have paid on time and some months they have been a few days late and again when they are late and [respondent] has received a call from Complainant C, she has done everything possible to assist claimant in getting her payment received as expeditiously as possible.

Respondent was issued a Notice to Appear and give testimony under oath. In respondent's first appearance, she initially denied that she ever received a check from the State Accident Fund in the amount of $120,000.00. During the same interview, she later acknowledged that she had received the $120,000.00 check, but stated she instructed her secretary to return the check to the State Accident Fund. Respondent denied negotiating the check.

In a separate interview, ODC presented a copy of the executed $120,000.00 check. Respondent then admitted under oath

that she had received, endorsed, and deposited the check into her checking account. Respondent also endorsed Complainant's C's name on the check.

Matter VI

Respondent had a trust account with BB&T Bank. She admits that, on or about October 19, 2010, checks in the amount of $8.31, $30.21, $80.12, and $120.82 were presented against her trust account. At the time the checks were presented, the trust account lacked sufficient funds to honor the checks. Respondent admits that the checks were issued to pay non-client related expenses.

On October 26, 2010, checks in the amount of $30.21, $80.12, and $120.82 were presented against the trust account. The trust account lacked sufficient funds to honor the checks. Respondent represented the $80.12 and $120.82 checks had been renegotiated by the bank in an attempt to honor the checks presented on October 19, 2010. Respondent admits the $30.21 check was issued to pay a non-client related expense.

On November 16, 2010, three checks in the amount of $30.00 each were presented against respondent's trust account. At the time of presentment, the account lacked sufficient funds to honor the checks. Respondent admits these checks were issued to pay non-client related expenses.

Review of respondent's trust account statements from BB&T Bank revealed numerous checks written to "cash" in amounts ranging from $149.00 to $3,500.00 and numerous account transfers from respondent's trust account to respondent's checking account in amounts ranging from $300.00 to $4,600.00.

Matter VII

Respondent represented Complainant D in a Workers' Compensation action that was settled in June 2010. On or about August 17, 2010, respondent was issued a check from the State

Accident Fund in the amount of $60,000.00. Respondent endorsed her name and Complainant D's name on the check and then deposited the funds into her trust account. Respondent endorsed Complainant D's name without Complainant D's knowledge or consent.

Respondent failed to pay Complainant D any of the $60,000 settlement proceeds. Instead, respondent used the funds belonging to Complainant D for respondent's personal benefit and the benefit of other clients.

By letter dated December 9, 2010, respondent was issued a Notice of Investigation and a request for a response within fifteen (15) days. When no response was received, ODC sent respondent a "Treacy"[1] letter by certified mail which requested an immediate response to the Notice of Investigation. To date, respondent has failed to submit a written response to the Notice of Investigation.

Matter VIII

On October 10, 2010, respondent and a co-defendant were arrested and charged with distribution or possession with intent to distribute a Schedule IV drug, possession of prescription medication in an unlabeled container, possession of less than one gram of meth or cocaine base, and open container. Additionally, respondent was charged with driving under the influence, 1st offense.

On October 11, 2010, respondent pled guilty to the driving under the influence and open container charges. Respondent was allowed to enroll in a Pre-Trial Intervention Program on the charges of distribution or possession with intent to distribute a Schedule IV drug, possession of prescription medication in an unlabeled container, and possession of less than one gram of meth or cocaine base. Respondent has now successfully completed a Pre-Trial Intervention Program.

[1] See In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

Matter IX

Respondent represented Complainant E in a civil dispute between Complainant E and her neighbor. In March 2010, respondent wrote a letter to Complainant E's neighbor. Complainant E then requested respondent file an action against the neighbor.

On March 30, 2010, Complainant E paid respondent $190.00, representing court costs and filing fees, to file the action. Respondent did not file the action. Respondent did not expedite the case as requested by Complainant E. Respondent failed to adequately communicate with Complainant E regarding the status of the case and failed to promptly respondent to Complainant E's requests for copies of documents. Respondent did request the attorney appointed to protect the interests of her clients pursuant to Rule 31, RLDE, Rule 413, SCACR, refund $190.00 from respondent's expense account following the filing of the complaint.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about the status of matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold funds belonging to clients or third persons separately from lawyer's personal account; lawyer shall maintain funds belonging to clients and third parties on deposit in trust account; upon receiving funds in which third person has an interest, lawyer shall promptly deliver funds to the third person); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 4.1 (in course of representing client, lawyer shall not knowingly make false statement of material fact to a third person); Rule 5.3 (lawyer who possesses managerial authority in law firm shall make reasonable efforts to ensure that the firm has in effect measures giving

reasonable assurance that non-lawyer's conduct is compatible with professional obligations of lawyer); Rule 8.1(a) (in connection with disciplinary matter, lawyer shall not knowingly make false statement of material fact); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.3 (lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the 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); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent further admits she violated the financial recordkeeping provisions of Rule 417, SCACR. In addition, she admits she wrote checks payable to "cash" on her trust account and failed to perform monthly reconciliations of her trust account, both in violation of Rule 417, SCACR.

Respondent admits her 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), Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to comply with a subpoena issued under Rule 413, SCACR, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response), and Rule 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 from the practice of law, retroactively to the date of her interim suspension. Within thirty (30) days of the date of this opinion, respondent shall enter into a payment plan with the Commission for repayment of costs incurred by ODC and the Commission in the investigation and prosecution of this matter.

Prior to seeking reinstatement, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School. Prior to seeking reinstatement or returning to the active practice of law, respondent shall reimburse Complainant C $2,329.60 and shall reimburse Complainant D $60,000.00. If Complainant C and/or Complainant D are reimbursed by the Lawyers' Fund, the amount due the complainants shall be reduced accordingly, and respondent shall reimburse the Lawyers' Fund for its payments to the complainants prior to seeking reinstatement or returning to the active practice of law.

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

DISBARRED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael
Langford Brown, Jr.,

Respondent.

Opinion No. 27058
Submitted September 26, 2011 – Filed October 24, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of Ballard Watson & Weissenstein, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of either an admonition or public reprimand with the following conditions: 1) to fully comply with the terms of his current contract with Lawyers Helping Lawyers (LHL) which was renewed in October 2010; 2) to submit an affidavit to ODC attesting to his compliance with the terms of his contract with LHL every three months for a period of one year from the date of the Court's order imposing discipline; 3) to submit to ODC statements from his medical treatment provider and his LHL monitor attesting to his compliance with his LHL contract every three

months for a period of one year from the date of the Court's order imposing discipline; 4) to submit his affidavit to ODC attesting to completion of the terms of the LHL contract one year after the date of the Court's order imposing discipline; 5) to submit a letter to ODC signed by his LHL monitor and a representative of the South Carolina Bar responsible for administration of LHL confirming respondent's completion with the terms of his LHL contract one year after the date of the Court's order imposing discipline; 6) to submit a letter to ODC signed by respondent's medical treatment provider confirming respondent's compliance with his treatment program and providing his prognosis and plan for future treatment, if any, one year after the date of the Court's order imposing discipline; 7) to allow an investigative panel to review this matter one year after the date of the Court's order imposing discipline and to unilaterally extend the above six conditions for one additional year; 8) to bear all costs of compliance with the terms of the Agreement and to be personally responsible for obtaining and submitting the required documentation; and 9) to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of imposition of discipline. We accept the agreement, issue a public reprimand, and order respondent to comply with each of the conditions set forth above.

The facts, as set forth in the Agreement, are as follows.

FACTS

In July 2007, respondent was arrested following an altercation with police officers at a bar. In July 2011, respondent pled guilty to resisting arrest and was sentenced to pay a fine and complete community service. Respondent paid the fine and is in the process of completing his community service.

Respondent acknowledges the incident in July 2007 was a result of his use and abuse of alcohol. With the assistance of Lawyers Helping Lawyers, respondent has been in treatment for substance abuse since the time of his arrest in July 2007. The treatment has included in-

patient and out-patient rehabilitation, active participation in Alcoholics Anonymous, peer monitoring, and random testing for alcohol use.

LAW

Respondent admits that, by his misconduct, he has violated 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), of the Rules Professional Conduct, Rule 407, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 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 find that respondent's misconduct warrants a public reprimand with conditions. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Respondent shall: 1) fully comply with the terms of his current contract with LHL which was renewed in October 2010; 2) submit an affidavit to ODC attesting to his compliance with the terms of his contract with LHL every three months for a period of one year from the date of this order; 3) submit statements to ODC from his medical treatment provider and his LHL monitor attesting to his compliance with his LHL contract every three months for a period of one year from the date of this order; 4) submit his affidavit to ODC attesting to completion of the terms of the LHL contract one year after the date of this order; 5) submit to ODC a letter signed by his LHL monitor and a representative of the South Carolina Bar responsible for administration of LHL confirming respondent's completion with the terms of his LHL contract one year after the date of this order; 6) submit a letter to ODC signed by respondent's medical treatment

provider confirming respondent's compliance with his treatment program and providing his prognosis and plan for future treatment, if any, one year from the date of this order; 7) allow an investigative panel to review this matter one year after the date of this order and to unilaterally extend the above six conditions for one additional year; 8) bear all costs of compliance with the terms of the Agreement and to be personally responsible for obtaining and submitting the required documentation; and 9) pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the date of this order.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolyn Holmes, Petitioner,

v.

National Service Industries, Inc., and New Hampshire Insurance Company, c/o Gallagher Bassett Services, Inc., Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27059
Heard May 25, 2011 – Filed October 24, 2011

AFFIRMED

Malcolm M. Crosland, Jr, of The Steinberg Law Firm, of Charleston, for Petitioner.

Weston Adams, III, and William Thomas Bacon, IV, of McAngus, Goudelock & Courie, of Columbia, for Respondents.

ACTING CHIEF JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' opinion in Holmes v. Nat'l Servs. Indus., Op. No. 2009-UP-364 (S.C. Ct. App. filed June 25, 2009).[1] We affirm.

FACTS

Petitioner began working for respondent National Service Industries ("National"), a linen company, at its Charleston laundering facility in August 1984. According to petitioner, the work environment at the facility was "very hot" and "sticky" with "a lot of lint and dust in the air," and was poorly ventilated. Petitioner was exposed to the fumes of bleach and did not wear a protective mask.

In 1992, petitioner began experiencing breathing and sinus problems. Petitioner never experienced breathing or sinus problems prior to working for National. Petitioner's breathing was "good" when she was away from work. In 1993, National transferred petitioner to its Atlanta facility where the working conditions were worse than in the Charleston facility. Petitioner ultimately left her employment with National because the working conditions were making her breathing problems worse.

