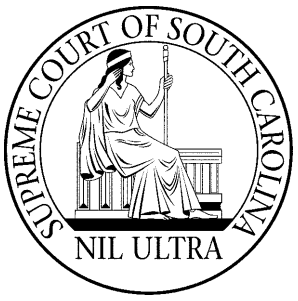

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
November 18, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chisolm Frampton, Employee, Appellant,

v.

S.C. Department of Natural Resources, Employer, and
S.C. State Accident Fund, Carrier, Respondents.

Appellate Case No. 2017-001764

Appeal From The Workers' Compensation Commission

Opinion No. 5726
Heard September 19, 2019 – Filed May 13, 2020
Withdrawn, Substituted and Refiled November 18, 2020

AFFIRMED

John C. Land, III, of Land Parker Welch, LLC, of Manning, for Appellant.

Kirsten Leslie Barr, of Trask & Howell, LLC, of Mount Pleasant, for Respondent.

HILL, J.: In this workers' compensation case, the single commissioner found Chisolm Frampton failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 (2015) to show his subsequent, on-the-job injury aggravated his preexisting neck condition. Nevertheless, the single commissioner found because the Department of Natural Resources (DNR) admitted the claim and provided medical treatment, Frampton was entitled to benefits for a 20% permanent partial disability to his spine. The appellate panel reversed, finding the single commissioner's conclusion that Frampton did not meet his burden of proof under § 42-9-35 was

correct and, as an alternate ground for reversal, found because the finding was not appealed, it was the law of the case. The appellate panel therefore concluded Frampton was not entitled to benefits as a matter of law. Frampton now appeals the appellate panel's reversal of the single commissioner's award, arguing (1) the appellate panel erred in requiring him to prove a compensable injury to his spine after DNR admitted liability, and (2) the single commissioner erred by considering Frampton's return to work and subsequent promotions in determining his impairment rating. Because the appellate panel's decision is supported by substantial evidence, we affirm.

I. Factual and Procedural Background

On September 4, 2010, Frampton experienced neck pain and stiffness after riding in a pickup truck across a bumpy dove field he and another DNR officer were inspecting. He reported the incident to his supervisor and went to Doctor's Care three days later. The notes from that visit indicated Frampton was diagnosed with cervical and trapezius strains and that workers' compensation paid for the visit. Frampton was released back to work the same day with the restriction of "no overhead lifting." He went back to Doctor's Care ten days later for a follow-up visit, after which he was released to work full duty.

On March 15, 2011, Frampton saw a neurosurgeon, Dr. Byron Bailey, who examined him for ongoing neck and arm pain. Frampton testified he was referred by workers' compensation to Dr. Bailey because his neck condition had not improved since the September 4, 2010 accident. Dr. Bailey's medical records, however, indicated he had treated Frampton before the dove field incident and was "following [Frampton] for cervical radiculopathy"[1] and described Frampton as having symptoms of neck pain and right arm numbness that had "progressed from the study that was done approximately a year ago." The next day, Frampton underwent a series of tests whereby Dr. Bailey determined he would require spinal surgery. Dr. Bailey performed a cervical discectomy and fusion on March 21, 2011, and continued to see Frampton for follow-up visits. Frampton returned to work on May 1, 2011, but was restricted to light duty for another several weeks.

[1]"Cervical radiculopathy is a disease process marked by nerve compression from herniated disk material or arthritic bone spurs. This impingement typically produces neck and radiating arm pain or numbness, sensory deficits, or motor dysfunction in the neck and upper extremities." Eubanks, *Cervical Radiculopathy: Nonoperative Management of Neck Pain and Radicular Symptoms*, 81 American Family Physician 33 (2010).

In June 2011, Frampton was involved in a serious car accident. He saw Dr. Bailey soon after for a previously scheduled appointment and reported experiencing aggravation of his neck pain. Dr. Bailey determined Frampton likely developed a cervical strain as a result of the car accident and prescribed a number of medications and physical therapy. Frampton continued to see Dr. Bailey periodically for neck pain.

On September 20, 2013, Dr. Bailey completed a Form 14B, stating Frampton reached maximum medical improvement (MMI) on April 17, 2013, listing his diagnosis as cervical spondylosis, and assigning him a 20% impairment rating to the cervical spine. However, Dr. Bailey later revised the form to assign Frampton a 75% impairment rating to the cervical spine and a 26% whole person impairment rating.

On November 17, 2014, Frampton filed a Form 50 seeking total permanent disability benefits for the injury to his neck and right arm allegedly sustained during the dove field accident. He denied any prior permanent disability.

