Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

February 2, 2012

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

A vacancy exists in the judicial office formerly held by the Honorable Timothy M. Cain, judge of the Family Court, Tenth Judicial Circuit, Seat 2, upon his resignation effective on September 26, 2011, in order to serve as a Judge for the United States District Court, District of South Carolina. The successor will fill the unexpired term of that office, which will expire June 30, 2016.

A vacancy will exist in the office currently held by the Honorable Richard W. Chewning, III, judge of the Family Court for the Eleventh Judicial Circuit, Seat 3, upon Judge Chewning's retirement on or before June 30, 2012. The successor will fill the unexpired term of that office which will expire June 30, 2013, and the subsequent full term which will expire June 30, 2019.

The term of office held by the Honorable Joe M. Crosby, Master-in-Equity of Georgetown County, will expire January 1, 2013.

The term of office held by the Honorable James O. Spence, Master-in-Equity of Lexington County, will expire January 1, 2013.

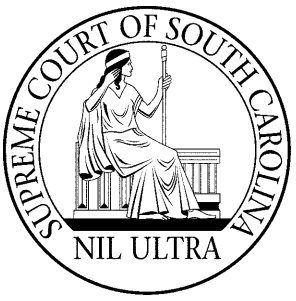
In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (T-Th).

The Commission will not accept applications after 12:00 noon on Tuesday, March 6, 2012.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php

H:\SCREEN\2012\Screen 1\Media Releases\MediaReleaseFeb.2.2012.docx



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
February 8, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2012-UP-067-Dona F. Ducker, Fred C. Ducker, and Commercial Refrigeration, LLC v. Eleanor S. Stamper
(Georgetown, Judge Joe M. Crosby)

2012-UP-068-State v. Andrea Person
(Richland, Judge Alison Renee Lee)

2012-UP-069-State v. Miguel Angel Ontiverous
(Spartanburg, Judge J. Mark Hayes, II)

2012-UP-070-State v. Antonio R. Trimmier
(Greenville, Judge John C. Few)

2012-UP-071-State v. Elijah C. Brown, Jr.
(Colleton, Judge D. Craig Brown)

2012-UP-072-State v. Clastimile Dixon
(Darlington, Judge Paul M. Burch)

2012-UP-073-SCDSS v. J.W., J.F., John Doe
(Oconee, Judge Timothy M. Cain)

2012-UP-074-Dontell Daniel McDaniels v. Alan Wilson, Attorney General, James Bogle, Jr., Assistant Attorney General for South Carolina
(Darlington, Judge Paul M. Burch)

2012-UP-075-State v. James Robert Nash
(Pickens, Judge G. Edward Welmaker)

2012-UP-076-Barbara S. McGowin v. Jeffrey D. McGowin
(Berkeley, Judge Wayne M. Creech)

2012-UP-077-SCDSS v. Sonya G., Terry G., and Oliver B.
(Kershaw, Judge Dana A. Morris)

2012-UP-078-Seyed D. Tahaei (a/k/a David Tahaei) v. Sherri L. Tahaei (f/k/a Sherri L. Smith)
(Colleton, Judge Frances P. Segars-Andrews)

PETITIONS FOR REHEARING

4818-State v. Randolph Frazier	Denied 06/10/11
4876-Crosby v. Prysmian Comm.	Granted 02/06/12
4892-Sullivan v. Hawker Beech Craft	Denied 2/8/2012
4898-Purser v. Owens	Pending
4912-State v. J. Elwell	Pending
4924-State v. B. Senter	Pending
4926-Dinkins v. Lowe's Home	Pending
4927-State v. J. Johnson	Pending
2011-UP-425-State v. V. Ravenel	Pending
2011-UP-455-State v. J. Walker	Pending
2011-UP-517-McLean v. Drennan	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-530-Owens v. Thompson Const.	Pending
2011-UP-540-Vessell v. Knagenhjelm	Pending
2011-UP-558-State v. T. Williams	Pending
2011-UP-565-Griggs v. Ashley Towne	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2012-UP-003-In the matter of G. Gonzalez	Pending
2012-UP-008-SCDSS v. Mitchell D.	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4592-Weston v. Kim's Dollar Store	Pending
4605-Auto-Owners v. Rhodes	Pending
4609-State v. Holland	Pending
4617-Poch v. Bayshore	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4670-SCDC v. B. Cartrette	Pending
4675-Middleton v. Eubank	Pending
4680-State v. L. Garner	Pending
4685-Wachovia Bank v. Coffey, A	Pending
4687-State v. Taylor, S.	Pending
4691-State v. C. Brown	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending

4732-Fletcher v. MUSC	Pending
4742-State v. Theodore Wills	Pending
4747-State v. A. Gibson	Pending
4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4760-State v. Geer	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4764-Walterboro Hospital v. Meacher	Pending
4765-State v. D. Burgess	Pending
4766-State v. T. Bryant	Pending
4769-In the interest of Tracy B.	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4781-Banks v. St. Matthews Baptist Church	Pending
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending
4789-Harris v. USC	Pending
4790-Holly Woods Assoc. v. Hiller	Pending
4792-Curtis v. Blake	Pending

4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4800-State v. Wallace	Pending
4808-Biggins v. Burdette	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending

4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
4887-West v. Morehead	Pending
4889-Team IA v. Lucas	Pending
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4902-Kimmer v. Wright	Pending
4907-Newton v. Zoning Board	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-378-State v. Parker	Pending

2010-UP-382-Sheep Island Plantation v. Bar-Pen	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-427-State v. S. Barnes	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-507-Cue-McNeil v. Watt	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-005-George v. Wendell	Pending
2011-UP-006-State v. Gallman	Pending
2011-UP-017-Dority v. Westvaco	Pending
2011-UP-024-Michael Coffey v. Lisa Webb	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-039-Chevrolet v. Azalea Motors	Pending
2011-UP-041-State v. L. Brown	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-059-State v. R. Campbell	Pending
2011-UP-071-Walter Mtg. Co. v. Green	Pending

2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-095-State v. E. Gamble	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-110-S. Jackson v. F. Jackson	Pending
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending
2011-UP-121-In the matter of Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-130-SCDMV v. Brown	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending

2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending

2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-James v. State	Pending
2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending

2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melissa Crosby, Respondent,

v.

Prysmian Communications Cables and Systems USA, LLC, Appellant.

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

Opinion No. 4876
Heard November 3, 2010 – Filed August 24, 2011
Withdrawn, Substituted and Refiled February 6, 2012

AFFIRMED

Robert L. Widener and Richard J. Morgan, both of Columbia, for Appellant.

Stephen Benjamin Samuels, of Columbia, for Respondent.

FEW, C.J.: This appeal is before us on petitions for rehearing filed by Appellant and Respondent. We grant both petitions, and substitute the following opinion.

The workers' compensation commission found that Melissa Crosby was injured in the course and scope of her employment with Prysmian Communications Cables and Systems USA.[1] Prysmian fired her nineteen days after her injury. Crosby sued Prysmian for retaliatory discharge under section 41-1-80 of the South Carolina Code (Supp. 2011), claiming she was fired for filing a workers' compensation claim. In a motion for summary judgment, Crosby asked the circuit court to give preclusive effect to the commission's finding and grant summary judgment on Prysmian's affirmative defense that the workers' compensation claim was fraudulent. We affirm the circuit court's order granting partial summary judgment that the commission's finding is preclusive, and hold this affirmative defense fails as a matter of law. We also affirm the circuit court's order granting summary judgment on Prysmian's counterclaims. Further, we do not address Prysmian's argument that the commission's finding does not extend to the factual question of whether Prysmian acted in good faith and without retaliatory motive because the answer to the question cannot affect the outcome of the case.

I. Facts and Procedural History

On September 22, 2004, Prysmian hired Crosby to operate machines that colored fiber optic cables. On January 6, 2005, Crosby made a claim for benefits under the Workers' Compensation Act by notifying her supervisor at Prysmian that she had injured her right knee on the job the day before. She formalized the claim on February 1, 2005, by filing and serving a Form 50 in which she alleged she "sustained an accidental injury to her right knee on 1-5-05."

[1] Prysmian Communications Cables and Systems USA is the successor to Pirelli Communications Cables and Systems North America. While this cause of action arose before Prysmian succeeded Pirelli, we will refer to Pirelli as Prysmian for the purposes of this opinion.

In July 2005, the workers' compensation commission held a hearing on the claim. Crosby and Prysmian presented conflicting evidence as to whether she was injured on the job on January 5. Crosby testified that on January 5 while she was stringing up a fiber optic line on one machine, an alarm activated on another machine. She explained that she hyperextended her right knee as she rushed to the other machine to prevent the severance of the fiber optic line. Prysmian presented evidence that Crosby did not injure the knee on January 5. First, Crosby did not report any injury until the next day. Crosby admitted she hurt the same knee on January 2, 2005, but testified she iced the knee and it got better before January 5. Crosby testified that she did not report the January 5 injury immediately because she thought it would get better like it had on January 2. Prysmian also presented the testimony of coworkers who observed Crosby limping on her right leg as she arrived at work on January 5. Though Crosby admitted she was limping, she attributed the limp to blisters on her toes she got from wearing high heels at a New Year's Eve church service. The single commissioner found that Crosby "is a credible witness who sustained an injury to her right lower extremity by accident arising out of and in the course of her employment on January 5, 2005." The single commissioner's order was affirmed by an appellate panel. Prysmian did not appeal the appellate panel's decision and it became the final decision of the commission.

On January 25, 2005, Prysmian notified Crosby that she was fired. The letter Prysmian sent to her stated in part:

> Both [Prysmian] and its workers' compensation insurer, American International Group, Inc. ("AIG"), have investigated your claim, and determined that your claim lacks merit and, [Prysmian] believes, was filed with fraudulent intent. In this regard, [Prysmian] has obtained statements from several employees who acknowledge that you appeared visibly injured at the time you reported for work on January 5, 2005, which indicates that the injury which you allege occurred in the course and scope of your work on January 5, 2005, did not, in fact, occur during such time. Separately, AIG has conducted an

> investigation and notified [Prysmian] that it is denying your claim for workers' compensation benefits based on essentially the same evidence.
>
> As a result of AIG's determination and the statements obtained in the course of [Prysmian]'s investigation of your claim, [Prysmian] has decided to terminate your employment, effective immediately, for filing a false claim for workers' compensation benefits.

On December 21, 2005, Crosby filed a civil lawsuit against Prysmian for retaliatory discharge under section 41-1-80. Prysmian answered and asserted an affirmative defense that Crosby "was validly terminated for fraudulently filing a workers' compensation claim."[2] Prysmian also asserted counterclaims for breach of the duty of loyalty, gross negligence, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation. Crosby filed a motion for summary judgment claiming she "is entitled to an order dismissing [Prysmian's] counterclaims with prejudice and to an order finding [Prysmian] terminated [Crosby's] employment in retaliation for filing a workers' compensation claim as a matter of law." The circuit court granted Crosby's motion and ordered the matter set for trial on damages and equitable relief.

Prysmian raises three issues on appeal. First, Prysmian claims the circuit court erred in giving preclusive effect to the factual finding of the commission that Crosby was injured in the course and scope of employment, and thereby granting partial summary judgment to Crosby as to Prysmian's affirmative defense that Crosby filed a fraudulent workers' compensation claim. Second, Prysmian argues that "even if the [commission's] decision has

[2] Prysmian's answer contains fourteen defenses, three affirmative defenses, and seven counterclaims. The quoted language is from the circuit court's order granting summary judgment, not from Prysmian's answer. The parties appear to agree that the affirmative defense for filing a fraudulent claim is contained in what Prysmian termed its "tenth defense, third affirmative defense, and third counterclaim" entitled "Statutory Defense pursuant to § 41-1-80."

preclusive effect in this case, it does not reach the questions of whether [Prysmian] acted in good faith and without a retaliatory motive." Third, Prysmian claims the circuit court erred in granting summary judgment as to Prysmian's counterclaims.