In 1995, petitioner visited Dr. Jefrey Lieberman, who diagnosed petitioner as suffering from sarcoidosis, a respiratory and pulmonary condition. Petitioner testified Dr. Lieberman told her he did not know what caused her sarcoidosis and that, in light of this statement, she took no further steps to determine the cause of her condition.

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[1] This Court has corrected the spelling of the employer's name to "National Service Industries" (rather than "National Services Industries") in the caption.

In July 2005, petitioner visited Dr. Michael Spandorfer. Dr. Spandorfer stated in his report that it was unclear whether petitioner's work exposure at National caused her sarcoidosis, but that it was more likely that petitioner's exposure to the airborne particles and fumes worsened her condition, which had previously developed.

Petitioner filed a workers' compensation claim alleging a compensable injury by accident to her lungs and respiratory system arising out of and in the scope of her employment with National on July 12, 2005, the date she alleges she first discovered her sarcoidosis was related to her employment.

The single commissioner found petitioner sustained a compensable injury by accident to her lungs which was discovered on July 12, 2005.

The full commission reversed the commissioner, finding petitioner's claim was barred by the two-year statute of limitations. Specifically, the full commission found petitioner was aware of her working conditions and, with some diligence on her part, could have discovered she had a claim more than two years before her filing date.

Petitioner appealed. The circuit court and Court of Appeals, pursuant to Rule 220(b), SCACR, affirmed the full commission's determination that petitioner failed to file her claim within the statute of limitations.

STANDARD OF REVIEW

In workers' compensation cases, the Commission is the ultimate fact finder. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). An appellate court must affirm the findings made by the Commission if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Id. The substantial evidence test "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment;" and

a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (quoting Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25 (Md. 1974)).

LAW/ANALYSIS

Petitioner argues the Court of Appeals erred in holding substantial evidence in the record supported the full commission's finding that petitioner's claim was barred by the statute of limitations. We disagree.

The right to workers' compensation for an injury by accident "is barred unless a claim is filed with the commission within two years after an accident . . . ." S.C. Code Ann. § 42-15-40 (Supp. 2010).

Under the discovery rule, the statute of limitations begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 20, 416 S.E.2d 639, 640 (1992).

Whether petitioner knew or should have known that her sarcoidosis was related to her employment with National over two years before filing her claim in 2005 is a question of fact for the commission. In our view, the Court of Appeals correctly held that substantial evidence in the record supported the full commission's finding that petitioner's claim was barred by the statute of limitations. Considering the record as a whole, there is substantial evidence that would allow reasonable minds to reach the conclusion that petitioner should have known she had a compensable injury when first diagnosed with sarcoidosis. Pierre, supra. There is evidence petitioner knew or should have known as early as 1992 her work environment was negatively affecting her health. Petitioner testified she experienced breathing problems and lesions when she was working at National's Charleston facility. Petitioner also testified her breathing was "good" when she was away from work and that she ultimately left her employment with National because the working conditions were making her breathing problems worse. Although reasonable

minds may differ as to whether petitioner should have known after being diagnosed with sarcoidosis that she had a compensable injury, this is not sufficient to set aside the judgment of the Appellate Panel. Lark, supra.

We requested the parties address whether the commission's findings regarding compensability and causation are the law of the case. Because we affirm the Court of Appeals' opinion regarding the statute of limitations issue, we decline to address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (when one issue is dispositive, the remaining issues need not be addressed).

CONCLUSION

The Court of Appeals correctly found there was substantial evidence in the record to support the full commission's findings that petitioner's claim was barred by the statute of limitations. Accordingly, the opinion of the Court of Appeals is

AFFIRMED.

KITTREDGE, J., and Acting Justice E. C. Burnett, III, concur. BEATTY, J., dissenting in a separate opinion in which Acting Justice James E. Moore, concurs.

JUSTICE BEATTY: I respectfully dissent, as I believe the substantial evidence in the record demonstrates Carolyn Holmes's claim for workers' compensation benefits was filed within two years of the date she knew or reasonably should have known that she had sustained a *compensable* injury. It is not the mere existence of the injury, but also the reasonable discovery of its *compensable* nature, i.e., the nexus between the injury and the claimant's employment, that is required to trigger the running of the statute of limitations. Holmes saw no fewer than half a dozen different doctors, none of whom related her ongoing medical problems to her employment until 2005, and Holmes timely filed her claim two months thereafter. Holmes, as a layperson, should not be held to a higher degree of medical skill than her treating physicians. This is especially true in light of the fact that medical experts universally acknowledge that sarcoidosis is a rare condition of unknown etiology that can encompass a multitude of seemingly unrelated symptoms. The discovery and evaluation of this complex condition is uniquely difficult, so a review of the events leading to Holmes's claim is illustrative.

I.

National Service Industries, Inc. ("National") is a holding company for National Linen Service Corp., a textile rental business that supplies towels, washcloths, and sheets to hotels and restaurants. Holmes began working for National at its Charleston laundering facility in August 1984. It is undisputed that the building was very hot and poorly ventilated, and the air contained a large amount of dust, lint, and chemical fumes. National provided hair nets to its employees, but did not offer dust masks or any other form of respiratory protection.

In 1992, approximately eight years after Holmes began working for National, she began to have breathing and sinus problems, and some lesions appeared on her skin. Holmes took over-the-counter medications that seemed to help. The relief was short-lived, however, and Holmes eventually sought medical care before transferring to another National facility in Atlanta in

1993. Holmes's symptoms worsened, and she left National in 1994 after working at the Atlanta location for six months.

Holmes next worked for United Parcel Service for a year, and then worked for six months at the Shepherd Center, a rehabilitation hospital. During this time, Holmes's sinus issues remained the same. In 1995, during her tenure at Shepherd, Holmes sought treatment at Piedmont Hospital in Atlanta. The medical staff there diagnosed her as having allergy and sinus conditions and provided treatment in accordance with this diagnosis.

Holmes's symptoms persisted, so she again sought treatment and was seen later in 1995 by Dr. Jefrey D. Lieberman. Dr. Lieberman noted Holmes was suffering at that time from congestion with bloody drainage, "lumps" on various parts of her legs, upper arms, and left cheek, and changes in pigmentation on her face. Dr. Lieberman diagnosed Holmes for the first time as having sarcoidosis, a highly variable, multi-systemic autoimmune disorder, and opined that her skin condition was indicative of the sarcoidosis and "that her sinus symptoms [were] secondary to the same process." He placed her on a course of medication. During this treatment, some of Holmes's symptoms improved. Holmes inquired as to the cause of her sarcoidosis and Dr. Lieberman told Holmes there was no known cause. He never advised her there was any possibility that it could be work-related. Holmes stated that, in light of Dr. Lieberman's statement, she had no reason to believe her condition could be related to her work. Rather, it was her understanding that sarcoidosis was something that "just happen[s]" or "just comes."

After working at Shepherd, Holmes was employed by Oak Hill Farm, a wine distributor, where her sinus symptoms continued unabated. Holmes subsequently changed doctors, but none of these doctors ever related her sarcoidosis to her employment.

Since her initial symptoms, Holmes had consulted at least half a dozen doctors before she was seen in 2005 by Dr. Michael Spandorfer, of Charleston. Although Dr. Spandorfer could not ascertain its cause, he determined that Holmes's sarcoidosis was aggravated by her employment

with National from 1984 to 1994 and her exposure to airborne particulates and fumes. Dr. Spandorfer stated in a report dated July 12, 2005 that the work conditions at National triggered what could have been a dormant sarcoidosis condition. Dr. Spandorfer also diagnosed Holmes with occupational-onset asthma. This was the first time that a medical professional had ever linked Holmes's wide range of physical problems to her employment at National.

On September 7, 2005, less than two months after Dr. Spandorfer's evaluation, Holmes filed her workers' compensation claim. A single commissioner of the South Carolina Workers' Compensation Commission concluded Holmes sustained a compensable injury by accident on July 12, 2005, "the date o[n] which the Claimant reasonably discovered the compensability of [her] injuries."

In a split decision (2-1), the Appellate Panel reversed. The Appellate Panel, noting it could make its own findings of fact, found an employment relationship existed at the time of Holmes's injury by accident and that the parties had stipulated the amount of Holmes' average weekly wage and compensation rate. It further found that Holmes suffered from sarcoidosis and occupationally-induced asthma, "which was aggravated by, and whose development was contributed to by, her employment and exposure to airborne dust, fumes, and particulate matter," and that she will require ongoing medical treatment for her pulmonary injury. However, the Appellate Panel lastly found and concluded that Holmes's claim was, nevertheless, barred by the two-year statute of limitations contained in section 42-15-40 of the South Carolina Code.

The dissenting member of the Appellate Panel stated he would affirm the commissioner because throughout all of her visits to physicians, none ever indicated Holmes's sarcoidosis or sinus problems were related to her work at National until Dr. Spandorfer made this determination in 2005. Further, Dr. Lieberman told Holmes that he did not know where her sarcoidosis came from, and there is no evidence in the record that would

indicate Holmes was negligent in relying on Dr. Lieberman's expert medical opinion.

Holmes appealed, challenging only the Appellate Panel's finding that the statute of limitations had run on her claim. She now appeals from the affirmance of the Court of Appeals. Thus, the only issue before this Court is the timeliness of Holmes's claim.

II.

"Under the discovery rule, the statute would begin to run from the date [the claimant] either knew or should have known of her *compensable* injury." *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 20, 416 S.E.2d 639, 640 (1992) (emphasis added). The claimant's knowledge of an injury, in and of itself, is not enough to commence the running of the statute of limitations. Rather, the claimant must also know or reasonably should have known that the injury is compensable. Compensability is the gravamen of the claim. The claimant must exercise reasonable diligence in discerning compensability. *See Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) ("The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point . . . .").

The alleged lack of diligence by Holmes is the cornerstone of the Appellate Panel's finding that the statute of limitation bars her claim. The Appellate Panel found that Holmes knew or reasonably should have known that she had a compensable injury based on her sarcoidosis diagnosis in 1995. Further, it found her knowledge of her work conditions and her symptoms should have also alerted her to the compensability of her injury.

In my opinion, the substantial evidence in the record does not support these findings. Compensability requires a nexus between the injury and the

employment that is known, or reasonably should have been known, by the claimant. The requisite nexus between Holmes's sarcoidosis and her employment at National could not have been known by Holmes before 2005, and she should not be charged with this knowledge at a time when it was not even known by the many medical experts who treated her.

The undisputed facts establish that in 1995 Dr. Lieberman, while diagnosing Holmes with sarcoidosis, failed to advise her of any causal relationship between her condition and her work at National. Instead, he told her that the cause of sarcoidosis was unknown and that her breathing and sinus problems were secondary to the sarcoidosis.