In its Form 51 Answer to Request for Hearing, DNR stated, "It is [a]dmitted the employee sustained an injury or illness on or about the date set forth in the Form 50." However, DNR (1) denied any injury to Frampton's right arm; (2) denied Frampton needed or was entitled to additional medical care as a result of any work-related injury; (3) claimed Frampton reinjured his cervical spine during his June 2011 car accident and was currently being treated for that injury; and (4) stated, "[d]isability, if any, to be determined by the [Worker's Compensation Commission]." In its prehearing brief, DNR again denied Frampton was permanently and totally disabled in light of his ability to continue working without restriction and reiterated its argument that the car accident was a subsequent, intervening accident. DNR did not, however, cite § 42-9-35 or the issue of Frampton's preexisting diagnosis of cervical radiculopathy in its Form 51 or Form 58 prehearing brief.

At the beginning of Frampton's hearing, Frampton asserted that during the September 4, 2010 dove field incident, he herniated a disc in his cervical spine, ultimately resulting in surgery and total permanent disability. DNR, however, opened the hearing by stating:

> It is our position that there is no evidence that [Frampton] sustained any additional injury or exacerbated his known preexisting condition as a result of the September 4, 2010 accident. [Frampton] has a known preexisting condition, as indicated in Dr. Bailey's records. Dr. Bailey diagnosed

> him with a C6-7 radiculopathy approximately six months prior to the dove field incident. [Frampton] has a burden of proof by a preponderance of the evidence that the preexisting condition was aggravated or exacerbated. We don't believe he's met that burden of proof.

Frampton did not object to DNR framing the case this way, and the hearing continued. During the hearing, Frampton testified he was working full time but had some limitations in what he was physically able to do. He believed he had lost at least 75% use of his neck because of his ongoing pain and his limited movement; however, he confirmed he was not taking any medications at the time of the hearing for his neck.

During the hearing, the issues of Frampton's preexisting diagnosis of cervical radiculopathy and pre-dove-field visit to Dr. Bailey were extensively discussed.[2] Frampton testified he did not recall seeing Dr. Bailey before the September 4, 2010 dove-field incident or having problems in his neck or arm before the incident. However, Dr. Bailey's medical records, which were stipulated to during the hearing, did not reference a work-related injury on September 4, 2010. Rather the records indicated in March 2010, Frampton self-reported numbness in his arm beginning at least three weeks earlier in February 2010. The records also indicated in March 2010, Frampton had an MRI scan of his neck to determine the cause of the reported arm and neck pain. Frampton acknowledged he would not have gone to see Dr. Bailey in March 2010 or had an MRI scan of his neck if he was not having neck pain at that time, and he agreed that, on the intake forms, he characterized his symptoms as having begun gradually over a number of years. Frampton also acknowledged he never mentioned the September 4, 2010 dove field incident when asked to describe his injuries to Dr. Bailey.

Frampton urged the single commissioner to find that he lost more than 50% use of his back as a result of the dove-field incident, and therefore, there was a rebuttable presumption he had a permanent and total disability. *See* S.C. Code Ann. § 42-9-30(21) (2015). "[S]ection 42-9-30(21) states there is a rebuttable presumption of [permanent and total disability] when a claimant has 50% or more loss of use of the back." *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 464, 732 S.E.2d 190, 195 (Ct. App. 2012).

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[2] At least ten pages of testimony from the transcript is devoted to discussion of the relationship between Frampton's preexisting diagnosis of cervical radiculopathy, the onset of neck pain and arm numbness, and the dove-field injury.

DNR argued Frampton's injury resulting from the dove-field incident was merely a cervical strain and Frampton failed to prove he aggravated his preexisting neck condition as a result of the dove-field incident pursuant to § 42-9-35. DNR also argued the June 2011 car accident was a subsequent, intervening accident, breaking any existing chain of causation between the dove-field accident and Frampton's injury, relying on *Geathers v. 3V, Inc.*, 371 S.C. 570, 579–80, 641 S.E.2d 29, 34 (2007) (holding when an employee with a preexisting but non-disabling prior injury suffers a subsequent, disabling injury that aggravates or activates the preexisting condition, compensability is limited to the second injury, not the first).

In the order following the hearing, the single commissioner found Frampton's testimony regarding the extent of his preexisting neck injury was not credible; rather, the single commissioner found Frampton suffered from preexisting neck pain and right arm numbness before his alleged September 4, 2010 work injury, citing Dr. Bailey's medical records predating the dove-field incident. The single commissioner further found there was no medical evidence the September 4, 2010 dove field incident aggravated or exacerbated Frampton's preexisting neck condition, concluding Frampton did not meet his burden of proving a compensable disability under § 42-9-35.