II. Standard of Review

Rule 56(c), SCRCP, provides that the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Each of Prysmian's issues presents questions of law. We decide questions of law with no deference to the lower court. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

III. Retaliatory Discharge Claim under Section 41-1-80

In order to recover for retaliatory discharge under section 41-1-80, a plaintiff must establish three elements: "1) institution of workers' compensation proceedings, 2) discharge or demotion, and 3) a causal connection between the first two elements." Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 97 (2000) (citing Hines v. United Parcel Serv., Inc., 736 F. Supp. 675, 677 (D.S.C. 1990)). The circuit court granted partial summary judgment in favor of Crosby as to liability for retaliatory discharge, leaving only the question of damages for the jury. Prysmian concedes Crosby satisfied all three elements.[3] However, Prysmian contends the circuit court's ruling was in error because questions of fact remain as to two affirmative defenses. In its first issue on appeal, Prysmian argues the circuit court erred by giving preclusive effect to the finding of the

[3] In our original opinion in this appeal, we stated Prysmian conceded only the first and second elements, but challenged the third. In its return to Crosby's petition for rehearing, Prysmian stated it did not argue the point we addressed as to the third element, and that our ruling in Prysmian's favor on that basis was "improper." This statement leaves Prysmian with no basis on which to challenge the existence of the third element, and thus we hold that Prysmian has conceded the existence of all three.

commission, and thereby granting partial summary judgment to Crosby as to Prysmian's affirmative defense that Crosby filed a fraudulent workers' compensation claim. We find the circuit court ruled correctly. In its second issue on appeal, Prysmian argues the circuit court's ruling should not foreclose Prysmian from proving at trial it fired Crosby in good faith and without retaliatory motive. We do not address this issue.

a. The Preclusive Effect of the Commission's Finding

In Wallace v. Milliken & Co., 305 S.C. 118, 121, 406 S.E.2d 358, 360 (1991), the supreme court recognized an affirmative defense to a section 41-1-80 claim for "violation of specific written company policies." Prysmian asserted this defense based on its "Standards of Conduct," which provide that an employee may be terminated for "acts and behavior which are unacceptable," specifically including: "Filing false claims of injury or illness." In its ruling granting partial summary judgment to Crosby, the circuit court stated:

> Defendant Prysmian offers, in defense, that [Crosby] was validly terminated for fraudulently filing a workers' compensation claim. The facts support a finding that Plaintiff Crosby's filing of a workers' compensation claim was in good faith. This Court notes the conclusions of law in the December 5, 2005 Order and Report of Commissioner J. Alan Bass of the South Carolina Workers Compensation [Commission]. ("2. Under § 42-1-160, claimant sustained injuries by accident arising out of and in the course of employment.").[4]

Prysmian's appeal presents us with the question of whether a ruling by the workers' compensation commission that the claimant was injured in the

[4] Prysmian also contends the language "support" shows the circuit court used the wrong standard for summary judgment. However, we decide this issue as one of law, and therefore we do not need to address the contention that the court used the wrong factual standard.

course and scope of employment is preclusive as to the affirmative defense that the employee filed a "false claim of injury." We hold that it is.

The question of whether the ruling by the workers' compensation commission is preclusive is one of issue preclusion, or what has traditionally been called collateral estoppel. See In re Crews, 389 S.C. 322, 340, 698 S.E.2d 785, 794 (2010) (equating issue preclusion and collateral estoppel). "Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action." Aaron v. Mahl, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009). Our courts have applied the doctrine of issue preclusion to the factual determinations of administrative tribunals. See Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) ("This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." (citing Earle v. Aycock, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981))). However, not every factual determination by an administrative agency is entitled to preclusive effect. In Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), our supreme court held that the factual findings of the employment security commission are not preclusive in a subsequent action for wrongful discharge. The Shelton court set forth the starting point for analyzing whether a particular agency's findings are preclusive:

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question. . . . The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.

325 S.C. at 252, 481 S.E.2d at 708 (quoting Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984)).

In order to determine whether an agency's factual finding is preclusive, we must first determine whether the particular finding meets the traditional elements of collateral estoppel. We must then examine whether there is some countervailing consideration which necessitates relitigation.[5] A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782.

We find that all the elements are met when the commission determines that an injury was sustained in the course and scope of employment. The commission affords both the claimant and the employer a full and fair opportunity to litigate the issue.[6] The parties are entitled to present witnesses and other evidence, make factual and legal arguments, and appeal a ruling they contend was made in error. The commission may not award benefits without actually litigating and directly determining the factual question of whether the claimant was injured in the course and scope of employment, and such a finding is necessary to support a judgment awarding benefits. See Ardis v. Combined Ins. Co., 380 S.C. 313, 320, 669 S.E.2d 628, 632 (Ct. App. 2008) ("To be compensable, an injury by accident must be one 'arising out of and in the course of employment.'" (quoting S.C. Code Ann. § 42-1-160 (Supp. 2007))). In this case, the record before us reveals that the issue was hotly contested before the commission, and the commission made a specific finding that "claimant sustained injuries by accident arising out of and in the course of employment." Thus, Crosby has established the three elements of collateral estoppel.

---

[5] Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

[6] "The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action." Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008).

Prysmian makes several arguments that countervailing considerations necessitate relitigation of the commission's finding. We find none of the arguments persuasive, and no unfairness or injustice will result from the application of issue preclusion to this situation.[7] First, Prysmian argues that the public policy of liberally construing the Workers' Compensation Act and resolving doubts in favor of coverage is a countervailing reason necessitating relitigation. We disagree. We believe the public policy cited by Prysmian actually favors protecting an injured worker from retaliation for filing a claim the commission finds to be work-related. See Horn v. Davis Elec. Constructors, Inc., 302 S.C. 484, 491, 395 S.E.2d 724, 728 (Ct. App. 1990) (applying "the policy of this state that injured employees be fully compensated for their work-related injuries" to a retaliatory discharge claim under section 41-1-80). Second, Prysmian argues that giving preclusive effect to the finding of the commission interferes with this court's scope of review in a retaliatory discharge case, which allows an appellate court to find facts according to its own view of the evidence. See Hinton, 343 S.C. at 242, 540 S.E.2d at 96 ("In reviewing a retaliatory discharge claim, the appellate court may find facts in accordance with its view of the preponderance of the evidence." (citing Wallace, 305 S.C. at 120, 406 S.E.2d at 359)). We disagree with this argument as well. Our scope of review requires us to independently evaluate evidence which has been presented to a circuit court

[7] In Shelton, the supreme court discussed the "countervailing considerations" that necessitated relitigation of the question that had been determined by the employment security commission. 325 S.C. at 252, 481 S.E.2d at 708. We find Shelton to be distinguishable because of the numerous differences between proceedings in the employment security commission and the workers' compensation commission. The Shelton court noted several points as to which employment security commission hearings are inconsistent with the doctrine of collateral estoppel. 325 S.C. at 252-53, 481 S.E.2d at 708. Those points are not applicable to the workers' compensation commission. The court concluded "public policy dictates the findings made during an ESC hearing should not receive collateral estoppel effect." 325 S.C. at 252, 481 S.E.2d at 708.

in a retaliatory discharge trial, but it does not allow us to reconsider a factual finding of the commission after the question has been fully litigated.[8]

Prysmian makes two other arguments of countervailing considerations. First, Prysmian contends the General Assembly would have given the commission authority to decide retaliatory discharge claims or it would have included such a provision in section 41-1-80 if it intended the commission's findings to be preclusive. Second, Prysmian argues that our holding makes unsuccessful workers' compensation claims preclusive, which would be contrary to the legislative intent of section 41-1-80. We find no merit in either argument. As to the second argument, our holding does not require that a finding by the commission that an injury is not work-related be given preclusive effect.

Therefore, as to Prysmian's first issue on appeal, we find the circuit court properly gave preclusive effect to the factual finding of the commission that Crosby was injured in the course and scope of employment. Applying that factual finding to this case, we affirm the circuit court's decision to grant summary judgment to Crosby on Prysmian's defense that Crosby filed a fraudulent workers' compensation claim.

---

[8] Other states have similarly held that the findings of a workers' compensation commission may be given preclusive effect. See, e.g., Frederick v. Action Tire Co., 744 A.2d 762, 767 (Pa. Super. Ct. 1999) ("Pennsylvania appellate courts have consistently held findings in workers' compensation cases may bar relitigation of identical issues in collateral civil actions, even third party tort actions."); Westman v. Dessellier, 459 N.W.2d 545, 547 (N.D. 1990) ("The decisions of administrative agencies, including those of the [Workers' Compensation] Bureau, may be res judicata even though administrative agencies are not courts."); McKean v. Municipality of Anchorage, 783 P.2d 1169, 1171 (Alaska 1989) ("[I]t is well-settled that res judicata may be applied to decisions of workers' compensation boards.").

b. Prysmian's Good Faith or Retaliatory Motive

In its second issue on appeal,[9] Prysmian argues "even if the [commission's] decision has preclusive effect in this case, it does not reach the questions of whether [Prysmian] acted in good faith and without a retaliatory motive." We do not address this issue. Even if it is possible to make a retaliatory discharge in good faith, the question of whether Prysmian acted in good faith or without retaliatory motive has no legal significance to Crosby's retaliatory discharge claim. Prysmian's letter to Crosby states unequivocally that she was fired because she filed a workers' compensation claim. The commission's finding establishes Crosby filed the claim in good faith. It is not a defense that Prysmian may have mistakenly believed her claim to be false or fraudulent. Section 41-1-80 lists the affirmative defenses available to an employer. Each one focuses on the conduct of the employee, and none relates in any way to whether the employer acted in good faith or without retaliatory motive. See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (citing "the canon of [statutory] construction . . . that to express or include one thing implies the exclusion of another") (citation and internal quotation marks omitted)). Thus, Prysmian's good faith or lack of retaliatory motive is not relevant to Crosby's claim.

c. Other Issues Argued by Prysmian

Prysmian argues it has other valid defenses for Crosby's alleged violations of company policy. For example, Prysmian claims Crosby violated company policy by not reporting her January 5, 2005, injury

[9] Prysmian's statement of the second issue is confusing. In subsections A and B of its argument on this issue, Prysmian repeats arguments it made in subsection A of the first issue, that the circuit court erred in giving preclusive effect to the commission's finding. In subsection C, Prysmian states "[a]s demonstrated earlier," and then repeats arguments it made in subsection B of the first issue. However, in light of issues Prysmian raised in its petition for rehearing, we interpret the second issue to raise the argument we decline to address in this section of the opinion.

"immediately." In this respect, Prysmian's company policy[10] is in conflict with the Workers' Compensation Act, which provides that an employee shall give notice "immediately on the occurrence of an accident, or as soon thereafter as practicable." S.C. Code Ann. § 42-15-20 (1985). This section, which has been amended since Crosby was injured,[11] allows a maximum of ninety days in which to give notice, but even then permits benefits to be awarded if "reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." Id. While Prysmian may be free to terminate an employee for violating company policy, it may not assert such a violation as a basis to defend a retaliatory discharge claim under section 41-1-80 if the policy the employee violated conflicts with the Workers' Compensation Act. If an employer contends the employee violated the Act in this or in some other manner, it may assert that violation to the commission.

Prysmian also argues that the language "indicates" in the circuit court's ruling shows it used the wrong standard for summary judgment. In light of our ruling, we do not specifically address this argument. However, our review of the circuit court's order leads us to believe the court was well aware that it could grant summary judgment only when "there is no genuine issue as to any material fact . . . ," Rule 56(c), SCRCP, and thus it used the correct standard.