As noted by the dissenting member of the Appellate Panel, Holmes was entitled to rely upon Dr. Lieberman's expert medical opinion. The mere diagnosis of her sarcoidosis condition, without more, does not give rise to a compensable injury under our workers' compensation law, and Holmes could not simply assume the condition was work related in the absence of expert medical evidence. *See Mauldin*, 308 S.C. at 20, 416 S.E.2d at 640 (stating a workers' compensation claim must be for a "compensable" injury); *cf. Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985) (observing there are "non-compensable causes" that can accelerate or aggravate an occupational illness). Based on Dr. Lieberman's statement, a reasonable person would have believed that sarcoidosis is a malady, not unlike cancer, whose occurrence is both unfortunate and unpredictable.[2]

[2] "Logically, an employee cannot be expected and certainly cannot be required to institute a claim until he has reliable information that his condition is the result of his employment." *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 416 (Mo. Ct. App. 1988), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). "Just as logically, given that there must be competent and substantial evidence of this link, the claimant is entitled to rely on a physician's diagnosis of his condition rather than his own impressions." *Id.*

Dr. Lieberman's medical opinion is consistent with existing medical knowledge, which universally recognizes that sarcoidosis is a rare condition whose etiology is unknown by medical experts, that it can affect any organ in the body, and that its symptoms are highly variable from patient to patient. *See Booker v. Int'l Rivercenter*, 905 So. 2d 498, 502 (La. Ct. App. 2005) (noting a physician's testimony that sarcoidosis has no known cause); *Hatem v. Bryan*, 453 S.E.2d 199, 200 (N.C. Ct. App. 1995) (stating the plaintiff "suffered from sarcoidosis, a chronic disease process of unknown cause which may affect any organ or tissue of the body").

It is also consistent with the fact that Dr. Spandorfer, likewise, was unable to definitively state the origin of Holmes's sarcoidosis in 2005. However, Dr. Spandorfer was, in contrast to Dr. Lieberman and Holmes's prior physicians, able to discern a link between what might have been a dormant underlying condition and Holmes's employment at National in his report of July 12, 2005. In addition, July 12, 2005 is the first date Holmes was advised by Dr. Spandorfer that she also suffered from occupationally-induced asthma related to her work at National.

The record as a whole indicates that the variety of complex symptoms Holmes experienced, such as the respiratory problems, lumps, skin lesions, changes in skin pigmentation, joint pain, and swelling of the lower extremities, among others, were all within the wide range of symptoms that can arise with sarcoidosis. At the same time, these symptoms were also indistinguishable from many other maladies. Merely being aware of her sarcoidosis symptoms would not alert Holmes to the compensability of her injury, especially when her treating physician told her sarcoidosis has no known cause and that her symptoms were secondary to the disease itself. Moreover, although Holmes commented at one point that her symptoms seemed to temporarily improve when she was away from work, Holmes also testified that her symptoms temporarily improved when she began taking over-the-counter medications, but ultimately, the symptoms persisted, even as she changed employers and work environments. Consequently, there was no definitive pattern to her condition.

The unique character of sarcoidosis undoubtedly made it more difficult for the medical experts to analyze as compared to conditions that uniformly manifest specific symptoms in a localized area. The fact that the current state of medical knowledge ascribes no known cause for this condition also proved to be an impediment to Holmes's physicians relating her sarcoidosis to her employment until it had progressed to the point where the connection was made by Dr. Spandorfer. Holmes went to a variety of physicians seeking medical treatment for her evolving array of symptoms. As a layperson, Holmes should not be penalized for, in essence, failing to detect what her own treating physicians had failed to discover prior to 2005. *Cf. Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461 (Tex. App. 2004) (reversing the grant of summary judgment based on the two-year statute of limitations and finding the fact that the employee continued to visit doctors from 1992 to 1997 was some evidence that he exercised reasonable diligence in ascertaining the cause of his silicosis and the employee did not discover his illness was work related and could not have assumed it was work related prior to the time he was so informed by a doctor in 1997).

Based on the foregoing, I would hold Holmes's claim regarding her sarcoidosis condition was filed within two years of when she knew or reasonably should have known that she had sustained a *compensable* injury. In addition, while the Appellate Panel found Holmes knew of her sarcoidosis diagnosis in 1995, there has been no allegation or finding that Holmes's occupationally-induced asthma existed at the time her sarcoidosis was diagnosed. Rather, it subsequently developed as Holmes's health problems progressed and was diagnosed in 2005. The Appellate Panel's discussion regarding the statute of limitations focused only on the timing of Holmes's sarcoidosis diagnosis and her alleged failure to timely determine the relation of her sarcoidosis to her employment. The diagnosis of Holmes's sarcoidosis has no bearing on her later-developed asthma. Holmes's claim regarding her asthma was timely asserted within two years of when she knew or reasonably should have known she had a compensable injury in this regard.

The Court observed in *Mauldin* that statutes of limitation should not be applied mechanically, but in a manner consistent with both their underlying

purposes and the need to provide substantial justice to all parties. *Mauldin*, 308 S.C. at 21, 416 S.E.2d at 640. The desire to protect defendants from false or fraudulent claims "must be balanced against a plaintiff's interest in prosecuting an action and pursuing [her] rights." *Id.* "Plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed." *Id.* "The statute of limitations applicable to workers' compensation claims, like the Workers' Compensation Act as a whole, should be given liberal construction, and any reasonable doubts should be resolved in favor of coverage." *Rogers v. Spartanburg Reg'l Med. Ctr.*, 328 S.C. 415, 418, 491 S.E.2d 708, 710 (Ct. App. 1997).

Allowing Holmes to recover for her injuries is consistent with the underlying purpose and objectives of the statute of limitations. Holmes's appeal presents an unusual case of a claimant with a rare condition; there is no allegation of a false or fraudulent claim and National has not been disadvantaged in its ability to evaluate the validity of the claim. As this Court has previously held, any doubts regarding the statute of limitations should be resolved in favor of coverage. This principle is particularly relevant in light of the fact that the Appellate Panel was itself divided on the statute of limitations issue.

III.

Having determined Holmes's claim is not time-barred, I would further hold the unchallenged factual findings of the Appellate Panel as to the compensability of Holmes's claim and her stipulated compensation rate are the law of the case. Therefore, I would reverse the decision of the Court of Appeals and remand this matter to the Commission for it to reinstate the order of the single commissioner.

Acting Justice James E. Moore, concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gloria Pittman, Respondent,

v.

Jetter Pittman and Pittman Professional Land Surveying, Inc., Defendants,

Of whom Jetter Pittman is, Appellant.

Appeal From York County
Brian M. Gibbons, Family Court Judge

Opinion No. 4858
Submitted June 1, 2011 – Filed August 3, 2011
Withdrawn, Substituted and Refiled October 18, 2011

AFFIRMED IN PART, REVERSED IN PART

Thomas F. McDow and Erin U. Fitzpatrick, both of Rock Hill, for Appellant.

Daniel Dominic D'Agostino, of York, for Respondent.

THOMAS, J.: In this divorce action, Jetter Pittman (Husband) appeals the award of alimony to Gloria Pittman (Wife), the identification and equitable division of the marital property, and the award of attorney's fees. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The parties met in 1991 and married April 29, 2000. This was the second marriage for each. No children were born of the marriage. Wife was born in 1948, and Husband was born in 1962.

When the parties met, Husband was living and working in North Carolina. In 1993, Husband moved into Wife's house in Fort Mill. The parties pooled their funds and contributed equally to the household expenses. In addition to his regular employment, Husband also did surveying work on the side and trained Wife to help him in the field.

Since 1986, Wife has worked as a surgical nurse and kept her professional credentials current. In 1996, Husband stopped working at his job to open his own surveying business, Pittman Professional Land Surveying. He initially conducted the business from Wife's home, but later moved into a small office. Wife worked for the business, but also continued to work full-time as a nurse.

After the parties married, Wife started working only three days a week at her nursing job and made up the difference between what she would have earned had she continued full-time work as a nurse and what she was earning on the part-time schedule by working at Pittman Professional Land Surveying. Wife later reduced the time she spent at her nursing job to one day per week. Wife served as corporate secretary and handled financial matters for the business. Because Wife was older than Husband, the parties agreed to raise her salary instead of Husband's salary in order to increase her social security income so that they would have more money during their retirement. During the parties' marriage, the business prospered through their joint efforts, grossing over $800,000 in 2006. Wife's salary at Pittman

Professional Land Surveying was $4,200 per month when she left the company.

The parties separated in March 2007, and Wife commenced divorce proceedings soon after. In October 2007 Husband moved in with his paramour. The following month Husband terminated Wife's employment with the business by leaving her a voice message telling her not to come to work. Husband also hired his paramour to perform Wife's former duties at the business and paid her the same salary he paid Wife, even though the paramour had not worked outside the home for the past fifteen years. Wife filed for unemployment after Husband fired her, but Husband appealed her application to the Employment Security Commission. Wife began receiving unemployment compensation only after she and Husband appeared before the Commission.

In January 2008, following a temporary hearing in the matter, the family court issued an order (1) directing Husband to reimburse Wife $1,500 in private investigator fees, (2) granting discovery, (3) allowing both parties to hire their own appraisers to value the business and any other property that may be marital in nature and ordering both parties to cooperate in the appraisals, and (4) restraining both parties from disposing or encumbering marital assets. The court also ordered Husband to pay Wife temporary alimony of $2,500 per month, but reserved the right to offset this award against Wife's equitable distribution award if at the final hearing the court determined that an offset would be appropriate. In addition, the court declined to order Husband to rehire Wife or to prohibit Husband from hiring his paramour for Wife's position at the company.

On May 7, 2008, the family court held a hearing pursuant to a motion by Wife to compel responses to discovery. By order dated June 18, 2008, the family court determined the issues raised in the motion would be resolved once Husband produced written verification regarding certain appraisals that Wife sought and stated that the issue of attorney's fees for the motion would be addressed during the final hearing.

A portion of the final hearing took place from January 20 through January 22, 2009. After a hearing on April 2, 2009, the court issued an order directing the parties to engage Tracy Amos for the purpose of performing an evaluation of the business. Fees for the appraisal were to be paid initially by Pittman Professional Land Surveying, but could be apportioned between Husband and Wife at a later date. In addition, the parties agreed to provide information concerning property associated with the business and to allow Wife access to the business at a designated time to verify the information that Husband provided.

The final hearing resumed in Chester County on September 29, 2009, at which time the appraiser testified as to the value of the business, Husband presented his case, and Wife testified in reply. On October 21, 2009, the family court held another hearing in the matter to address contempt proceedings brought by Wife concerning Husband's temporary alimony payments.

By order dated and filed October 23, 2009, the family court granted Wife a divorce on the ground of adultery, awarded her permanent periodic alimony of $600 per month, ordered Husband to contribute $12,500 toward Wife's attorney's fees, denied Husband's request for a credit towards the equitable distribution for some or all of the alimony paid pursuant to the temporary order, and set a deadline for Husband to finish paying the alimony arrearage from the temporary order. The family court also identified, valued, and divided the marital property, specifically finding that Pittman Professional Land Surveying had been transmuted into a marital asset and including the business in Husband's share of the marital estate.

By order dated October 30, 2009, the family court found Husband had the ability to pay alimony but willfully failed to do so. Based on this finding, the court found Husband in civil contempt and ordered him to serve ninety days in jail unless he paid $5,000 of his total arrearage.

On November 2, 2009, Husband moved to alter or amend the judgment, challenging, among other issues, (1) the finding that Pittman Professional

Land Surveying had been transmuted into marital property, (2) the court's failure to consider part of the business as either nonmarital property or as part of his contribution to the marital estate, and (3) other findings relevant to alimony and equitable distribution. The family court declined to change its order, and Husband filed this appeal.

ISSUES

I. Did the family court err in refusing to make the requisite findings of fact on which to base its awards of alimony, equitable apportionment, and attorney's fees?

II. Is the alimony award of $600 per month supported by the evidence?

III. Did the family court err in declining to offset the temporary alimony award against Wife's share of the marital estate?

IV. Did the family court err in awarding Wife $12,500 in attorney's fees?

V. Did the family court err in valuing two vehicles at $8,000 each?

VI. Did the family court err in finding Pittman Professional Land Surveying had been transmuted?

VII. Did the family court err in failing to consider the premarital value of Pittman Professional Land Surveying or Husband's nonmarital contributions toward this asset?

VIII. Did the family court err in awarding Wife a laptop computer that was purchased with funds belonging to Pittman Professional Land Surveying?

STANDARD OF REVIEW

"'In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the

evidence. However, this broad scope of review does not require [an appellate court] to disregard the findings of the family court.'" Lewis v. Lewis, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011) (quoting Eason v. Eason, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)). The family court's equitable distribution award should be reversed only when the appellant shows the court abused its discretion. Lewis, 392 S.C. at 384-85, 709 S.E.2d at 651. Similarly, "[a]n award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." Allen v. Allen, 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct. App. 2001).

LAW/ANALYSIS

I. Findings of Fact

Husband first claims the family court erred in refusing to find the incomes, earning potential, and expenses of the parties relating directly to issues of alimony, equitable apportionment of property, and attorney's fees. Husband is correct that a number of the findings in the appealed order are only qualitative in nature rather than quantitative; however, this deficiency is not necessarily reversible error. See Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) (allowing the appellate court to make its own findings of fact if the record is sufficient, even though the family court may have failed to set forth specific findings of fact and conclusions of law to support its decision). We hold the record is sufficient to make our own findings of fact regarding the issues Husband has presented on appeal and hold the family court's failure to make them does not warrant a remand.[1]

II. Alimony Award

Husband next complains the family court erred in awarding Wife permanent alimony of $600 per month without making any findings about the

[1] Moreover, as explained below, we conclude from remarks during oral argument that where the record lacked the necessary information for this court to make a finding of fact on a particular issue, this absence resulted from the fact that the relevant evidence was not proffered to the family court.

income and expenses of either party. We disagree. The family court made sufficient findings of fact that, along with the evidence in the record, would support the alimony award. In particular, the family court noted the following: (1) the parties were married nine years, during which they enjoyed a comfortable standard of living; (2) at the time of the divorce, Wife was sixty-one years old and Husband was forty-seven; (3) Husband was at fault in the breakup of the marriage; (4) Husband fired Wife, hired his paramour for her job, and paid his paramour the same salary he paid Wife; (5) whereas Husband was in good health, Wife has been under the care of a counselor because of the stress of the divorce and Husband's adultery; (6) because of their ages, neither party would be able to increase his or her earning power through additional training or education; (7) although Wife was to receive several rental properties from the marital estate, one of them was vacant and there was a mortgage payment associated with another one of the properties; (8) Husband was to receive Pittman Professional Land Surveying in his share of the marital estate and could increase his income substantially through this asset; (9) the alimony would be taxable to Wife and deductible to Husband; and (10) Wife was close to retirement age, had worked in Pittman Professional Land Surveying during the entire course of the marriage, and is not underemployed given her age, experience, position, and job availability.

Furthermore, although the family court did not state findings concerning the parties' earnings, expenses, and needs in quantitative detail in its discussion concerning alimony factors, it made such findings elsewhere in the order. Earnings, for example, are referenced in the court's discussions on the parties' educational backgrounds, employment history and earning potential, and marital and nonmarital property. Similarly, the court discussed the parties' expenses and needs in its findings on standard of living and on the parties' physical and emotional health. Given these findings, we hold the family court acted within its discretion in awarding Wife permanent alimony of $600 per month. See Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005) ("An award of alimony rests within the sound discretion of family court and will not be disturbed absent an abuse of discretion."); Myers v. Myers, 391 S.C. 308, 314, 705 S.E.2d 86, 90 (Ct. App. 2011) (stating that in

determining an appropriate alimony award, "[n]o one [statutory] factor is dispositive").[2]

III. Offset of Temporary Alimony

Husband next argues the family court erred in declining to award him an offset of the temporary alimony that he was ordered to pay against Wife's share of the marital property. To support his complaint, he asserts (1) the record lacks support for the temporary alimony award of $2,500 per month and (2) in view of the provision in the temporary order that the family court "reserves the right to offset temporary alimony against [Wife's] equitable distribution if the Court at the final hearing determines that such is appropriate," the family court's refusal to consider the possibility of an offset amounted to an abuse of discretion. On appeal, he suggests that this court determine a reasonable amount for permanent alimony and apply the remaining balance to Wife's share of the apportionment of the marital property. We find no reversible error.

Husband did not offer any arguments or supporting authority for his position that the temporary alimony award was excessive or otherwise unwarranted. We therefore hold he has abandoned the issue of whether the record supports the award of temporary alimony. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding the appellant, in failing to provide arguments or supporting authority for one of his assertions, was deemed to have abandoned the corresponding issue).

In support of its decision to decline to treat any part of the temporary alimony as an advance on equitable distribution, the family court noted that both parties treated the payments as alimony for tax purposes. We agree with Husband that this alone would have been insufficient to support the family

[2] We further note that, contrary to Husband's assertion in his reply brief that Wife has the option of receiving her Social Security benefits and continuing to work, this option would be available only when she reached "full retirement age," which she had not done at the time the divorce decree was issued.

court's refusal to exercise the discretion it reserved in the temporary order to treat alimony paid during the pendency of the litigation as an advance on equitable distribution. The court also found, however, that the amount of alimony Husband paid before the final hearing was "an appropriate amount of alimony as temporary alimony," and we have found nothing in the record on appeal warranting reversal of this finding.

At the temporary hearing in November 2007, Wife revealed on her financial declaration she was earning $1,030.75 per month from her job as a surgical nurse. In addition, she noted two sources of rental income of $900 per month and $1,025 per month, as well as her monthly salary from Pittman Professional Land Surveying of $4,166.67. In the temporary order, the family court noted Husband had terminated Wife's employment with the business and found Wife was able to work but had not been employed full-time outside the business for several years. In directing Husband to pay temporary alimony of $2,500 per month, the court encouraged Wife to find employment and specifically "reserve[d] the right to offset temporary alimony against [Wife's] equitable distribution if the Court at the final hearing determines that such is appropriate." According to Wife's final financial declaration, dated January 20, 2009, she was earning $3,194 per month from her job.[3] The portions of the transcript included in the record on appeal, however, do not indicate when Wife's job earnings increased. During oral argument, counsel for Wife advised that no such information was presented during the hearing, and opposing counsel offered no opposition to this assertion during rebuttal. Neither party suggested any other variables that this court could consider in determining whether Husband could receive an offset of the temporary alimony that he paid against Wife's share of the marital property. We therefore hold the record is insufficient for this court to make findings of fact as to whether any part of the temporary alimony paid should be offset against Wife's share of the marital estate. See Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996) (stating the appellant has the burden of providing a sufficient record upon which the appellate court can make a decision).

[3] At this time, one of Wife's rental properties was vacant; therefore, she was receiving only $1,025 per month in rental income.

Moreover, given the Supreme Court's recent censure of allowing "a second bite at the apple," we decline to remand the matter to the family court for further proceedings on this issue. Lewis v. Lewis, 392 S.C. at 393 n.11, 709 S.E.2d at 656 n.11.

IV. Attorney's Fees

Husband next challenges the award of attorney's fees to Wife, arguing (1) the family court made insufficient findings of fact to support the award; (2) the family court appeared to have placed undue emphasis on his marital misconduct, noting further that he freely admitted his adultery; (3) the family court penalized him for refusing to concede the issue of transmutation; (4) the family court did not give due consideration to the consequences of the award on Husband's finances; (5) Wife made spurious claims during the proceedings regarding valuation of certain assets; and (6) Wife wasted money on unnecessary private investigator fees. We find no abuse of discretion. See O'Neill v. O'Neill, 293 S.C. 112, 119, 359 S.E.2d 68, 73 (Ct. App. 1987) ("It is elementary that an award of attorneys' fees is discretionary with the trial judge."). Here, the family court awarded Wife only fifty-six percent of her total fee; thus, we find the court gave sufficient consideration to any misconduct on Wife's part that prolonged the litigation unnecessarily. Furthermore, although we do not dispute that Husband has the right to advance a meritorious position on certain issues even if they are ultimately rejected by the family court, this right does not override the principle that beneficial results obtained by counsel remains a factor in determining a reasonable attorney's fee in a family court case. See Glasscock v. Glasscock, 304 S.C. 158, 160-61, 403 S.E.2d 313, 315 (1991) (rejecting the appellant's argument that an attorney's fee awarded by the family court was in effect a contingency fee, but nevertheless citing "beneficial results obtained" as one of the six factors in determining a reasonable attorney's fee).