IV. Prysmian's Counterclaims

Prysmian asserted seven counterclaims to Crosby's retaliatory discharge claim. The trial judge granted summary judgment in favor of Crosby with regard to the counterclaims. Each of the counterclaims arises exclusively out of one of the following two events: (1) Crosby's filing of the

[10] Prysmian's "Standards of Conduct" lists numerous "acts and behavior which are unacceptable," including: "Failure to immediately report any work related injury, illness, or accident."

[11] This section was amended in 2007. See S.C. Code Ann. § 42-15-20 (Supp. 2011).

workers' compensation claim, or (2) Prysmian's decision to fire Crosby because she filed a false claim. Prysmian alleges damages resulting solely from one of those two events. An employer simply cannot recover damages against an employee for filing a good faith workers' compensation claim. We hold as a matter of law that an employer may not prevail in a retaliatory discharge action on a counterclaim for damages which arise only from the filing of a workers' compensation claim or the employer's decision to fire the plaintiff for filing the claim. Prysmian's counterclaims were properly dismissed because Prysmian alleged no actionable damages caused by Crosby's conduct.

V. Conclusion

Based on the foregoing reasons, the circuit court's order is

AFFIRMED.

SHORT, J., concurs.

WILLIAMS, J., concurs in part and dissents in part in a separate opinion.

WILLIAMS, J.: concurring in part and dissenting in part: I concur with the majority in affirming the trial court's grant of summary judgment on Prysmian's counterclaims. However, I respectfully dissent with the portion of the majority's opinion that affirms the trial court's application of collateral estoppel in a retaliatory discharge action pursuant to section 41-1-80.

As to the issue of collateral estoppel, the majority concludes "[N]o unfairness or injustice will result from the application of issue preclusion to this situation." I respectfully disagree. The "countervailing considerations" presented in this case necessitate relitigation.

First, I note the dichotomy regarding the application of preclusion doctrines in the context of administrative tribunals between Bennett v. South Carolina Department of Corrections., 305 S.C. 310, 408 S.E.2d 230 (1991), and Shelton v. Oscar Mayer Foods, 325 S.C. 248, 481 S.E.2d 706 (1997).

In Bennett, Bennett filed a grievance complaint with the State Employee Grievance Committee (Grievance Committee) challenging his discharge from the South Carolina Department of Corrections (SCDC). Bennett, 305 S.C. at 311, 408 S.E.2d at 231. The Grievance Committee denied Bennett's complaint and Bennett failed to appeal. Id. Bennett then filed a retaliatory discharge claim pursuant to section 41-1-80. Id. The SCDC moved for summary judgment, claiming the Grievance Committee's decision precluded Bennett's retaliatory discharge claim under the doctrines of collateral estoppel and res judicata. Id. The trial court granted summary judgment in favor of SCDC on the grounds of collateral estoppel and res judicata and also held Bennett failed to exhaust his administrative remedies. Id. at 312, 408 S.E.2d at 231. On appeal, our supreme court affirmed the trial court and held:

> The doctrines of res judicata and collateral estoppel do not bar recovery under S.C. Code section 41-1-80 for state employees, but they do bar relitigation of issues which have been decided by or should have been presented to the State Grievance Committee. The statutory requirements that state employees bring their grievances before the State Grievance Committee and that they exhaust their administrative remedies before seeking judicial review do not bar the bringing of an action under S.C. Code § 41-1-80, but they do require that the Grievance Committee have the exclusive right to decide those issues subject only to an appeal for judicial review of their decisions.

Id. at 313, 408 S.E.2d at 231-32.

In Shelton, our supreme court addressed the issue of whether findings of fact made during a South Carolina Employment Security Commission (ESC) hearing were entitled to a preclusive effect under the doctrine of collateral estoppel. 325 S.C. 248, 481 S.E.2d 706. In Shelton, a security guard observed Shelton smoking marijuana in the company's parking lot, and

as a result, Shelton was allegedly discharged without further investigation. Shelton, 325 S.C. at 250, 481 S.E.2d at 707. Shelton filed and received unemployment benefits after an ESC hearing officer found he was discharged without cause. Id. Shelton's former employer did not appeal the ESC's decision. Id.

Shelton initiated a wrongful termination action. Shelton, 325 S.C. at 250, 481 S.E.2d at 707. Based on the ESC's finding, Shelton moved for partial summary judgment, claiming his employer was collaterally estopped from litigating whether he was discharged for smoking marijuana. Id. The trial court denied Shelton's motion for partial summary judgment. Id. On appeal, this court initially reversed the trial court's ruling but ultimately affirmed after rehearing the matter. Id. at 250-51, 481 S.E.2d at 707. Our supreme court affirmed and held, "The purposes of the ESC are in conflict with the doctrine of collateral estoppel; therefore, public policy dictates the findings made during an ESC hearing should not receive collateral estoppel effect." Id. at 252, 481 S.E.2d at 708.

In a footnote, our supreme court distinguished Bennett, and stated:

> Bennett dealt with the application of collateral estoppel to a proceeding before the State Employee Grievance Committee. Bennett filed a complaint with the grievance committee and the grievance committee ruled in favor of the employer. Instead of appealing this decision through the proper administrative channels, Bennett filed a civil suit alleging he was discharged in retaliation for filing a workers' compensation claim. This Court held the circuit court properly granted the employer's summary judgment motion because the issues in Bennett's civil claim were identical to the issues presented to and ruled upon by the grievance committee. Bennett had abandoned any opportunity for a ruling on these issues in his favor when he failed to appeal the grievance committee's findings. Bennett is distinguishable from the matter, *sub*

> *judice.* State employees must bring complaints before the grievance committee prior to seeking judicial review; therefore, the hearing before the grievance committee is necessarily more in the nature of a full evidentiary hearing. An ESC hearing only determines the narrow issue of whether an employee may receive unemployment benefits.

Bennett, 325 S.C. at 251, 481 S.E.2d at 708.

Next, our supreme court discussed the purpose of an ESC hearing is to expeditiously provide benefits for employees who became unemployed through no fault of their own, and the ESC's jurisdiction is limited to whether an employee is qualified to unemployment benefits. Id. at 252, 481 S.E.2d at 708. Thus, the supreme court opined collateral estoppel in the ESC context would transform these hearings into a forum of lengthy civil litigation of claims relating to the employee's discharge. Id. Finally, the supreme court concluded employers generally do not intensely contest ESC hearings and stated:

> Employers normally are not compelled to intensely contest ESC hearings because the stakes are not great in such hearings. An ESC hearing only determines whether an employee was discharged for cause and thus disqualified from receiving unemployment benefits. A wrongful termination lawsuit determines whether the employer wrongfully discharged the employee and seeks to place blame on the employer. The damages available in a wrongful discharge lawsuit are much greater than unemployment benefits. Thus, an employer has more incentive to fully contest a civil suit.

Id. at 253, 481 S.E.2d at 708.

Although, a workers' compensation hearing is more akin to a full evidentiary hearing, collateral estoppel is inapplicable to this case. Similar to

the ESC context, our State's workers' compensation laws were enacted by our General Assembly to provide benefits to individuals. Specifically, the purpose of our workers' compensation scheme is to protect workers who have suffered injuries arising out of and in the course of their employment. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980) (stating our workers' compensation laws reflect a societal recognition to provide swift and sure compensation for injuries arising out of and in the course of employment); see also Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault."). This principle was aptly noted in Cokeley v. Robert Lee, Inc., 197 S.C. 157, 168, 14 S.E.2d 889, 893-894 (1941), in which our supreme court stated:

> Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society.

In addition to the public policy underpinnings of workers' compensation law, the claimant-friendly inferences drawn in the workers' compensation context will unduly bind the trial court in subsequent retaliatory discharge actions. It is axiomatic that workers' compensation laws are to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act and to avoid any incongruous or harsh results. See Cokeley, 197 S.C. at 169, 14 S.E.2d at 894; see also Pelfrey v. Oconee Cnty., 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945) ("Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt . . . of the propriety of such conclusion."). Applying collateral estoppel from the workers' compensation context to a retaliatory

discharge action will bind the trial court to a liberal construction doctrine, which favors the inclusion of injured employees. Thus, an issue decided in a workers' compensation hearing, which must be construed in favor of the claimant, will result in the trial court being bound to apply this finding in a separate and distinct retaliatory discharge action. As a result, the application of collateral estoppel will significantly conflict with the trial court's purview in independently determining the merits of a retaliatory discharge claim pursuant to section 41-1-80.

Further, the workers' compensation commission is a forum of limited jurisdiction because it determines the compensability of an injury arising out of and in the course of employment. The imposition of collateral estoppel from a forum that only decides such a narrow issue will force employers and employees to fully litigate ancillary civil claims due to the majority's holding. Therefore, I believe the workers' compensation commission is not the appropriate forum to determine whether a claimant filed a claim in good faith for purposes of section 41-1-80. This point is further underscored because a retaliatory discharge action under section 41-1-80 is not actionable in a workers' compensation proceeding. See Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 96 (2000) ("A retaliatory discharge claim is an equity action tried without a jury.").

Moreover, a workers' compensation proceeding determines whether a claimant has suffered a compensable claim arising out of and in the course of employment. On the other hand, a retaliatory discharge action determines whether the employer wrongfully discharged an employee for filing a workers' compensation claim in good faith. Similar to the reasoning expressed in Bennett, I believe due to the nature of the workers' compensation proceedings that applying collateral estoppel prevents the employer from having an opportunity to fully contest the retaliatory discharge action.

Accordingly, I would hold collateral estoppel from the workers' compensation context is inapplicable to a retaliatory discharge action under section 41-1-80. Accordingly, I would reverse the grant of summary judgment and remand this matter for trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Matthew C. Sullivan, Appellant,

v.

Hawker Beechcraft Corp. (fka Raytheon Aircraft Co.), Raytheon Aircraft Co., Teledyne Continental Motors, Inc., J.P. Instruments, Inc., Pacific Scientific Company, Aircraft Belts, Inc., Dukes, Inc., FloScan Instrument Co., Inc., UMA, Inc. dba UMA Instruments, Inc., Orlando Avionics Corp. dba Orlando Aircraft Service, Mena Aircraft Interiors, Inc., Hickok, Inc., The Estate of John William C. Coulman, Deceased, The Estate of Eric Johnson, Deceased, Rodrick K. Reck, Phillip Yoder, and John Does 1-14 (whose true names are unknown), Individuals and/or corporations involved in the design, manufacture, inspection, installation, maintenance, servicing, and/or repair of Beechcraft V35 Bonanza Aircraft Registration No.

N9JQ, its engine, fuel system, restraint systems, or component parts, Defendants,

of whom, Pacific Scientific Company, Aircraft Belts, Inc., and Mena Aircraft Interiors, Inc. are Respondents.

Appeal From York County
S. Jackson Kimball, III, Circuit Court Judge

Opinion No. 4892
Submitted May 4, 2011 – Filed September 21, 2011
Withdrawn, Substituted, and Refiled February 8, 2012

AFFIRM

Blake Alexander Hewitt and John Nichols, both of Columbia; Jamie R. Lebovits, Ellen M. McCarthy, and Brenda M. Johnson, all of Cleveland, Ohio; Robert V. Phillips, of Rock Hill, for Appellant.

Jim Hunt of Los Angeles, California; Michael Wilkes, Melissa Nichols, and Derek M. Newberry, all of Spartanburg; Russell T. Burke, of Columbia; Susan Hofer and Payton Hoover, both of Charlotte, North Carolina, for Respondents.

KONDUROS, J.: Matthew Sullivan appeals the dismissal of Aircraft Belt, Inc. (ABI), Mena Aircraft Interiors, and Pacific Scientific (collectively Respondents) from his civil case for damages arising from an airplane crash. Sullivan argues the trial court erred in dismissing Respondents for lack of personal jurisdiction. Sullivan also contends the trial court erred in failing to allow him to conduct jurisdictional discovery and amend his complaint for a second time prior to dismissing the lawsuit with prejudice. We affirm.

FACTS

Sullivan, a resident of Ohio, was injured in July 2005, when the airplane he was traveling in crashed in York County, South Carolina. The airplane was in route from the Ohio State University Airport to Rock Hill, South Carolina. An Ohio resident owned the airplane, a Beechcraft V35 Bonanza, and Sullivan alleged in the complaint it was maintained and serviced in Ohio, Florida, and Arkansas. The original purchaser of the airplane was also an Ohio resident.

Sullivan commenced two lawsuits as a result of the crash. Initially, he filed suit in Ohio state court in April 2006. In that litigation, Sullivan named several defendants including "John Doe" defendants, but never named Respondents. Almost three years after the crash, Sullivan inspected the airplane. Ohio's two-year statute of limitations had expired by the time of inspection, which led him to pursue his action in South Carolina.

On July 23, 2008, Sullivan filed his initial complaint in South Carolina against multiple defendants, including ABI and Mena. On August 25, 2009, Sullivan filed an amended complaint, naming Pacific for the first time.[1] In regards to personal jurisdiction, Sullivan asserted in the amended complaint the trial court had personal jurisdiction under S.C. Ann. § 36-2-803 (A)(4)

[1] Some defendants sought to dismiss pursuant to Rule 12(b)(8), SCRCP, due to the pendency of litigation involving the same claim and the same or substantially the same issues. These included: Orlando Avionics Corp. d/b/a Orlando Aircraft Services, Philip Yoder, The Estate of Eric A. Johnson, The Estate of John William C. Coulman, and Rodrick K. Reck.

over all defendants named "because each has caused tortious injury within this State as set forth herein, and each regularly does or solicits business, or engages in a persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this State as contemplated under the statute."

In response to the amended complaint, Respondents filed motions to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), SCRCP. The trial court heard the motions of ABI and Mena on January 5, 2009. The trial court heard Pacific's motion for lack of personal jurisdiction on January 23, 2009. Respondents argued Sullivan's amended complaint was insufficient to meet Sullivan's burden of making a prima facie showing of jurisdiction and the trial court lacked both general and specific personal jurisdiction. ABI, Mena, and Pacific submitted an affidavit in support of their respective motions.

Respondents' affidavits asserted that their principal places of business were outside of South Carolina and at no time had any of Respondents solicited or conducted business in the state. Additionally, they maintained (1) none of them exceeded one percent of their revenue from sales to customers located in South Carolina in the years leading up to the airplane crash, (2) no goods were produced or services rendered by Respondents in this state, and (3) Respondents never obtained a business license in South Carolina.

Sullivan did not conduct jurisdictional discovery on Respondents prior to the trial court hearing the motions to dismiss in January 2009. Additionally, Sullivan did not offer any affidavits or other evidence to the trial court to support his assertion of jurisdiction over Respondents. Sullivan did not allege that any of the products in the airplane were sold to anyone connected with South Carolina or that any services were performed to or on the airplane in this state. Sullivan relied solely on the long-arm statute for his argument that personal jurisdiction was established.

The trial court entered an order granting Mena's and ABI's motions to dismiss for lack of personal jurisdiction on January 30, 2009. Sullivan then

filed a motion for leave to file a second amended complaint, in which he sought to add allegations regarding several defendants including Pacific. On April 13, 2009, the trial court entered an order granting Pacific's motion to dismiss for lack of personal jurisdiction.[2] This appeal followed.

LAW/ANALYSIS

I. Prima Facie Burden

Sullivan contends the trial court erred in determining his complaint and allegations could not support a finding of personal jurisdiction. Sullivan asserts his amended complaint meets the burden of a prima facie showing of personal jurisdiction and his allegation is not a legal conclusion. We disagree.

Rule 8(a), SCRCP, mandates that a complaint "shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends[.]" Sullivan's allegations of personal jurisdiction are based on section 36-2-803(A)(4) of the South Carolina Code (Supp. 2010), which provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> . . .

[2] Respondents chose to file their brief jointly because the issues and defenses are substantially similar. While the appeal initially involved the dismissal of other parties, on January 15, 2010, pursuant to agreements between Sullivan and those parties, the Court of Appeals issued an order dismissing the following parties from the appeal: Dukes, Inc.; FloScan Instruments Co. Inc.; The Estate of John William C. Coulman, J.P. Instruments, Inc.; Teledyne Continental Motors; Hickok, Inc.; Orlando Avionics Corp.; Rodrick K. Reck; Hawker Beechcraft Corp.; and Raytheon Aircraft Co.

> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State[.]

(emphasis added).

"The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis." Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 505, 402 S.E.2d 177, 179 (1991). The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process. Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008).

"[T]he party seeking to invoke personal jurisdiction over a nonresident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." Moosally v. W.W. Nortion & Co, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." Id. at 327, 594 S.E.2d at 882. "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." Coggshell v. Reprod. Endocrine Assocs., 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). "The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Id. at 491, 611 S.E.2d at 508.

Sullivan relies solely on the language of section 36-2-803(A)(4) in arguing the trial court has personal jurisdiction without stating any general factual allegations to support his use of the long-arm statute. The repeating of the statute is insufficient to support a finding of personal jurisdiction, particularly based on the subsection of the long-arm statute Sullivan chose to plead. A prima facie showing of personal jurisdiction can be made through factual allegations in the complaint or through affidavits that establish a basis for the court to assert jurisdiction over an out-of state-defendant. S. Plastic Co. v. S. Commerce Bank, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992). Sullivan did not submit any affidavits, and in his amended complaint, he did not allege Respondents had any direct contact with South Carolina.

Our state's long-arm statute affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina. Cockrell, 363 S.C. at 491, 611 S.E.2d at 508; Moosally, 358 at S.C. at 329, 594 S.E.2d at 883. However, even with a liberal construction of the statute and the complaint, Sullivan has failed to allege any facts that show Respondents (1) have regular transactions of business or solicitation, (2) engage in a persistent course of conduct, (3) derive substantial revenue, or (4) consume goods or services rendered in South Carolina. Sullivan's inability to substantiate the trial court's authority over Respondents properly necessitated Respondents' 12(b)(2) motion be granted by the trial court. Thus, the trial court is affirmed.

II. Jurisdictional Discovery

Sullivan also maintains the trial court erred in denying his request to perform additional jurisdictional discovery that would have allowed him to make a prima facie showing of jurisdiction. We disagree.

"When [the] plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous." Rich v. KIS Cal., Inc., 121 F.R.D. 254, 259 (M.D.N.C. 1988). "However, where a plaintiff's claim of personal jurisdiction appears to be

both attenuated and based on bare allegations in the face of specific denials made by defendants, the court need not permit even limited discovery confined to issues of personal jurisdiction if it will be a fishing expedition." Id. "When a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery." Tuttle v. Dozer Works Inc., 463 F. Supp. 2d 544, 548 (2006) (quoting Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003)); See Roberts v. Peterson, 292 S.C. 149, 152, 355 S.E.2d 280, 281 (Ct. App. 1987) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

Sullivan has offered mere speculation and conclusory assertions to support his request for jurisdictional discovery. The affidavits introduced by Respondents specifically deny jurisdictional acts or contacts. The record establishes the trial court's thorough review of all facts presented in favor of Sullivan and well-developed analysis of case law regarding jurisdictional discovery. Based on this court's standard of review, we defer to the trial court's discretion and affirm the trial court's decision.

On appeal, Sullivan argues the trial court misstated the burden the law imposes on a plaintiff at the initial stages of litigation. The order states "even at the initial pleading stage, Plaintiff bears the burden of providing enough evidence to demonstrate that its assertion of personal jurisdiction over the Moving Defendants is meritorious, and that there is sufficient cause to obtain jurisdictional discovery." (emphasis added). Sullivan is correct that a plaintiff is not required to assert he will be meritorious on personal jurisdiction; rather, he must demonstrate enough facts to support a prima facie showing. However, this issue is not preserved for review on appeal because Sullivan failed to raise this issue in a Rule 59(e), SCRCP, motion. See Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding when theory of unjust enrichment was first raised in judge's order, appellant should have challenged this basis for recovery by a Rule 59 motion to preserve the issue for appeal). Accordingly, this argument is abandoned.

We find the trial court properly applied the prima facie standard in determining whether or not Sullivan met his burden under Rule 8(a), SCRCP, and the long-arm statute. Additionally, the trial court did not abuse its discretion in denying jurisdictional discovery. Thus, the decision of the trial court is affirmed.

III. Dismissal of Second Amended Complaint With Prejudice

Sullivan contends Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006), provides this court with the discretion to modify a lower court's order to find a dismissal is without prejudice. While we agree this court has the discretion to make such a determination, we affirm the trial court's decision to deny Sullivan the right to amend his second complaint with prejudice.

Rule 15(a), SCRCP, provides "[a] party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served[.]" Rule 15(a), SCRCP. "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Id. "Courts have wide latitude in amending pleadings." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). "[T]he decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Id.

The supreme court in Spence v. Spence stated that when a plaintiff is not given the opportunity to file and serve an amended complaint and "additional factual allegations or an alternative theory of recovery, which taken as true in a well-pleaded complaint may state a claim upon which relief may be granted," an appellate court affirming the dismissal may modify the order to find the dismissal is without prejudice. Id. at 130, 628 S.E.2d at 881-82. In this case, we find Sullivan, in both his Rule 59(e) motion and in his

appellant brief, fails to cite any new factual allegations that would impact the jurisdictional issue. The trial court was within its discretion to deny Sullivan's motion to amend his complaint for a second time.

Because we find the trial court properly denied the motion to amend, we decline to exercise our discretion to find the dismissal was without prejudice allow Sullivan to amend his complaint for a second time and accordingly affirm the trial court.

CONCLUSION

The trial court properly dismissed Respondents pursuant to their motions to dismiss for lack of personal jurisdiction. Additionally, the trial court was within its discretion to deny both jurisdictional discovery and Sullivan's motion to amend his complaint for a second time. Accordingly, the judgment of the circuit court is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marlon Jermaine Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4938
Heard October 20, 2011 – Filed February 8, 2012

AFFIRMED

Appellate Defenders M. Celia Robinson and Breen Stevens, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley Elliott,

Assistant Attorney General Christina J. Catoe, all of Columbia, for Respondent.

HUFF, J.: Petitioner, Marlon Jermaine Smith, was convicted of armed robbery and use of a deadly weapon during the commission of a violent crime. The trial court imposed a sentence of twenty-two years for armed robbery, and a concurrent five-year sentence for the weapon charge. This court granted certiorari to review petitioner's belated appeal from the denial of his application for post-conviction relief (PCR). Petitioner asserts the PCR judge erred in denying and dismissing his claims of ineffective assistance of trial counsel because trial counsel failed to (1) adequately communicate with petitioner, (2) interview or present the testimony of witnesses, and (3) advise petitioner to testify in his defense. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was charged with armed robbery and use of a deadly weapon during a violent crime stemming from his alleged participation in the robbery of a Best Western Hotel. The desk clerk at the motel testified that while she was working on October 7, 1998, two men rushed in with guns and took a money bag and a cell phone, along with her purse. The clerk described one of the men as being about 5'4" or 5'5", and the other as being taller and bigger. Shortly after reporting the incident, the clerk was taken to another location, and officers separately pulled three individuals from police cars for the clerk to view, placing a spotlight on each. The clerk did not recognize the first individual, but recognized the second individual by his clothes and build. When the third individual was brought out, the clerk "knew it was him" from the time she "saw him and heard him." This person was around 5'4" in height, and she recognized his voice from the robbery. She was also able to identify him because of his clothes. The clerk identified petitioner as this third individual, and stated there was no doubt in her mind when she identified him. When the clerk identified petitioner to the police, she had a strong reaction, crying and attempting to get away by exiting the police car, stating she was afraid he was going to kill her.