V. Valuation of Vehicles

Husband next argues the family court erred in finding that a Volvo and a Volkswagen, both of which were awarded to Wife, were each worth

$8,000. He claims Wife did not offer testimony or other evidence about the value and that the values that he presented in his testimony were the only competent evidence on this issue. We disagree. In the marital assets addendum to Wife's financial declaration, she listed both vehicles with the corresponding values. Although, as Husband argues in his reply brief, he conceded to admitting the addendum only as a summary of Wife's testimony, there is nothing in the record indicating the family court admitted it for only this limited purpose. Moreover, the statement by Wife's counsel that the vehicles were "$8,000 each" was made during Wife's direct examination and was not a statement by counsel to the court. Though the inquiry was not artfully presented, common sense warrants interpreting it as a question. We hold Wife, in answering this question in the affirmative, presented evidence of the values of these items. See Reiss v. Reiss, 392 S.C. 198, 204, 708 S.E.2d 799, 802 (Ct. App. 2011) (stating the family court "has broad discretion in valuing marital property" and its valuation of marital assets "will not be disturbed absent an abuse of discretion").

VI. Transmutation of Pittman Professional Land Surveying

The family court found Pittman Professional Land Surveying had been transmuted into marital property "as evidenced by the intent of [Husband] to treat the same as a marital asset," but made no findings as to Wife's intent. Husband disputes the finding concerning his intent that to treat the asset as marital property, arguing (1) he never referred in any way to the business that would indicate that Wife had any interest in it; (2) Wife was only an employee of the business and received a salary for her services and, after she was discharged, unemployment benefits to which she would not have been entitled if she had an ownership interest in the business; and (3) an unlimited guarantee provided by Wife to help secure credit for the business had expired several years before the commencement of this action. We hold these arguments do not warrant reversal of the finding by the family court that Wife met her burden to prove transmutation.

Property acquired by either party before the marriage is considered nonmarital; however, it may be transmuted into marital property if "(1) it

becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property." Pool v. Pool, 321 S.C. 84, 88, 467 S.E.2d 753, 756 (Ct. App. 1996) (emphases added). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Id.

We agree with Wife the record supports the family court's finding that Husband intended to treat Pittman Professional Land Surveying as a marital asset. Wife was listed as secretary for the corporation. After the parties married in 2000, Wife, with Husband's consent, reduced the hours she worked at her nursing job to work full-time in the business and thus contributed less to her 401K and retirement accounts. Most significantly, Husband and Wife agreed that the business would pay Wife a higher salary for her services than what her services warranted with the expectation that this business decision would benefit both parties during their retirement together. Under these circumstances, we decline to disturb the finding that Pittman Professional Land Surveying had been transmuted. See Lewis v. Lewis, 392 S.C. at 392, 709 S.E.2d at 655 ("[T]he family court's factual findings will be affirmed unless 'appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court.'") (quoting Finley v. Cartwright, 55 S.C. 198, 202, 33 S.E.2d 359, 360-61 (1899)).

VII. Equitable Apportionment of Pittman Professional Land Surveying

Husband further argues that if we uphold the family court's finding that Pittman Professional Land Surveying is a marital asset, Wife's interest in this asset should have been limited to a special equity. In the alternative, Husband contends he should have received credit for the premarital value of the business. We reject both arguments.

At the final hearing, objective evidence was presented to show that during the marriage, both parties regarded the business as the common property of the marriage. See Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110-11 (Ct. App. 1988) ("The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."). The parties pooled their earnings, and with Husband's approval the business paid Wife a higher salary with the objective of increasing her Social Security income and ultimately providing more money for both parties during their retirement. In addition, Wife relinquished retirement benefits that she could have earned through full-time nursing work in order to devote time to developing the business. She made this sacrifice with the expectation that the business would take care of both parties when they retired. We therefore uphold the family court's finding that the business was transmuted into marital property and further hold it is unnecessary to consider whether Wife should have received only a special equity in this asset.

In support of his position that he should have received some credit for the premarital value of the business, Husband argues "the trial judge certainly had no problem in 'backing out' the nonmarital portion of the wife's retirement savings plan." Whereas, however, the family court determined that the entire business had been transmuted into a marital asset, there was no finding that the nonmarital portion of Wife's retirement account had been transmuted. The distribution of Wife's retirement account was based on a completely different premise from the distribution of Pittman Professional Land Surveying. In the case of the business, the premarital value of that asset was determined to have been transmuted into marital property.

VIII. Laptop Computer

Finally, Husband argues the family court should not have allowed Wife to retain possession of a laptop computer that she purchased with company funds after the filing of this action. We agree.

In allowing Wife to retain the computer, the court noted only that "no credible testimony was offered as to its value." It was undisputed, however, that Wife purchased the computer after the filing of this action with funds belonging to Pittman Professional Land Surveying, an asset awarded in its entirety to Husband as his portion of the marital estate. We agree with Husband that the award to him of the business, together with all its assets, should have included the laptop. Although the family court's remarks suggest Wife would have been ordered to reimburse Husband for the computer had evidence of its value been presented at trial, the absence of this information did not prevent the court from using a "reasonable means to achieve equity between the parties." S.C. Code Ann. § 20-3-660 (Supp. 2010). Full equity between the parties could easily have been attained by awarding the computer to Husband. We therefore reverse the award to Wife of the laptop computer and hold the family court should have awarded it to Husband.

CONCLUSION

We affirm the family court's decisions regarding alimony and attorney's fees. As to Husband's appeal of the equitable division award, we affirm the family court's valuation of the equitable division award, the court's inclusion of Pittman Professional Land Surveying in the marital estate, and the court's refusals to limit Wife's interest in the business to a special equity and to award Husband credit for the premarital value of the business. We hold, however, the family court erred in allowing Wife to retain possession of the laptop computer and therefore reverse this provision of the appealed order.

AFFIRMED IN PART, REVERSED IN PART.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Team IA, Inc.,	Appellant,
v.	
Cicero Lucas, George Lawson, IV, and 5 Point Solutions, LLC,	Defendants,
Of whom Cicero Lucas is	Respondent,
Cicero Lucas and George Lawson, IV,	Third-Party Plaintiffs,
v.	
Brent Yarborough and Team IA, Inc.,	Third-Party Defendants.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4889
Submitted June 1, 2011 – Filed September 14, 2011
Withdrawn, Substituted and Refiled October 20, 2011

REVERSED AND REMANDED

Joel W. Collins, Jr., Robert F. Goings, and Christian Bosel, all of Columbia; and S. Clay Keim, Jeffrey A. Lehrer, and Lucas J. Asper, all of Spartanburg, for Appellant.

Terry Richardson, Jr., Daniel S. Haltiwanger, and Christopher J. Moore, all of Barnwell, for Respondent.

GEATHERS, J.: This is an appeal from a circuit court order granting partial summary judgment to Respondent Cicero Lucas on the grounds that the non-competition and non-solicitation clauses in an employment agreement he signed were overly broad and unenforceable. Appellant Team IA, Inc. (Team IA) argues the circuit court erred in granting partial summary judgment to Lucas, when (1) material facts were in dispute as set forth in the Supplemental Affidavit of Brent Yarborough; (2) the circuit court applied Georgia law despite the presence of a choice of law provision in the agreement signed by the parties requiring the application of South Carolina law; (3) the circuit court arguably would have reached a different result had it applied South Carolina law to evaluate whether the non-solicitation clause was an unreasonable restraint on trade; (4) no evidence was presented that the non-competition provision would improperly curtail Lucas's efforts to earn a livelihood; and (5) the circuit court could have limited the nationwide geographic restriction in the non-competition clause to the less expansive restricted territory alternatively defined in the employment agreement as South Carolina, North Carolina, Georgia, and Alabama. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Team IA conducts business in the microfilm, data entry, software, hardware, consulting, and related services industries. Team IA markets its business on a nationwide basis through electronic and print media, including the internet, attendance at trade shows, submission of bids, direct sales, and other means. In April of 2001, Team IA hired Lucas as a sales representative

for the company. The parties signed an employment agreement, which contained the following clauses:

> A) Non-Solicitation Agreement
>
> > 1) Employee agrees and acknowledges by signing below, that while employed by Employer and for a period of twelve (12) months following termination of Employee's employment with Employer, regardless of who initiates said termination, that he will neither directly [n]or indirectly, for himself or on behalf of any other person, firm, or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer products or services.
> >
> > 2) For the purposes of this Agreement, the term "CUSTOMER" shall mean any person, firm, or business entity who currently has a system or product which was designed or installed by or is being serviced by Employer; or who has purchased goods or services or who has contracted to purchase goods or services from Employer during the twelve (12) months prior to Employee's separation from employment; or who is an Employer prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months.[1]
>
> . . . .
>
> B) Covenant Not to Compete
>
> > 1) In order to prevent the improper disclosure or use of confidential and proprietary

[1] We note that the non-solicitation clause in this agreement appears to prohibit contact with both former customers and former prospective customers of Team IA.

> information and other trade secrets, and to protect the Employer from unfair competition, Employee agrees that, absent the prior express written consent of the Employer, while employed by Employer and for twelve (12) months immediately following the resignation or termination of his employment with the Employer, regardless of who initiates separation from employment, Employee shall not, directly or indirectly, by himself, or through or on behalf of any other person, firm, partnership, company, corporation, representative or agent, within the geographical territory (hereinafter, the "RESTRICTED TERRITORY") set forth below, solicit, attempt to solicit, sell, or attempt to sell, provide, or attempt to provide COMPETING SERVICES as defined below.
>
> Recognizing that Team IA competes on a nationwide basis, the Parties to this agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court or other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama.

(emphasis added) (footnote added).

The employment agreement also contained the following choice of law provision:

> This Agreement shall be governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina. Any dispute concerning or arising under this Agreement must be

> submitted to a court of competent jurisdiction, either state or federal, within the State of South Carolina, and the Parties hereby voluntarily submit to the jurisdiction of such court.

(emphasis added).

Lucas resigned from Team IA in February of 2009. Subsequent to his resignation, Lucas contacted all but one of the customers with whom he had worked while employed at Team IA. Phone records supplied by Lucas and attached as an exhibit to Team IA's memorandum in opposition to summary judgment indicate Lucas contacted at least eight Team IA customers with whom he worked extensively while he was employed. In a second supplemental response to Team IA's interrogatories, Lucas admitted he contacted "all of his personal customers" by telephone to inform them of his departure, and he listed eleven Team IA customers by name.

Within one week of his resignation, Lucas established and became part owner and operator of 5 Point Solutions, LLC, a company that performed services similar to those provided by Team IA. The Fulton County, Georgia, Clerk of Superior Court had previously reached an agreement with Team IA for a large microfilm creation project. The day after Lucas formed 5 Point Solutions, Fulton County pulled the project from Team IA and designated Lucas's new company as its microfilm vendor. The Fayette County, Georgia, Clerk of Superior Court also pulled a scanning project from Team IA and awarded the same project to 5 Point Solutions. Lucas had been actively involved in securing business from both of these customers while he worked for Team IA.