After a dispatch was issued concerning the robbery at the Best Western, the police stopped a vehicle that was driven by petitioner and occupied by two passengers. Petitioner told the police that he was simply giving the two passengers a ride. One of the passengers, Cohiese Prince, told the police he "did not rob that motel." When asked what motel he was referring too, Prince became visibly nervous. The other passenger, a juvenile named Demetris, fled into a nearby wooded area and was subsequently apprehended. Demetris then led officers to a bush, where he had placed two hand guns and a phone belonging to the motel. Petitioner, who was also the owner of the car, gave officers permission to search the vehicle. The officers found a bank bag full of money and the clerk's purse in the trunk of the car. When asked, petitioner denied that anyone else had been driving the car or had the keys to his car or had been in the trunk of his car that night. Testimony revealed petitioner was five feet and four inches tall, while Prince was six feet and one inch and Demetris was six feet tall.

Prince, who is petitioner's cousin and who was initially to be tried along with petitioner, pled guilty to this robbery on the morning of the trial. Prince then testified on petitioner's behalf at the trial claiming he and Demetris committed the armed robbery, and though petitioner drove them to the Best Western, he was unaware that Prince and Demetris planned to rob the motel. According to Prince, petitioner was supposed to go pick up petitioner's brother from work. Trial counsel also presented petitioner's brother, John Gause, as a witness. Gause testified that on the night of the incident, he asked petitioner to pick him up from work, but petitioner never showed. Although petitioner initially indicated to the court that he wished to testify on his own behalf, petitioner did not, in fact, take the stand, and the defense rested after presenting the testimony of Gause and Prince.

In closing arguments, the defense attacked the eyewitness identification of petitioner by the clerk, noting that the clerk's written statement to police shortly after the incident indicated the two gunmen were both of average height, whereas her testimony on the stand was distinctly different, and further maintained that Prince's testimony supported their defense that petitioner simply gave Prince and Demetris a ride and was unaware of the

robbery. The State argued there were three possible scenarios for the jury to consider: (1) that Prince and Demetris robbed the hotel and petitioner knew nothing about it, (2) that Prince and Demetris robbed the hotel, but petitioner knew about the robbery and was in on the plan, or (3) the clerk properly identified petitioner as one of the two men who robbed her at gunpoint. The jury convicted petitioner as charged.

Following his direct appeal, petitioner filed an application for PCR, which was denied and dismissed by Judge Thomas. Petitioner thereafter sought review of the denial of PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), alleging ineffective assistance of his original PCR counsel in failing to seek review. Judge Baxley issued a consent order for an Austin review; petitioner submitted a petition for writ of certiorari; and this court subsequently granted the writ of certiorari.

ISSUE

Petitioner contends the PCR judge improperly denied and dismissed his application, asserting the result of the proceeding and his right to a fair trial were cast in doubt by the ineffective assistance of trial counsel in that trial counsel (1) failed to adequately communicate with him, (2) failed to interview or present the testimony of witnesses, and (3) failed to advise petitioner to testify in his defense.

STANDARD OF REVIEW

Under the Sixth Amendment to the United States Constitution, a defendant has the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984); Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Id. "On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of

probative value in the record." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

> To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." To establish prejudice, the defendant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Smith v. State, 386 S.C. 562, 565-66, 689 S.E.2d 629, 631 (2010) (citing to and quoting from Strickland, 466 U.S. 668).

LAW/ANALYSIS

I. Failure to Communicate

In regard to petitioner's allegation that trial counsel failed to adequately consult with him and prepare his case, the PCR judge noted that brevity of time spent in consultation, without more, is insufficient to establish ineffective assistance of counsel, and petitioner failed to point to any specific matters counsel failed to discover, aside from other allegations of ineffective assistance of counsel, for which the court found no merit.

Petitioner contends the PCR court erred in dismissing and denying his application for relief, asserting the result of the proceeding and his right to a fair trial were cast in doubt by the ineffective assistance of trial counsel in that trial counsel failed to adequately communicate with his client. Petitioner argues that during the hearing, trial counsel confirmed that he met with

petitioner only twice, once prior to trial and then again on the day of the trial. Trial counsel also admitted that he would have had to have discussed discovery with petitioner immediately prior to the trial. Petitioner also contends trial counsel only took about five to ten minutes to explain to him that he should not testify. Accordingly, petitioner maintains that as a result of trial counsel's failure to adequately communicate with him, trial counsel was not sufficiently familiar with petitioner's version of events to defend against the armed robbery charge, counsel did not prepare petitioner to testify, petitioner was not prepared to examine Prince in depth, and counsel failed to call petitioner's character witnesses to testify.

We find petitioner failed to demonstrate that trial counsel's preparation and communication with him was inadequate, and further failed to offer any evidence or argument as to how counsel's alleged lack of preparation or communication prejudiced him. At the PCR hearing, trial counsel testified in regard to his trial preparation that he had a taped statement from Demetris and, even though petitioner's and Prince's defenses were somewhat antagonistic toward each other, he was in contact with Prince's attorney on several occasions and they were able to work together. He did not inform the Solicitor's office of the possibility that a co-defendant might testify that petitioner did not commit the robbery because it was not until Prince pled guilty that morning that such information arose. Thus, trial counsel did not anticipate any testimony from Prince. Trial counsel stated he reviewed the co-defendants' statements prior to trial, spoke with Prince's attorney, discussed the State's plea offer with petitioner, filed for discovery, and reviewed the discovery material with petitioner prior to trial. Trial counsel also spoke with petitioner's mother concerning petitioner's defense, and arranged for a polygraph examination of petitioner. He further acknowledged that he reviewed the discovery material with petitioner immediately prior to trial, and that petitioner was able to read the discovery material; he talked with petitioner about the material and made him aware of the State's evidence; petitioner was able to tell counsel his differing version of the facts; and petitioner seemed to understand the material. Additionally, trial counsel did not feel like he needed a continuance, but felt he was prepared to go to trial. Further, the record shows the trial judge informed petitioner of his right

to testify or not testify, and petitioner agreed with the trial judge that he had discussed this right with trial counsel. The trial judge then allowed a ten minute break for petitioner to further discuss the matter with counsel. Finally, petitioner testified at his PCR hearing that there was nothing he could think of that was requested of trial counsel that counsel did not do for petitioner.

Thus, the uncontradicted evidence in the record shows that counsel met with petitioner prior to trial, discussed the discovery materials with him, and provided petitioner the opportunity to explain his version of the events. Counsel further prepared for the defense by arranging a polygraph examination and meeting with petitioner's mother to discuss the incident and petitioner's defense. Counsel also consulted with petitioner throughout the two day trial. Additionally, the record reflects petitioner indicated to the trial court that he had discussed with trial counsel the right to testify, and the trial court thereafter gave petitioner an additional ten minutes to discuss his decision with trial counsel. The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation. Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). Additionally, petitioner did not offer any evidence of how additional preparation or communication would have resulted in a different outcome. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where PCR applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel's lack of preparation prejudiced him); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial).

II. Failure to Interview and Present Witnesses

On the issue of failure to call witnesses, the PCR judge held prejudice from trial counsel's failure to interview or call witnesses cannot be shown

where the witnesses did not testify at the PCR hearing, and petitioner's mere speculation as to what a witness' testimony would have been could not satisfy his burden of showing prejudice.

Petitioner contends the PCR judge erred in denying and dismissing his application for PCR based on trial counsel's failure to interview his co-defendant or call his character witnesses to testify at trial. He argues, as a result of Prince's testimony, the State altered its theory of the case, switching from relying on the clerk's identification of petitioner to proposing that petitioner was merely "driving the get-away car" and must have been aware the robbery was taking place. Petitioner contends, because trial counsel failed to interview Prince prior to trial, he was not prepared for the change in the State's theory and was thus able to perform only a limited examination of Prince and made no attempt to blunt the prosecution's response that Prince and petitioner were "family." Petitioner further contends trial counsel failed to call petitioner's character witnesses to the stand, even though he had asked counsel to speak with them and they were present in the courtroom at the time of his trial. Petitioner argues, although these character witnesses did not testify at the PCR hearing, at least one of the character witnesses was present at the PCR hearing. Petitioner asserts the substance of the character witnesses' testimony should be presumed.

Rule 4.2 of the Rules of Professional Conduct, Rule 407, SCACR provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the 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 or is authorized to do so by law or a court order.

Thus, trial counsel properly communicated with Prince's attorney during the pre-trial phase. Further, trial counsel testified at the PCR hearing that just prior to Prince's testimony, once he decided to plead guilty, counsel met with Prince and the solicitor to discuss Prince's statement that petitioner was not

involved in the robbery. All indications were that Prince decided to take a plea agreement at the last minute, and it was not until then that trial counsel was able to learn that Prince would testify petitioner was unaware of the robbery. Once counsel learned of this change, he called Prince to testify on petitioner's behalf. Additionally, petitioner failed to present any testimony from Prince at the PCR hearing to establish prejudice from any inadequate questioning of Prince at trial. Further, there is nothing in the record to indicate that interviewing Prince prior to Prince's guilty plea would have led to any different result. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding, where there was nothing in the record to indicate that interviewing the victims would have led to any different result, trial counsel's failure to conduct an independent investigation did not constitute ineffective assistance of counsel, as the allegation was supported only by mere speculation as to the result).

As well, petitioner failed to present any testimony from the alleged character witnesses at the PCR hearing in order to establish prejudice from the lack of testimony of these witnesses at trial. Thus, petitioner failed to show trial counsel's actions or inactions resulted in prejudice. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting our courts have "repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial"); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the burden of showing prejudice).

III. Failure to Advise Petitioner to Testify

Petitioner's PCR application alleged numerous grounds to support his assertion of ineffective assistance of trial counsel but, notably, did not specifically assert counsel was ineffective in advising petitioner not to testify at trial. Rather, in regard to the presentation of witness testimony, petitioner simply maintained that trial counsel "presented no witnesses on [his] behalf,

not even a character witness." At the PCR hearing, the judge asked PCR counsel to specify what allegations of ineffective assistance were being made so the court would know what allegations had been abandoned. PCR counsel then outlined the various allegations contained in petitioner's application, again maintaining trial counsel "presented no witnesses on [petitioner's] behalf, not even a character witness," but PCR counsel failed to specifically assert error in trial counsel's advice to petitioner that he not testify. During the PCR hearing, however, PCR counsel questioned trial counsel as to how many witnesses he called on behalf of petitioner, and trial counsel incorrectly stated he called no defense witnesses, including petitioner. PCR counsel thereafter asked trial counsel how many witnesses the State called, to which counsel replied that the State had called eleven witnesses, and agreed with PCR counsel that zero witnesses had been called on behalf of petitioner. However, a review of the trial transcript reveals that the State called nine witnesses to testify before the jury, and trial counsel called two witnesses; petitioner's brother, John Gause, and co-defendant Prince. Based on this misapprehension that the defense called no witnesses, trial counsel testified that he advised petitioner against testifying at his trial in order to "preserve the last close in this case." Counsel noted that the clerk's written statement regarding the height description of the two robbers differed from her trial testimony, but he believed he could illustrate that point without having petitioner testify. Trial counsel also testified he discussed with petitioner the strategy of not calling petitioner to the stand in order to maintain last argument, but also discussed with petitioner "the dangers, the advantages and disadvantages of him testifying."

Petitioner testified at the hearing that he thought the outcome of his trial would have been different had he been able to tell the jury what happened that night, and one of his bases for a new trial was that trial counsel advised him not to testify. In his summation to the court, PCR counsel argued that the State called eleven witnesses, while trial counsel called zero witnesses in petitioner's defense. PCR counsel further maintained, given the way the State had to change gears during the trial, that petitioner "could have shed some light on the fact that maybe it wasn't him," creating doubt for the jury that ultimately convicted petitioner. Importantly, no one corrected the

misapprehension that the defense presented no witnesses and was thereby able to present the last closing argument.