Team IA filed a lawsuit for breach of contract, breach of duty of loyalty, tortious interference with contractual relations, and nine other causes of action, alleging inter alia that Lucas breached the terms of his employment agreement. Lucas filed a motion for partial summary judgment on the breach of contract action with respect to the non-solicitation and non-competition provisions contained therein, and the circuit court held a hearing on the motion.

Two weeks after the hearing on the summary judgment motion, Team IA filed the Supplemental Affidavit of Brent Yarborough. In that document, Yarborough listed numerous "customers/prospective customers" with whom Lucas had worked in South Carolina, North Carolina, Alabama, and Georgia while employed by Team IA. On October 5, 2009, Lucas filed a Motion to Strike the Supplemental Affidavit as untimely. On October 19, 2009, Team IA filed a Memorandum in Opposition to Lucas's Motion to Strike. The circuit court neglected to expressly rule on the motion to strike, and the November 19, 2009 order granting summary judgment did not mention the supplemental affidavit.

The circuit court granted partial summary judgment to Lucas on the grounds that (1) the restricted territory set forth in the non-competition clause was overly broad as Team IA did not have clients in three of the four states listed, and (2) the non-solicitation provision was unenforceable as it prohibited Lucas from accepting business from unsolicited customers of Team IA. The circuit court applied Georgia law to evaluate the validity of the non-solicitation provision and South Carolina law to evaluate the validity of the non-competition clause. Team IA filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. In its motion, Team IA argued the circuit court erred in failing to consider the facts and evidence set forth in Yarborough's affidavit and supplemental affidavit.

The circuit court denied Team IA's motion to alter or amend, noting, "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively." The order did not specifically mention Yarborough's supplemental affidavit. This appeal followed.

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(e), SCRCP, further provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In ascertaining whether any triable issue of fact exists, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Application of the Summary Judgment Standard

Team IA argues the trial court erred in accepting as true the facts set forth in Lucas's affidavit while disregarding the facts set forth in Yarborough's initial affidavit and supplemental affidavit. We agree.

A covenant not to compete will be upheld only if it is: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983).

"Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer." Id. at 675, 301 S.E.2d at 143. "A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer." Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct. App. 1995). Nonetheless, "agreements not to compete, while looked upon with disfavor, critically examined, and construed against any employer, will be upheld as enforceable if such agreement is reasonable as to territorial extent of the restraint and the period for which the said restraint is to be imposed." Almers v. S.C. Nat'l Bank of Charleston, 265 S.C. 48, 51, 217 S.E.2d 135, 136 (1975).

"A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." Dudley, 278 S.C. at 676, 301 S.E.2d at 143. South Carolina has enforced a non-solicitation agreement precluding a former employee from "selling to the accounts or in the territory" in which he had been performing his duties as a sales representative. Standard Register Co. v. Kerrigan, 238 S.C. 54, 59, 74, 119 S.E.2d 533, 535, 544 (1961) (emphasis added).

Recently, our supreme court held that "the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). The supreme court further noted "it would violate public policy to allow a court to insert a geographical limitation where none existed." Id. at 587-88, 694 S.E.2d at 17 (emphasis added).

In reaching its conclusion, the Poynter court analyzed this court's Faces Boutique opinion. Id. at 588, 694 S.E.2d at 18 (citing Faces Boutique, 318 S.C. at 43-44, 455 S.E.2d at 709). In Faces Boutique, this court concluded an employer's willingness to stipulate at trial to an interpretation of a non-competition provision that would render it proper in scope does not rectify the invalidity of the covenant as initially written. 318 S.C. at 43-44, 455 S.E.2d at 709. Therefore, we interpret the supreme court's holding in Poynter to mean that (1) a court may not "blue pencil" the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by

the parties in order to make it valid and enforceable, and (2) the parties may not of their own accord convert an overly broad territorial restriction into an enforceable one by entering into a subsequent agreement that artificially limits the actual terms used in the parties' original contract.

Here, we believe the nationwide territorial restriction contained in the non-competition provision at issue was overly broad on its face. However, we conclude the alternative territorial restriction contained in the parties' original agreement (South Carolina, North Carolina, Georgia, and Alabama) would remain valid and enforceable to the extent it is not overly broad after further development of the facts.

Yarborough's initial affidavit stated:

> Team IA both allowed and expected Mr. Lucas to solicit new business for Team IA on a nationwide scale. A review of a sample of Mr. Lucas's sales activities – based on expense reports he submitted to Team IA for reimbursement – demonstrates Mr. Lucas's nationwide sales activities on behalf of Team IA. (See Attachment 4 Attached Hereto.) This summary also shows examples of Mr. Lucas's attendance at and participation in tradeshows, on behalf of Team IA, which took place across the country and included attendees representing a nationwide prospective customer base.

The expense report attached to Yarborough's initial affidavit reflects Lucas conducted sales activity in South Carolina, North Carolina, Georgia, Alabama, Kansas, California, Illinois, Pennsylvania, and Florida. However, Lucas's own affidavit conflicts with Team IA's assessment. Lucas's affidavit averred, "I performed no work for customers in Alabama, South Carolina, or North Carolina." We hold further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable. Specifically, whether the "sales activity" Lucas conducted as documented in

the expense report included contact with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama is unclear. See Standard Register Co., 238 S.C. at 59, 119 S.E.2d at 535 (enforcing a non-solicitation agreement that precluded a former employee from "selling to the accounts or in the territory" in which he had been performing his duties as a sales representative) (emphasis added).

In his supplemental affidavit, Yarborough listed numerous "customers/prospective customers" with whom Lucas worked in South Carolina, North Carolina, Alabama, and Georgia while employed by Team IA.[2] However, the circuit court did not expressly rule on whether this supplemental affidavit was timely. The Record on Appeal is unclear as to whether the circuit court considered Yarborough's supplemental affidavit when ruling on Team IA's motion to reconsider; the order did not specifically mention the supplemental affidavit, nor any of the facts set forth within it. Nonetheless, the order denying Team IA's motion to reconsider noted, "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively."

Under the circumstances, regardless of whether or not the circuit court considered the facts set forth in Yarborough's supplemental affidavit, we hold summary judgment was premature. See Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294, 417 S.E.2d 631, 632 (Ct. App. 1992) ("Accordingly, summary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful."). Our decision is based on a genuine issue of material fact in dispute as to whether or not Lucas interacted with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama during the term of his employment. See Dudley, 278 S.C. at 676, 301 S.E.2d at 143 ("A geographic restriction is generally reasonable if [it] is limited to the territory in which the employee was able,

[2] We decline to rule on whether a non-solicitation agreement's prohibition on contact with former prospective customers of a former employer is overly broad and unenforceable on its face as that particular issue is not yet ripe for our review. Specifically, the Record on Appeal is unclear as to whether Lucas contacted former customers or former potential customers of Team IA.

during the term of his employment, to establish contact with his employer's customers.").

Accordingly, we reverse and remand for further development of the facts in order to clarify application of the law. See Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) ("Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law."). We also direct the circuit court to rule on Lucas's Motion to Strike the Supplemental Affidavit of Brent Yarborough prior to entering an order on the Motion for Partial Summary Judgment.

II. Choice of Law

Team IA contends the circuit court erred in applying Georgia law to determine the validity of the non-solicitation clause at issue despite the presence of a choice of law provision in the employment agreement requiring the application of South Carolina law. We agree.

Choice of law clauses are generally honored in South Carolina. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 221, 578 S.E.2d 329, 336 (2003) ("We hold that a settlor may designate the law governing his trust, and absent a strong public policy reason, or lack of substantial relation to the trust, the choice of law provision will be honored."); see also Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.").

In Livingston v. Atlantic Coast Line Railroad, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935), our supreme court discussed traditional choice of law rules in the absence of a choice of law provision: "It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs." (emphasis added). "If the contract be silent thereabout, the presumption is

that the law governing the enforcement is the law of the place where the contract is made." Id. (emphasis added). Therefore, traditional choice of law rules apply only in the absence of an express provision regarding the applicable law to govern the contract.

In the present matter, the circuit court applied traditional choice of law rules despite the presence of a choice of law provision designating South Carolina law. Specifically, the circuit court relied upon Witt v. American Trucking Ass'ns, 860 F. Supp. 295, 300-01 (D.S.C. 1994) (applying South Carolina common law choice of law rules when determining what law should govern a contract that did not contain a choice of law provision), Livingston, 176 S.C. at 391, 180 S.E. at 345, and Lister v. NationsBank of Delaware, 329 S.C. 133, 144-45, 494 S.E.2d 449, 455-56 (Ct. App. 1997) (applying South Carolina law to a breach of contract accompanied by fraudulent act action when the contract did not contain a choice of law provision, when the contract was performed in South Carolina, and when the breach occurred in South Carolina). These cases regarding choice of law in the absence of a choice of law provision are not applicable to this contract because it contained a choice of law provision.

The only recognized exception to adhering to the parties' choice of law provision does not apply here because the contract designated South Carolina law, and it is being interpreted here in South Carolina. See Nucor Corp., 482 F. Supp. 2d at 728 ("However, a choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy."). Finally, neither party disputes the validity of the choice of law provision. Therefore, the circuit court should have applied South Carolina law.

We need not reach the merits of the final two issues on appeal given our reversal on the previously stated grounds. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive).

CONCLUSION

We conclude further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable. Accordingly, we reverse and remand for further development of the facts in order to clarify application of the law. We direct the circuit court to rule on Lucas's Motion to Strike the Supplemental Affidavit of Brent Yarborough. Finally, we instruct the circuit court to apply South Carolina law in evaluating the non-solicitation provision contained in this employment agreement. Accordingly, the decision of the circuit court is

REVERSED AND REMANDED.[3]

SHORT and KONDUROS, JJ., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ralph Duane King, Jr., Appellant,

v.

International Knife and Saw - Florence, Employer,

and

Peerless Insurance Company c/o Montgomery Insurance, Respondents.

Appeal From the Appellate Panel
Of the Workers' Compensation Commission

Opinion No. 4895
Heard October 3, 2011 – Filed October 19, 2011

REVERSED

Stuart Wesley Snow, of Florence, for Appellant.

James H. Lichty, Weston Adams, III, and Helen F. Hiser, all of Columbia, for Respondents.

CURETON, A.J.: After Ralph D. King, Jr., suffered work-related injuries and filed a workers' compensation claim, the single commissioner awarded him benefits. King's employer, International Knife and Saw-Florence, and its insurance carrier, Peerless Insurance Company, (collectively Employer) appealed to the Appellate Panel of the Workers' Compensation Commission (Appellate Panel). The Appellate Panel reversed. King appeals, arguing the Appellate Panel erred in: (1) concluding his repetitive trauma injury was compensable at a time when King had missed no work because of the condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury; (2) concluding the ninety-day notice period commenced before King was diagnosed with a repetitive trauma injury; (3) finding substantial evidence indicated King had "first noticed [a repetitive trauma injury] a couple of years ago, . . . suspected his job was causing [a repetitive trauma injury] when he first noticed it, and . . . discovered his condition was compensable a couple of years ago"; (4) finding substantial evidence that, even if King had not discovered his condition was compensable, he could have done so years earlier through the exercise of reasonable diligence; and (5) failing to address whether King had a reasonable excuse for failing to give timely notice and whether Employer suffered undue prejudice as a result. We reverse on the issue of compensability, reinstate the benefits awarded by the single commissioner, and decline to address King's remaining issues.

FACTS

From April 1995 to May 2008, King used six-, eight-, and ten-pound hammers to hammer saw blades to customer specifications for his employer. On April 17, 2008, the hammer King was using broke, and King experienced a sharp pain in his shoulder. He continued working for nearly a month before notifying his supervisor of his injury and seeking medical treatment. King stopped working on May 15, 2008.

On August 7, 2008, King filed a claim for workers' compensation benefits due to right shoulder and neck injuries. Employer denied his claim, alleging his injuries were not work-related and he failed to give timely notice of a repetitive trauma injury. King later amended his claim to include carpal tunnel syndrome in his right arm, hand, and fingers. Both the original and the amended claim indicated he sought benefits for "injury" as well as "repetitive trauma."

On November 25, 2008, the parties appeared for a hearing before the single commissioner on the issue of whether King gave Employer proper notice. King testified he stopped working for Employer in May because of pain in his "arm and shoulder and stuff." Although King denied having any problems using his hands or arms prior to that day, he conceded his right arm had hurt and ached for the past couple of years. Furthermore, he suspected the ache in his arm was connected to his work: "After slinging a hammer all day, . . . your arm's going to be tired."

King's medical records reflected that, from May to September 2008, King sought and received medical treatment for pain on his right side, from his neck to his hand, and numbness in his right hand. He received prescription pain medications, and his doctors explored possible causes in his rotator cuff, cervical spine, nervous system, and carpal tunnel. An MRI excluded King's rotator cuff and spine as sources of the pain; however, one of his treating physicians found a mild nerve impingement in his right shoulder. A steroid injection to King's shoulder relieved some of his shoulder pain.

In addition, electrodiagnostic studies revealed King suffered from moderate carpal tunnel syndrome on his right side. He underwent ETPS[1] and physical therapy. By August, King reported his right hand was still numb. His doctor recommended carpal tunnel release surgery to treat King's hand.

[1] The record identifies this procedure only by its initials. It appears to be a form of acupuncture accompanied by an electric current that may be used to treat carpal tunnel syndrome.

The single commissioner found King's report to Employer was timely and awarded benefits for total disability and medical treatment. Employer appealed, and the Appellate Panel reversed both the finding of timeliness and the award of benefits. Specifically, the Appellate Panel found King "first noticed this injury a couple of years ago," suspected his work caused the injury, "knew well before he gave notice that he had a work-related problem," and "discovered his condition was compensable a couple of years ago." This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi–Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). However, we may reverse the Appellate Panel's decision when it is unsupported by substantial evidence or controlled by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Statutory interpretation is a question of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). This court is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007). "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper, 373 S.C. at 479-80, 646 S.E.2d at 165.

LAW/ANALYSIS

King asserts the Appellate Panel erred in concluding his repetitive trauma injury was compensable at a time when he had missed no work because of the condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury. We agree.

The South Carolina Workers' Compensation Act (Act) requires employers to compensate employees who sustain injuries "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2010). The compensation to which an injured employee is entitled is "the money allowance payable to an employee or to his dependents as provided for in . . . Title [42] and includes funeral benefits." S.C. Code Ann. § 42-1-100 (1985). Employers are obligated to provide medical treatment and supplies. S.C. Code Ann. § 42-15-60 (Supp. 2010). In addition, employers must pay benefits to injured employees for their total or partial disability, according to a statutory schedule. S.C. Code Ann. § 42-9-10 to -30 (1985 & Supp. 2010). Our supreme court has observed the workers' compensation system does not compensate an employee for his injury but, instead, "provid[es an] injured employee with sufficient income and medical care to keep him from destitution." Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 108 (2003).

When an employee suffers a repetitive trauma injury:

> [N]otice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the [Workers' Compensation C]ommission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

S.C. Code Ann. § 42-15-20(C) (Supp. 2010). The statutory notice requirements in this section "should be liberally construed in favor of claimants." Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011). The Appellate Panel's findings concerning notice are subject to the substantial evidence standard. Id. at 82-83, 710 S.E.2d at 457.

We find substantial evidence does not support the Appellate Panel's findings characterizing King's long-term arm ache as an "injury," determining King discovered or could have discovered "a couple of years ago" that he had a compensable condition, and barring King from receiving benefits for failing to satisfy the notice requirement. Therefore, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

The question before us is this: in the case of a repetitive trauma injury, what event triggers an injured employee's obligation to report and commences the ninety-day reporting period established in section 42-15-20(C)? By its nature, a repetitive trauma injury lacks a definite time of injury because the damage "is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A) (Supp. 2010); see also Schurlknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002) ("Repetitive trauma injuries . . . have a gradual onset caused by the cumulative effect of repetitive traumatic events or 'mini-accidents.' As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury."). Employer focuses its arguments on section 42-15-20(C)'s use of the word "condition," contending any occurrence of pain, when coupled with the employee's belief that the pain is work-related, triggers the employee's reporting obligation under section 42-15-20(C). In short, Employer urges us to equate pain with a compensable condition. We decline to do so. Nothing in the Act suggests our legislature intended to compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related. Cf. Wigfall, 354 S.C. at 116, 580 S.E.2d at 108 (observing workers' compensation laws "are not designed to compensate the employee for his injury, but merely to provide him with

the bare minimum of income and medical care to keep him from being a burden to others").

An employee's obligation to report a work-related repetitive trauma injury is not triggered by the onset of pain but, rather, by the employee's diligent discovery that his condition is compensable. § 42-15-20(C). We must determine, then, when a repetitive trauma injury becomes compensable. Our supreme court has long recognized that the Act entitles employees injured at work to compensation on only two bases, lost earning capacity and specific, scheduled injuries. Wigfall, 354 S.C. at 104, 580 S.E.2d at 102 (citing Jewell v. R.B. Pond Co., 198 S.C. 86, 90-91, 15 S.E.2d 684, 686 (1941)); see also §§ 42-1-100, 42-9-10 to -30, & 42-15-60 (establishing and describing compensation for (1) medical care or treatment for a work-related injury and/or (2) disability). Accordingly, a work-related repetitive trauma injury does not become compensable, and the ninety-day reporting clock does not start, until the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition.

Here, the Appellate Panel found King was obligated to give Employer notice of his injury based upon his knowledge of pain "a couple of years" before he either required medical care or was unable to perform his job. In doing so, the Appellate Panel improperly required King to give notice of a condition that he had no reason to believe was compensable. Under section 42-15-20(C) and the sections addressing compensation, King had a duty to notify Employer of his injury within ninety days of the date he discovered or should have discovered it qualified him to receive benefits for medical care, treatment, or disability. The record reflects King acknowledged to the single commissioner that his arm was tired, sore, and achy for a couple of years before he became unable to work. He further admitted that he believed his arm ached because he worked "slinging a hammer all day." However, a mere work-related ache does not constitute a compensable condition, regardless of whether the employee later develops an injury. The Act requires an injured employee to be diligent, not prescient. King's condition was not

compensable until it either required medical care or interfered with his ability to perform his job, whichever occurred first.

The record reflects King first missed work on May 15, 2008, and first saw a doctor for his injuries within two weeks after that date. King testified that, until May 2008, he neither required medical treatment nor experienced any condition that affected his ability to perform his job as he had done for many years. Nonetheless, his medical records reflect he reported to his physician that his pain suddenly became "much worse" in April 2008. Even assuming King should have discovered in April 2008 that his injury required medical treatment, his report of his injury to Employer in May 2008 fell well within the ninety-day notice period.

For the foregoing reasons, the Appellate Panel erred in finding King knew or should have known his injury was compensable "a couple of years" before he became disabled. As a result, the Appellate Panel's denial of benefits was error. Therefore, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

We decline to address King's remaining issues because reversal on the issue of compensability disposes of this appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find an injury does not become compensable under the Workers' Compensation Act until the injured employee satisfies the statutory criteria entitling him to compensation. We further find the evidence adduced in this case indicates King had no reason to discover his injury was compensable before April 2008, and the factual determinations supporting the Appellate Panel's denial of King's claim are unsupported by substantial evidence in the record. Accordingly, we reverse the decision of the Appellate Panel,

reinstate the single commissioner's award of benefits, and do not reach King's remaining issues on appeal.

REVERSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Pugh, Appellant,

v.

Piedmont Mechanical and
Zurich Insurance, Respondents.

Appeal from the Appellate Panel
South Carolina Workers' Compensation Commission

Opinion No. 4896
Heard September 14, 2011 – Filed October 19, 2011

REVERSED AND REMANDED

Emmette J. Saleeby, of Spartanburg, for Appellant.

Errol Anne Y. Hodges and Amanda L. C. Bradley, both of Columbia, for Respondents.

KONDUROS, J.: This is an appeal of a workers' compensation case arising from James Pugh's consolidated request for medical treatment for two injuries to his right knee. He contends the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred in failing to fairly and justly determine his average weekly wage and in ignoring the existence of exceptional circumstances, making it unfair to calculate his average weekly wage for his 2007 injury based on a seventeen-week period. Pugh also argues the Appellate Panel erred by failing to award temporary total disability for a three-month period.[1] We reverse and remand.

FACTS

Pugh began working for Piedmont Mechanical in 1978 and by 2006 was earning eighteen dollars per hour as a certified pipefitter. He routinely worked forty hours per week with occasional overtime depending on the project to which he was assigned. On July 31, 2006, while working for Piedmont, Pugh was carrying pipes when he stepped on a bottle, causing him to fall and suffer an injury to his right knee. The claim was admitted by Piedmont's carrier, Amerisure Mutual Insurance Company (Amerisure). Pugh was treated by Dr. John dePerczel, an orthopedist, and he underwent arthroscopic surgery and chondroplasty to his right knee.