In her order of dismissal, the PCR judge addressed several allegations raised by petitioner, but did not specifically address whether trial counsel was ineffective for advising petitioner not to testify at trial or whether petitioner was prejudiced thereby. However, the following language was included in the order:

> As to any and all allegations which were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant waived such allegations and failed to meet his burden of proof regarding them.
>
> . . . Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

Petitioner asserts the PCR judge erred in denying and dismissing his application for PCR where the result of the proceedings and his right to a fair trial were cast in doubt by ineffective assistance of trial counsel in that trial counsel advised petitioner not to testify in his own defense. He contends trial counsel acknowledged that petitioner was intelligent enough to testify at trial, and that, in retrospect, putting petitioner on the stand "could have made a difference." Most importantly, petitioner argues trial counsel's explanation that he made a strategic decision to forgo the benefit of petitioner's testimony in exchange for the right to last argument was objectively unreasonable and established counsel's assistance was ineffective because trial counsel did, in fact, call witnesses to the stand and the defense was not afforded the last argument. Petitioner maintains that, but for trial counsel's ineffective performance in advising petitioner not to testify in his defense, the result of the proceeding would very likely have been different.

We agree with the State's contention that this issue is not preserved for review. It is clear that the PCR court did not rule on petitioner's assertion at the PCR hearing that he was entitled to a new trial based on trial counsel's advice that he not testify. Additionally, there is no indication in the record that petitioner filed a Rule 59(e) SCRCP, motion to address the matter. Our supreme court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations. Marlar v. State, 375 S.C. 407, 408-10, 653 S.E.2d 266, 266-67 (2007). The court in Marlar noted that "[p]ursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented," and the failure to specifically rule on the issues precludes appellate review of the issues. Id. at 408, 653 S.E.2d at 266. Further, the court in Marlar held language in the PCR court's order similar to that contained in the order at hand - providing that as to any allegations raised in the application or at the hearing not specifically addressed by the PCR order, the PCR court found that the applicant failed to present any evidence regarding such allegations -- did not constitute a sufficient ruling on any issues since it did not set forth specific findings of fact and conclusions of law. Id. at 409, 653 S.E.2d at 266. Thus, this language in the order in the present matter is not sufficient to preserve the issue for review. Accordingly, we hold this issue is not preserved for review, as the PCR court did not rule on the matter and petitioner failed to make a Rule 59(e), SCRCP motion to alter or amend the judgment to include specific findings of fact and conclusions of law. At any rate, this argument is also not preserved inasmuch as it was not raised to or ruled upon by the PCR judge. Petitioner did not argue to the PCR court, as he does on appeal, that counsel's advice to forego testifying in order to gain last argument was not objectively reasonable and fell far below the professional standard where counsel did not, in fact, make the last argument. Indeed, the fact that trial counsel called two witnesses to the stand for the defense and that he was therefore not afforded the last closing argument was never brought to the PCR court's attention. See Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (noting an issue that was neither raised to nor

ruled upon by the PCR court is not preserved for appellate review); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review).

CONCLUSION

Based on the foregoing reasons, the order denying petitioner's PCR application is

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beau D. Cranford, Employee, Appellant,

v.

Hutchinson Construction, Employer, and Companion Property & Casualty Group, Carrier, Respondents.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4939
Heard December 6, 2011 – Filed February 8, 2012

AFFIRMED IN PART and REMANDED IN PART

Stephen B. Samuels, of Columbia, for Appellant.

Michael W. Burkett, of Columbia, for Respondents.

WILLIAMS, J.: In this workers' compensation appeal, Beau Cranford (Cranford) challenges the Appellate Panel of the Workers' Compensation Commission's (Appellate Panel) findings that he was not entitled to temporary disability compensation, permanent partial disability compensation, and additional medical treatment for injuries he incurred while working for his employer, Hutchinson Construction (Hutchinson). Additionally, Cranford contends the Appellate Panel erred in failing to make specific findings regarding whether he had reached maximum medical improvement (MMI) and in implicitly finding he had reached MMI. We affirm in part and remand in part.

FACTS

Cranford's claim for benefits and medical treatment stems from an injury he sustained while working for Hutchinson. Hutchinson hired Cranford on June 26, 2007, as a day laborer, to assist in assembling a steel building at one of Hutchinson's project sites. On July 20, 2007, Cranford was working in a forklift basket approximately ten feet above ground. Cranford testified the basket was lowered to the ground, and his co-worker climbed out of the basket. When Cranford was raised back in the air, the basket began to tilt forcing Cranford to jump out of the basket. Cranford sustained injuries to both hands, both arms, and his back as a result of the fall.

Cranford was taken immediately to Conway Medical Center for treatment. Dr. Michael Ellis treated the lacerations on Cranford's arms and noted Cranford complained of mid-lumbar pain when he would sit upright. Dr. Ellis discharged Cranford with instructions to refrain from "heavy lifting or strenuous activity" and to return the following week. At his follow-up visit, Dr. Ellis' notes reflect he instructed Cranford to "be taking it easy" and to notify Dr. Ellis if he experienced any additional problems.

Cranford was out of work for three weeks, during which time Hutchinson paid him $265 per week in lieu of temporary disability benefits. When Cranford returned to work on August 13, 2007, Hutchinson restricted him to light-duty activities, but then Hutchinson terminated Cranford on

August 31, 2007, for being unsafe on the job site. Because Cranford had worked a minimum of fifteen days prior to his termination, Hutchinson filed a Form 15 claiming he was no longer entitled to temporary compensation.

After Hutchinson fired Cranford, he obtained employment with a greenhouse from early September until November 21, 2007. While working at the greenhouse, Cranford made deliveries, watered plants, and lifted fifty to sixty pound bags of fertilizer two to four times per day twice a week. He earned on average $163.96 per week.

Cranford's complaints of back pain resurfaced following his brief employment with the greenhouse. In response to his complaints of back pain, Hutchinson sent him to Doctor's Care on January 11, 2008. Doctor's Care restricted him from lifting more than ten pounds and instructed him to return for a follow-up visit in one week. Cranford returned ten weeks later on March 25, 2008. Doctor's Care then referred him to an orthopedic surgeon, Dr. William Edwards.[1]

Cranford saw Dr. Edwards on May 15, 2008, with lower back complaints. Dr. Edwards' notes reflect that Cranford told him he had been out of work since his initial injury. Dr. Edwards ordered an MRI on May 21, 2008, and Cranford returned to Dr. Edwards on June 3, 2008. On June 3, 2008, Dr. Edwards concluded Cranford had reached MMI with no evidence of permanent impairment. Dr. Edwards noted Cranford could return to work with "the use of good body mechanics and careful lifting techniques."

Upon referral from Cranford's attorney, Cranford underwent a subsequent evaluation with Dr. Timothy Zgleszewski on July 22, 2008. Dr. Zgleszewski diagnosed Cranford with sacroiliitis and opined to a reasonable degree of medical certainty that Cranford was not at MMI and should remain out of work until further testing and treatment were completed. Hutchinson refused to provide the treatment recommended by Dr. Zgleszewski.

[1] Dr. Edwards' notes reflect that Cranford's mother also requested Doctor's Care refer Cranford to Dr. Edwards for additional medical treatment.

After Cranford saw Dr. Edwards and Dr. Zgleszewski, he briefly worked at a machinery plant as a machine operator from September 12, 2008 until November 7, 2008. He testified this position did not require any heavy lifting responsibilities. Cranford earned $469.98 per week as a machine operator before he was laid off by the machinery plant.

In response to Hutchinson's refusal to provide additional medical treatment, Cranford filed a Form 50 on January 15, 2009, in which he requested a hearing as well as additional medical treatment for his back and arms and temporary disability benefits. In response, Hutchinson timely filed a Form 51, admitting laceration/disfigurement to the right and left arms and an injury to the back. Hutchinson, however, maintained Cranford reached maximum medical improvement (MMI) for all injuries and denied Cranford was entitled to temporary disability benefits.

Prior to Cranford's hearing, he again returned to Dr. Zgleszewski on April 23, 2009, with complaints of reoccurring lower back pain, occasional numbness in his hands, and problems with lifting and twisting. Dr. Zgleszewski opined Cranford suffered a 10% impairment rating to his back and a 9% whole person impairment rating based on the scars on his arms.

The single commissioner held a hearing on May 14, 2009. The commissioner subsequently issued an order on September 28, 2009, awarding Cranford four weeks of compensation to his left arm and eight weeks of compensation to his right arm for the disfigurement caused by his fall. The commissioner agreed with Dr. Edwards' conclusions that Cranford had suffered no permanent impairment to his back and consequently found a 0% disability to Cranford's back. In addition, the single commissioner found Cranford failed to demonstrate by a preponderance of the evidence that he was entitled to any temporary disability benefits or additional medical treatment. Cranford appealed the single commissioner's order, and in a form order, the Appellate Panel affirmed the single commissioner in full. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Frame v. Resort Servs. Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004) (internal citation omitted). Accordingly, this court will not overturn a finding of fact by the Appellate Panel "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (internal citation omitted).

LAW/ANALYSIS

I. Temporary Disability Compensation

Cranford first claims the Appellate Panel erred in failing to order Hutchinson to pay him temporary disability benefits. We disagree.

Section 42-1-120 of the South Carolina Code (1985) defines disability as the "incapacity because of injury to earn the wages which an employee was receiving at the time of the injury in the same or some other employment." During the period of disability, an employer may pay temporary total or partial compensation, or salary in lieu of compensation, to the injured employee. See 25A S.C. Code Ann. Regs. 67-503(B) (Supp. 2010). Whether compensation is partial or total depends on whether the employee is partially or totally incapacitated from the injury. See S.C. Code Ann. §§ 42-9-10, -20 (1985 & Supp. 2010), 25A S.C. Code Ann. Regs. 67-502(E), (F) (Supp. 2010).

Temporary disability benefits are triggered "[w]hen an employee has been out of work due to a reported work-related injury . . . for eight days[.]" S.C. Code Ann. § 42-9-260(A) (Supp. 2010). Once temporary disability payments have commenced, these benefits "may be terminated or suspended immediately at any time within the one hundred fifty days if . . . the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments must be resumed immediately[.]" S.C. Code Ann. § 42-9-260(B)(1) (Supp. 2010).

Cranford claims he was not released to work without restriction, and Hutchinson failed to provide him suitable employment during his period of incapacity. Although Cranford was under work restrictions at the time he returned to work, we find Cranford failed to prove he was entitled to temporary disability benefits. Hutchinson afforded Cranford suitable employment based on his light-duty work restrictions for the requisite amount of time under section 42-9-260(B)(1). When Cranford was discharged from Conway Medical Center on July 21, 2007, Dr. Ellis placed minimal work restrictions on Cranford, which included refraining from heavy lifting and strenuous activity. When Cranford returned to Dr. Ellis one week later, Dr. Ellis' instructions were limited to "taking it easy." Cranford was out of work from July 21, 2007 until August 13, 2007, during which time Hutchinson paid Cranford his salary in lieu of temporary total compensation.

When Cranford returned to work three weeks after his accident, he acknowledged that his supervisor assigned him to light-duty tasks. Specifically, Cranford testified, "[Hutchinson] wouldn't let me get in the basket more than four foot [sic] up off the dirt or anything. He had me picking up trash and doing the weather sealing panels for a roof." Cranford even admits in his brief that "Hutchinson provided work suitable to Cranford's light duty capacity" prior to being terminated[2] by Hutchinson. Moreover, because Cranford returned to work for at least fifteen days and was provided suitable employment during that time, Hutchinson was not required to resume temporary disability payments under the plain language of section 42-9-260(B)(1). See § 42-9-260(B)(1) ("[T]emporary disability payments . . . may be terminated or suspended immediately at any time within the one hundred fifty days if . . . the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments must be resumed immediately[.]").

Cranford also argues the Appellate Panel erred in failing to award him temporary benefits because Hutchinson failed to properly commence and terminate Cranford's benefits. While Cranford raises a meritorious argument, he argues this specific issue for the first time on appeal. Thus, this issue is not preserved for review. See Smith v. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) ("Only issues raised [to] and ruled upon by the [Appellate Panel] are cognizable on appeal."); see also Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) ("[O]nly issues within the application for review are preserved for the full commission."). Accordingly, we affirm the Appellate Panel's decision to deny Cranford temporary disability benefits.

[2] Hutchinson terminated Cranford on August 31, 2007, seventeen days after returning to work, for being unsafe on the job site. Cranford testified Hutchinson fired him because "he was getting worried [about] me getting hurt in another accident, getting killed or dying of a heart attack." While Cranford argues in his brief that Hutchinson's motivation for firing him was pretextual, the propriety of his firing is not before this court.

II. Maximum Medical Improvement

Next, Cranford claims the Appellate Panel erred in affirming the single commissioner's finding that he had reached MMI for his back and arms, particularly when the single commissioner failed to explicitly find Cranford reached MMI. We agree in part.

"Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). "MMI is a factual determination left to the discretion of the [Appellate] [P]anel." Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006).

Regarding Cranford's back, the single commissioner did not make any explicit findings about whether Cranford achieved MMI. However, the single commissioner agreed with Dr. Edwards' 0% impairment rating and concluded that Cranford had a 0% disability to his back. Additionally, the single commissioner concluded as a matter of law that based on Dr. Edwards' testimony, "no further medical treatment will lessen [Cranford's] period of disability." In making these conclusions, the single commissioner, and ultimately the Appellate Panel, implicitly held that Cranford had achieved MMI for his back. See O'Banner, 319 S.C. at 28, 459 S.E.2d at 327 ("Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment.") (emphasis added).

Additionally, there is substantial evidence in the record to conclude Cranford attained MMI no later than June 3, 2008. Specifically, Cranford was able to maintain two jobs after his injury, the first of which involved routine stooping, bending over, and lifting. Despite Cranford's testimony that he was limited in the tasks he could undertake, he also testified on the date of

the hearing he was physically capable of working "full time at medium to light duty." In addition, Cranford did not seek medical treatment for almost six months after his injury. When Cranford eventually sought medical treatment, he was instructed by Doctor's Care to follow up in one week, yet Cranford failed to return for another ten weeks. When Cranford did return, the X-Rays of his back were normal.

Because Cranford claimed continued back pain, Doctor's Care referred him to Dr. Edwards. After an MRI scan, Dr. Edwards noted a minimal disc protrusion at his L5-S1 disc, but he noted it did not likely have any clinical significance. Dr. Edwards also concluded Cranford had attained MMI and stated returning to work was acceptable with "the use of good body mechanics and careful lifting techniques." Cranford claims Dr. Edwards' caveat and prescription of Flexeril for his muscle spasms is evidence that Cranford has not reached MMI. To the contrary, Dr. Edwards' report coupled with the thirty-day prescription of Flexeril constitutes evidence from which the single commissioner could conclude the medication would help to temporarily alleviate Cranford's remaining symptoms, but his medical condition would not further improve. See O'Banner, 319 S.C. at 28, 459 S.E.2d at 327 (disagreeing with claimant's assertion that doctor's prescription of medication after discharge was evidence claimant had not reached MMI because substantial evidence in record existed to show that medication helped to temporarily alleviate claimant's remaining symptoms despite the fact that his medical condition would not further improve).

As to Cranford's arms, the single commissioner never made a finding of MMI to his arms. The single commissioner's only finding pertaining to Cranford's arms was an award for disfigurement for his keloid scars in the amount of four weeks of compensation for his left arm and eight weeks of compensation for his right arm. We note a disfigurement award is generally not proper prior to a finding of MMI. See Halks, 208 S.C. at 48, 36 S.E.2d at 855-56 (reversing award for disfigurement when claimant was receiving temporary total disability benefits because receipt of temporary disability established he had not attained MMI, which was a prerequisite for permanent disfigurement award). However, both parties stipulated to this award, and

Cranford does not appeal the propriety of the disfigurement award. Regardless, the issue of disfigurement is separate from the issue of permanent disability in the instant case.[3] As such, an explicit finding for MMI is still necessary because it is also relevant to Cranford's entitlement to permanent disability. Thus, we remand for specific findings on this issue.

III. Permanent Disability Benefits

Next, Cranford contends the Appellate Panel erred in failing to award him permanent partial disability benefits based on the injuries to his back, arms, and skin. We agree in part.

In the single commissioner's order, he concluded Cranford did not sustain any permanent partial disability to his back under section 42-9-30 of the South Carolina Code (Supp. 2010). In making this conclusion, the single commissioner considered Cranford's six-month delay in seeking medical treatment from Doctor's Care in addition to his failure to follow-up with Doctor's Care for ten weeks, despite instructions to return within one week of his initial visit.

[3] An employee may be entitled to both a disability and a disfigurement award when an injury is in the form of a keloid scar. See S.C. Code Ann. § 42-9-30(23) (Supp. 2010) ("[P]roper and equitable benefits must be paid for serious permanent disfigurement of the face, head, neck, or other area normally exposed in employment, not to exceed fifty weeks. Where benefits are paid or payable for injury to or loss of a particular member or organ under other provisions of this title, additional benefits must not be paid under this item, except that disfigurement also includes compensation for serious burn scars or keloid scars on the body resulting from injuries, in addition to any other compensation.") (emphasis added); see generally Mason v. Woodside Mills, 225 S.C. 15, 21, 80 S.E.2d 344, 347-48 (1954) (finding employee was entitled to disability and disfigurement for work-related accident that caused not only loss of use to his arm but significant atrophy to his arm resulting in disfigurement).

Further, Dr. Edwards' medical opinion supports the single commissioner's and the Appellate Panel's conclusion. After being referred to Dr. Edwards, Cranford underwent an MRI, which revealed no evidence of a fracture. Dr. Edwards found a minimal disc protrusion at L5-S1, but he concluded it was likely of no clinical significance. Dr. Edwards noted Cranford sustained a lumbar sprain and accordingly prescribed him one month of Flexeril to temporarily alleviate his discomfort. In approving the occasional use of Flexeril for a limited period of time, he concluded Cranford was capable of returning to work with "the use of good body mechanics and careful lifting techniques." The single commissioner acknowledged Cranford's visit to Dr. Zgleszewski. Hutchinson claims the Appellate Panel afforded less weight to Dr. Zgleszewski's medical reports based on the timing of Cranford's visits and the fact that his visits were at the behest of Cranford's attorney. The nature and timing of Cranford's visits do not discredit Dr. Zgleszewski's medical opinion. We find both parties presented credible conflicting medical evidence. The single commissioner, and ultimately the Appellate Panel, had the discretion to weigh the conflicting evidence in rendering its decision. Thus, we defer to its findings on this issue. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The single commissioner, however, failed to make any conclusions on whether Cranford sustained permanent disabilities to his skin or arms. Without specific findings regarding whether Cranford suffered a permanent impairment to his arms and skin, we remand this issue to the Appellate Panel to make specific findings on Cranford's impairment to his arms and skin based on the evidence, and consequently, his entitlement to permanent partial disability benefits. See Baldwin v. James River Corp., 304 S.C. 485, 486, 405 S.E.2d 421, 422 (Ct. App. 1991) (finding that without specific and definite findings upon the evidence, this court could not review the Appellate Panel's decision that a claimant sustained neither an injury to his back nor a permanent disability to his right arm, particularly when those were material facts in issue).

IV. Additional Medical Treatment

Finally, Cranford contends the Appellate Panel erred in affirming the single commissioner's finding that he was not entitled to additional medical treatment for his back. We disagree.

Section 42-15-60 of the South Carolina Code (Supp. 2010) provides for "[m]edical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from the date of an injury to effect a cure or give relief and for such additional time as in the judgment of the Appellate Panel will tend to lessen the period of disability . . . ." Pursuant to this section, an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability even if the claimant has returned to work and has reached maximum medical improvement. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 583, 514 S.E.2d 593, 598 (Ct. App. 1999); see also Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (holding substantial evidence supported a finding of maximum medical improvement despite the claimant continuing to receive physical therapy); O'Banner, 319 S.C. at 28, 459 S.E.2d at 327 (finding claimant's receipt of prescriptive medicines after he had reached maximum medical improvement constituted substantial evidence from which the single commissioner could conclude the medication helped to temporarily alleviate the claimant's remaining symptoms, but his medical condition would not further improve).

The relevant inquiry is not whether Cranford attained MMI for his back, but whether additional medical treatment and medication will tend to lessen his period of disability. See generally Dodge, 334 S.C. at 581, 514 S.E.2d at 596 (finding whether employee reached MMI was irrelevant to entitlement to permanent disability benefits because "'[m]aximum medical improvement' is a distinctly different concept from 'disability.'"). Again, because the medical evidence is conflicting on this issue, we must defer to the Appellate Panel. See Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) ("Where there is a conflict in the

evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive."). In Dr. Edwards' June 3, 2008 report, he diagnosed Cranford with a lumbar strain/sprain, but he concluded it was acceptable for Cranford to take an occasional Flexeril for muscle spasms and wrote Cranford a thirty-day prescription for Flexeril. Because Dr. Edwards opined Cranford suffered no permanent impairment, the single commissioner concluded Cranford sustained a 0% disability to his back. Although Dr. Zgleszewski documented muscle spasms on July 22, 2008 and on April 23, 2009, and opined that additional treatment would alleviate Cranford's pain, numbness, and spasms in his back, the Appellate Panel afforded more weight to Dr. Edwards' testimony in determining further medical treatment would not lessen Cranford's period of disability. See id. at 340, 513 S.E.2d at 846. ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony."). Accordingly, we affirm the Appellate Panel on this issue.

CONCLUSION

Based on the foregoing, we affirm the Appellate Panel's decision to deny Cranford temporary disability benefits. We affirm the finding of MMI to Cranford's back but remand the issue of MMI for Cranford's arms to the Appellate Panel based on its failure to rule on this issue. We affirm the Appellate Panel's conclusion that Cranford is not entitled to permanent partial disability benefits for his back but remand the issue of permanent disability for his arms and skin to the Appellate Panel based on the single commissioner's and Appellate Panel's failure to rule on these issues. Lastly, we affirm the Appellate Panel's conclusion that Cranford was not entitled to additional medical treatment.

Accordingly, the Appellate Panel's decision is

AFFIRMED IN PART and REMANDED IN PART.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

York County, Appellant,

v.

South Carolina Department of Health and Environmental Control and C&D Management Company, LLC, Respondents.

Appeal from the Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 4940
Heard May 4, 2011 – Filed February 8, 2012

AFFIRMED

Amy E. Armstrong and James S. Chandler, Jr., both of Pawleys Island, for Appellant.

Susan A. Lake, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

W. Thomas Lavender, Jr., and Joan W. Hartley, both of Columbia, and Leon C. Harmon, of Greenville, for Respondent C&D Management Company, LLC.

FEW, C.J.: The South Carolina Department of Health and Environmental Control (DHEC) issued C&D Management Company a permit for a construction, demolition, and land-clearing debris landfill in York County. The County challenged that decision before the Administrative Law Court (ALC), which ruled in favor of C&D Management. The County appeals the ALC's judgment, arguing DHEC impermissibly ignored a County ordinance purporting to impose a moratorium on the construction of any new landfills. We affirm.

I. Facts and Procedural History

The South Carolina Solid Waste Policy and Management Act provides that each county must adopt a solid waste management plan. S.C. Code Ann. § 44-96-80 (2002). Before DHEC may issue any permit for the construction and operation of a landfill in a particular county, DHEC must determine that the proposed landfill is consistent with the county's solid waste management plan and other applicable local ordinances. S.C. Code Ann. § 44-96-290(F) (2002).