Pugh was out of work for thirty weeks and paid temporary total disability benefits of $568.89 per week based on an average weekly wage of $853.28. Pugh's average weekly wage was calculated based on his earnings during the four quarters preceding the 2006 injury.

Dr. dePerczel determined Pugh reached maximum medical improvement for the 2006 injury on July 16, 2007, with a fifteen percent

[1] Pugh originally argued that if the court affirmed his issue regarding the average weekly wage, the award of twenty percent permanent partial disability to his right leg is an error as a matter of law because substantial evidence does not support the disability rating. This issue was resolved with Amerisure, and the appeal was withdrawn.

impairment rating to the right leg. The doctor assigned permanent work restrictions of (1) only occasional climbing or squatting and (2) no lifting over fifty pounds. Pugh returned to work for Piedmont in March 2007.

On October 19, 2007, Pugh reinjured his right knee getting off of a forklift at Piedmont. Pugh testified that while descending the forklift, he twisted his right knee and felt a pop, which caused severe pain and swelling to his right knee. Dr. dePerczel examined Pugh's knee and noted swelling, tenderness under the kneecap, and medial femoral condyle. Dr. dePerczel maintained the only option for permanent relief would be a total knee replacement. Dr. dePerczel, at this examination, placed Pugh on sedentary work.

Pugh lived about ninety minutes from Piedmont's office and felt commuting three to four hours every day from his home in Hickory, North Carolina to Piedmont's home office in Spartanburg, South Carolina was aggravating his right knee.[2] Pugh opted to stay out of work for a month without pay and workers' compensation benefits to see if his knee would improve with rest. Pugh's pain did not subside, and he returned to Dr. dePerczel on November 26, 2007. Dr. dePerczel recommended Pugh have a magnetic resonance imaging (MRI) to determine the amount of cartilage damage in the right knee. At this visit, Dr. dePerczel instructed Pugh to limit his work to sitting work only and not to drive more than one hour at a time. Pugh believed this limitation kept him from driving the ninety minutes to Piedmont's office.

Amerisure sought clarification of Dr. dePerczel's driving restrictions in January 2008. Dr. dePerczel determined Pugh could drive forty-five minutes to an hour followed by a fifteen to thirty minute break, which would then allow him to drive the remaining thirty to forty-five minutes to Piedmont.

[2] Prior to the 2006 injury, Pugh worked remotely for Piedmont, requiring him to travel to Piedmont project sites throughout the country. Following his return to work in March 2007, Pugh performed light duty work in Piedmont's home office located in Spartanburg, South Carolina.

Following the clarification, Pugh was notified by letter that Piedmont was unable to provide Pugh with any sedentary work.

Between the 2006 injury and the 2007 injury, Piedmont changed its workers' compensation provider from Amerisure to Zurich American Insurance (Zurich). Neither carrier would approve Dr. dePerczel's order for an MRI, further medical treatment, or temporary total disability following the new work restrictions outlined by Dr. dePercezel.

Pugh requested a hearing to determine whether he had sustained a new on-the-job injury and a determination of which carrier would be responsible for his workers' compensation benefits following the second injury. The single commissioner entered his order June 11, 2009, and the Appellate Panel affirmed the order in pertinent part, finding (1) Pugh sustained a second injury with Piedmont Mechanical on October 19, 2007; (2) Zurich was responsible for the 2007 claim; (3) Pugh had reached maximum medical improvement for the 2006 injury; (4) the average weekly wage for the 2006 injury was $852.20 with a compensation rate of $568.89 per week; (5) Pugh sustained a permanent partial disability of twenty percent; and (6) the average weekly wage for the 2007 injury was $537.20 with a compensation rate of $358.15. Pugh's average weekly wage for the 2007 claim was calculated based on the seventeen-week period Pugh worked following his return to Piedmont after the 2006 injury. The Appellant Panel ordered Zurich to authorize a MRI of Pugh's right leg with the results to be reviewed by Dr. dePerczel to develop an appropriate treatment plan. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, 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., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (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 conclusions the administrative agency reached in order to justify its actions." Brought v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. Id.

LAW/ANALYSIS

I. Average Weekly Wage Calculation

The Appellate Panel calculated Pugh's average weekly wage for the 2007 injury as $537.20 based on the seventeen-week period Pugh worked prior to the injury. Pugh appeals this method of calculation, contending the Appellate Panel erred in failing to fairly and justly determine his average weekly wage and in ignoring the existence of exceptional reasons to justify a deviation from the Appellate Panel's chosen method of wage calculation. He argues the Appellate Panel should have calculated his wage by the alternative method of finding exceptional reasons to recognize his years of employment, earning capacity, and age because the calculation based on the seventeen-week period is a misleading snapshot of his average earnings.

The Workers' Compensation Act defines "average weekly wage" for the purposes of computing compensation and sets forth a primary method of calculation and four alternative methods.[3] The primary method for

[3] Section 42-1-40 of the South Carolina Code (Supp. 2010) provides as follows:

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of

calculating the average weekly wage is to take "the total wages paid for the

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> fifty-two weeks immediately preceding the date of the injury, ... "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

(emphasis added).

last four quarters divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." § 42-1-40; Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App. 2010). "The [Appellate Panel] must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." Pilgrim, 391 S.C at. 44-45, 703 S.E.2d at 244 (citing § 42-1-40).

In this case, Pugh had been working for less than four quarters since his return from the 2006 injury, thus the primary method of calculation was not appropriate. The Appellate Panel calculated Pugh's average weekly wage based on Zurich's Form 20 in which it "divided the annual salary by the actual number of weeks worked versus [fifty-two] weeks." When the Appellate Panel determines the primary method of calculation is not permissible, it is required to consider which of the alternative methods for calculating the average weekly wage is most appropriate based on the facts. Id. "Before the [Appellate Panel] may use any one of these alternatives, the [Appellate Panel] must find, or the record must clearly show, that the necessary conditions [, as prescribed in the statute,] exist." Id. The first alternative method of wage calculation, used by Zurich and adopted by the Appellate Panel's order, is proper if two "predicate conditions" exist: (1) it is "practicable" to use the alternative method and (2) the calculation yields a result "fair and just" to both parties. Id. at 46, 703 S.E.2d at 245.

We believe the Appellate Panel failed to satisfy the second predicate condition, therefore making the use of the first alternative method of calculation an error of law. The first condition of practicability is established both in the Appellate Panel's order and in the record based on Pugh working less than fifty-two weeks prior to his second injury. The second condition of fairness was not specifically addressed in the Appellate Panel's order, nor does the record reflect that the alternative method of calculation was a fair and just result for both Piedmont and Pugh, as statutorily required. This is particularly bothersome in light of the significant decrease in an average weekly wage for a thirty-year veteran of the company.

The record suggests a frequent fluctuation between projects and the hours available for employees to work depending on the projects Piedmont was undertaking. The natural variance in available work in this industry makes capturing the ebb and flow of work in a seventeen-week period difficult. The only evidence presented regarding Pugh's pay and hours worked was Pugh's testimony and the earnings outlined in Form 20. The prevailing goal and policy of section 42-1-40 is to use the method that will fairly compensate the employee "for reductions in their earning power caused by work-related injuries." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). See Foreman v. Jackson Minit Mkts., Inc., 265 S.C. 164, 170, 217 S.E.2d 214, 216-17 (1975). In this case, the Appellate Panel had the ability to see an extended and continual work history and average earnings for a thirty-year period.

The Appellate Panel's chosen method of calculation resulting in a thirty-seven percent decrease in Pugh's average weekly wage for the 2007 injury is drastic and should have been directly addressed by the order to comply with the statutory obligation. The record alone does not properly establish the calculation provided a fair and just result. Therefore, we remand this issue to the Appellate Panel for the purpose of reconsidering and clarifying the method of calculation in light of the Appellate Panel's requirement to select a method of calculation that is fair and just to both parties. While we leave the selection of the alternative method of calculation to the Appellate Panel, we recognize section 42-1-40 has been interpreted to provide "'an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss.'" Forrest v. Price Mech., 373 S.C. 303, 309, 644 S.E.2d 784, 787 (2007) (quoting Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002)).

II. Temporary Total Disability

Pugh contends the Appellate Panel erred in failing to award temporary total disability benefits for the period from November 26, 2007, to February 29, 2008, because substantial evidence shows he is entitled to benefits during

this period. Pugh specifically argues he is entitled to temporary total disability for the ten-week period from November 26, 2007, to February 4, 2008, because he was not informed until February 4, 2008, of Dr. dePerczel's clarification of his driving restrictions, which he had been following pursuant to the requirements of the Workers' Compensation Act. Additionally, he maintains he is entitled to temporary total disability for the three-and-a-half-week period between February 5, 2008, to February 28, 2008, because Piedmont was unable to arrange a sedentary job that complied with his work restrictions.

The Appellate Panel's order fails to make specific findings of fact on whether Pugh is entitled to temporary total disability during the thirteen-and-a-half-week period. Without specific findings upon the evidence regarding the material fact of whether Pugh's understanding of the restrictions were warranted, this court cannot determine whether the general finding or conclusion was proper. See Baldwin v. James River Corp., 304 S.C. 485, 486, 405 S.E.2d 421, 423 (Ct. App. 2001). Thus, we remand this case to the Appellate Panel to make specific findings on Pugh's understanding of the restrictions and his entitlement to temporary total disability for the thirteen-and-a-half-week period.

CONCLUSION

For the foregoing reasons, this case is reversed and remanded to the Appellate Panel for the purpose of amending its award in keeping with the views expressed herein.

REVERSED and REMANDED.

FEW, C.J., and THOMAS, J., concur.

The South Carolina Court of Appeals

The State, Respondent,

v.

Rita G. Bixby, Appellant.

The Honorable Alexander S. Macaulay
Abbeville County
Trial Court Case No. 2004-GS-01-00325

ORDER

This order addresses Appellant's motion to abate her case ab initio and withdraw opinion number 4768, refiled August 10, 2011. After a careful consideration of the motion, the Court finds Appellant passed away while her petition for rehearing was pending. Hence, the Court grants Appellant's request to abate the appeal and withdraw the opinion. However, the Court declines to find the abatement should be ab initio. See State v. Anderson, 281 S.C. 198, 199, 314 S.E.2d 597, 597 (1984) ("[T]he death of a criminal appellant, prior to the disposition of his appeal, abates that appeal and constitutes grounds for its dismissal.").

s/ John C. Few C.J.

s/ Paula H. Thomas J.

s/ Daniel F. Pieper J.

Filed
October 19, 2011