In August 2005, C&D Management submitted an application to DHEC for a permit for the landfill. At that time, York County managed its solid waste using the 1994 Catawba Regional Solid Waste Management Plan (1994 Plan). In September 2005, DHEC issued a letter to C&D Management stating it made a determination that the landfill was consistent with the 1994 Plan.

While DHEC continued to process C&D Management's application over the next year, the County moved towards adopting a new solid waste management plan. On January 9, 2007, York County Council passed what it called an "emergency ordinance," which stated "all proposed landfills and landfill expansions not yet permitted by DHEC are declared inconsistent with the 1994 Plan." The emergency ordinance described the declaration as a

"moratorium" that would give the County more time to complete and adopt a new plan.

Initially, DHEC believed the emergency ordinance prevented it from issuing C&D Management a permit for the landfill. However, DHEC ultimately determined the emergency ordinance did not affect its determination that the proposed landfill was consistent with the 1994 Plan. On February 22, 2007, it issued C&D Management a permit.

The County asked the South Carolina Board of Health and Environmental Control to review DHEC's decision to issue the permit. The Board declined, and the County requested a contested case hearing before the ALC.

The ALC affirmed DHEC's decision to issue the permit. With regard to the emergency ordinance, the ALC determined that under Southeast Resource Recovery, Inc. v. South Carolina Department of Health & Environmental Control, 358 S.C. 402, 595 S.E.2d 468 (2004) (per curiam), DHEC could not defer to the County's declaration of inconsistency, as doing so would amount to an improper delegation of DHEC's exclusive authority over permitting decisions for solid waste management facilities. The ALC therefore concluded DHEC properly disregarded the emergency ordinance in making its permitting decision.

II. Effect of the Emergency Ordinance

We agree DHEC properly disregarded the emergency ordinance. Our supreme court has made clear that DHEC alone has the authority to make consistency determinations. In Southeast Resource Recovery, the court held DHEC may not delegate that authority to counties. 358 S.C. at 408, 595 S.E.2d at 471. Prior to the court's decision in that case, DHEC's practice was to leave consistency determinations to county governments, which issued their determinations in the form of letters of consistency. Id. The court held the practice was impermissible, stating:

> There is no statutory authority providing a county's consistency determination is determinative of the

> ultimate permitting decision. Although Section 44-96-290(F) requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances.
> . . . DHEC, not the county, is charged with ensuring [solid waste management] facilities meet the requirements for permitting.

Id.; see also Sandlands C & D, LLC v. Cnty. of Horry, 394 S.C. 451, 463, 716 S.E.2d 280, 286 (2011) (stating "there is no doubt the express language of the [Solid Waste Policy and Management Act] provides for DHEC's exclusive authority in the area of permitting" (emphasis in original omitted)).

We view the emergency ordinance as an effort by the County to control DHEC's permitting decision. The only effect the emergency ordinance purports to have is to impose a "moratorium" on new and expanded landfills in York County. The section entitled "Scope of Moratorium" states in its entirety: "During the time that the emergency moratorium is in effect, all proposed landfills and landfill expansions not yet permitted by DHEC are declared inconsistent with the 1994 Plan." No other language in the emergency ordinance explains the scope or the effect of the moratorium. Therefore, by its own terms, the emergency ordinance merely makes a blanket determination that all new landfills are inconsistent with the 1994 Plan.

Looking past the emergency ordinance's "moratorium" label and focusing instead on its content and actual effect, we find no meaningful distinction between the emergency ordinance and the letters of consistency that Southeast Resource Recovery prohibits DHEC from following. In both situations, a county makes a consistency determination regarding a proposed landfill—a power only DHEC may exercise. The only difference here is that instead of DHEC willingly delegating its authority to local government, as it did in Southeast Resource Recovery, local government has attempted to usurp that authority. Because DHEC could not follow the emergency

ordinance without delegating its authority in violation of Southeast Resource Recovery, DHEC was required to disregard it.

The County argues it had the authority to enact the emergency ordinance, and because subsection 44-96-290(F) requires DHEC to consider "applicable local ordinances" when it makes a consistency determination, DHEC was required to consider whether the proposed landfill was consistent with the emergency ordinance. We disagree. Subsection 44-96-80(K), on which the County relies for its authority, prohibits a county from enacting an ordinance that is inconsistent with state law. As Southeast Resource Recovery explains, it is inconsistent with state law for DHEC to follow a county's consistency determination. See 358 S.C. at 408, 595 S.E.2d at 471. In this respect, the emergency ordinance is not consistent with state law, and is therefore not "applicable" under subsection 44-96-290(F). DHEC properly disregarded the emergency ordinance.

III. Other Issues

The remaining issues the County raises relate to factual determinations. As to those issues, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 1-23-610(B) (Supp. 2010) (providing this court may reverse a decision of the ALC that is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"); Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011) (stating a factual decision of the ALC should be upheld if it is supported by substantial evidence in the record).

The judgment of the Administrative Law Court is

AFFIRMED.

PIEPER, J., concurs.

LOCKEMY, J., dissents in a separate opinion.

LOCKEMY, J. dissenting: I respectfully dissent. Although I agree with the majority decision to affirm the other issues, I would reverse the

ALC's determination that the proposed landfill was consistent with the 1994 Plan, and revoke C&D's permit for the proposed landfill based on the County Council's enactment of the emergency ordinance.

The ALC determined the County Council enacted the emergency ordinance in an attempt to affect DHEC's permitting decision, and therefore, it was impermissible under Southeast Resource Recovery. The ALC also found, under Simpkins v. City of Gaffney, 315 S.C. 26, 431 S.E.2d 592 (Ct. App. 1993), that the County Council lacked the authority to enact an ordinance imposing a moratorium on DHEC's permitting authority. According to the ALC, the emergency ordinance was an attempt by the County Council to affect DHEC's permitting decisions, and therefore, it was inconsistent with sections 44-96-260(2) and 44-96-290(A) of the Solid Waste Act, which give DHEC the exclusive authority to issue permits for the construction of solid waste management facilities. I disagree.

I would find the ALC erred in determining the emergency ordinance was inconsistent with the Solid Waste Act. Pursuant to section 44-96-80(K),

> [t]he governing body of a county is authorized to enact such ordinances as may be necessary to carry out its responsibilities under this chapter; provided, however, that the governing body of a county may not enact an ordinance inconsistent with the state solid waste management plan, with any provision of this chapter, with any other applicable provision of state law, or with any regulation promulgated by the department providing for the protection of public health and safety or for protection of the environment.

S.C. Code Ann. § 44-96-80(K) (2002). While DHEC has the sole authority to issue landfill permits and make consistency determinations, the governing body of each county has the authority, pursuant to section 44-96-80(A), to determine the content of the county's solid waste management plan. In addition, counties have the authority to enact ordinances to carry out their responsibilities under their plans. Here, the County Council adopted the

emergency ordinance to preserve the status quo while it reviewed and modified its solid waste plan. The County began efforts to revise its solid waste management plan in 2003. In August 2006, the County Council gave first reading to Ordinance 207 which authorized the County to withdraw from the 1994 Plan and adopt a new County solid waste management plan. Thereafter, in October 2006, the County Council gave second reading to Ordinance 207. On January 8, 2007, the County Council adopted the emergency ordinance. On January 30, 2007, DHEC notified C&D it was holding C&D's landfill permit in abeyance while it considered the effect and validity of the emergency ordinance. Thereafter, on February 22, 2007, DHEC determined the emergency ordinance did not amend the 1994 Plan and issued C&D a permit for the proposed landfill. On February 28, 2007, the County Council gave third reading and adopted Ordinance 207 which created a separate York County Solid Waste Management Plan.

The emergency ordinance stated that "an imminent peril to the public health, safety, welfare and property rights require[d] the adoption of an emergency ordinance and moratorium." The emergency ordinance further provided that its adoption was necessary to give the County sufficient time to study and review issues concerning the impact of unprecedented growth and development, and to evaluate the need for additional waste disposal sites. I would find the County Council acted within its authority under section 44-96-80(K) in enacting the emergency ordinance. See Sandlands, 394 S.C. at 463-64, 716 S.E.2d at 286 (holding neither the Solid Waste Act nor the DON Regulation contain express provisions prohibiting county regulation of the flow of waste) (citing S.C. Code Ann. § 44-96-80 (A), (J), (K); S.C. Code Ann. § 44-96-290(F) (Supp. 2010) ("[N]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the department unless the proposed facility or expansion is consistent with local zoning, land use, and *other applicable local ordinances, if any[.]*") (emphasis added); S.C. Code Ann. Regs. § 61–107.B.5.c (Supp. 2010) (requiring consistency determinations account for any local ordinances)).

I would also find neither Southeast Resource Recovery nor Simpkins are applicable in this case. In Southeast Resource Recovery, our supreme court found DHEC's practice of delegating to the counties the authority to

determine consistency through the counties' issuance of letters of consistency was impermissible. 358 S.C. at 408, 595 S.E.2d at 471. The court determined that although section 44-96-290(F) "requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances." Id. Southeast Resource Recovery is not applicable to this case because the emergency ordinance is not a consistency determination. The emergency ordinance was adopted by the County Council to carry out the County's solid waste plan as authorized by section 44-96-80(K).

I would also find the ALC erred in relying on Simpkins in determining the County Council lacked the authority to impose a moratorium on DHEC's permitting decisions. In Simpkins, this court found a city council did not have the authority to put a moratorium in place by merely passing a motion to that effect. 315 S.C. at 29, 431 S.E.2d at 594. The Simpkins court found neither sections 5-23-40 and 5-23-50, which grant municipal corporations the authority to provide for the manner in which zoning regulations are established and amended, nor any other statute supplies authority for a municipal corporation to suspend an ordinance by merely passing a motion creating a moratorium. Id. The court noted our supreme court has held municipal ordinances cannot ordinarily be amended or repealed by a mere resolution, and instead, a new ordinance must be passed. Id. Here, unlike in Simpkins, the County Council enacted a new ordinance to modify and amend the 1994 Plan, and did not merely pass a motion that called for a moratorium.

Finally, the effect of the majority decision permits an agency of this state to ignore legislation adopted and duly passed by representatives of the people of a local government. The emergency ordinance was neither a consistency determination nor a motion, but was an ordinance duly adopted by the required *super majority vote* of the County Council members present pursuant to section 4-9-130 of the South Carolina Code of Laws (1986). If there was concern about the legality or constitutionality of the legislation, then a challenge, including injunctive relief, should have been instituted in circuit court. The County Council complied with the long legal process to adopt a new solid waste management plan. It was only after the County was at the precipice of this process that the emergency ordinance was adopted, not

as a consistency determination, but to preserve the status quo while the new plan was completed. Indeed, DHEC took no action for three weeks after its adoption and then decided to suspend the permitting process for another three weeks. Six weeks was more than enough time to seek temporary and immediate injunctive relief from a judicial body if there was a question about the effect and validity of the duly adopted legislation. Instead, on the virtual eve of third reading and with time running out before the effective date of the new solid waste management plan, DHEC chose to issue the permit just ahead of the pending legislation.

Even assuming my colleagues are correct, in hindsight, that "DHEC properly disregarded the emergency ordinance," are we to permit an agency of the executive branch of government to just disregard such laws of a legislative body on its own determination prior to any judicial review? If agencies are permitted to unilaterally decide to ignore county legislation prior to judicial review can they also do so for state legislation they deem improperly passed? Just to say that the emergency ordinance was reviewed by this court and eventually found to be improper overlooks the effect had no appeal been taken from the ALC determination. There are many small municipalities in South Carolina that are too financially strained to challenge big state agencies wielding executive, legislative, and judicial power.

Accordingly, I would find the ALC erred in determining the emergency ordinance was inconsistent with the Solid Waste Act. I would reverse the ALC's determination that the proposed landfill was consistent with the County's solid waste management plan and revoke C&D's permit for the proposed landfill.