Nevertheless, the single commissioner awarded Frampton disability benefits because she found DNR admitted Frampton's claim and provided medical treatment. As to the details of the award, the single commissioner found Frampton was not permanently and totally disabled but had sustained 20% permanent partial disability to his spine as a result of his September 4, 2010 dove-field work-related injury based on the evidence as a whole, including Dr. Bailey's original Form 14B assigning Frampton a 20% impairment rating to the cervical spine. The single commissioner found the June 16, 2011 car accident was not a superseding, intervening act that broke the chain of causation, finding *Geathers* inapplicable.

Both Frampton and DNR appealed the single commissioner's order. Frampton asserted the single commissioner erred in finding Frampton was not totally and permanently disabled, while DNR alleged the single commissioner erred, "in awarding medical and compensation benefits to the [Frampton] after finding and concluding that [Frampton] did not meet his burden of proof under S.C. Code Ann.§ 42-9-35[.]" At the hearing in front of the appellate panel, DNR alleged that by not appealing the single commissioner's specific factual findings and conclusions of law indicating Frampton did not meet his § 42-9-35 burden, those findings and conclusions were now the law of the case and Frampton was not entitled to disability benefits.

In its order reversing the single commissioner, the appellate panel found, according to § 42-9-35, Frampton "was required to prove, with expert medical evidence stated to a reasonable degree of medical certainty, that the alleged accident on September 4, 2010 aggravated his pre[]existing neck condition." The appellate panel found the term "shall" in § 42-9-35 mandated that "only by meeting this statutory burden of proof may the [worker's compensation commission] properly award medical or compensation benefits to [Frampton] under the Act." The appellate panel next found the single commissioner correctly determined Frampton did not meet his burden of proof under § 42-9-35, and finally, the appellate panel adopted DNR's argument that because Frampton did not appeal the single commissioner's finding of his failure to meet his burden of proof for compensability, it was law of the case.

II. Standard of Review

The Administrative Procedures Act (APA) provides a reviewing court "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2019); *see also Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) ("Pursuant to the APA, this [c]ourt's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law."). "In workers' compensation cases, the [appellate panel] is the ultimate fact finder. An appellate court must affirm the findings made by the [appellate panel] if they are supported by substantial evidence." *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011) (citation omitted). Our supreme court has defined substantial evidence as "not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but . . . evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Laws v. Richland Cty. Sch. Dist. No. 1*, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)). "The final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) (citations omitted). "Accordingly, a reviewing court may not substitute its judgment for that of the [appellate panel] as to the weight of the evidence on questions of fact." *Clark v. Aiken Cty. Gov't*, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005).

"The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Crisp v. SouthCo. Inc*., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) (quoting *Clade v. Champion Labs*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998)). "[A]n employer who has responded to a workers' compensation claim may assert a general denial of liability whether or not the response expressly contests compensability." *Hargrove v. Carolina Orthopaedic Surgery Assocs., PA*, 389 S.C. 119, 124, 697 S.E.2d 641, 643 (Ct. App. 2010). "Injury" for purposes of workers' compensation means "only injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015); *see also Turner v. SAIIA Constr.*, 419 S.C. 98, 105, 796 S.E.2d 150, 154 (Ct. App. 2016) ("For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." (quoting § 42-1-160(A))). "An injury arises out of employment if it is proximately caused by the employment." *Id.*

III. Discussion

Frampton argues because DNR admitted the injury and paid for some of his treatment with Dr. Bailey, the parties believed the only disputed issue at the hearing before the single commissioner would be the extent of his spinal injury and whether his arms were injured. Frampton contends DNR did not properly present § 42-9-35 as a defense because it failed to specify the statute as a defense on its Form 51 or in its prehearing brief. He further contends because DNR admitted the injury, he was not on notice he would be required to prove liability.

DNR acknowledges it admitted Frampton suffered an accident involving his cervical spine on its Form 51 but argues it also specifically denied liability for any workers' compensation benefits on the Form and in its prehearing brief. According to DNR, its admission that Frampton sustained an injury did not absolve him of his burden of proving entitlement to benefits, including his burden under § 42-9-35. DNR maintains § 42-9-35 is a statutory prerequisite to compensation benefits when there is a preexisting condition, rather than an affirmative defense. DNR argues it was not aware of Frampton's potential preexisting condition until it received Frampton's medical records on the eve of the hearing before the single commissioner, at which time it raised the issue of § 42-9-35 without objection.

A. Admitted Claim

§ 42-9-35 provides:

> (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
>
> > (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
> >
> > (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.
>
> (B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

See also Burnette v. City of Greenville, 401 S.C. 417, 427, 737 S.E.2d 200, 205–06 (Ct. App. 2012) ("An injured employee 'who has a permanent physical impairment or preexisting condition' may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that 'the subsequent injury aggravated the preexisting condition or permanent physical impairment.'" (quoting § 42-9-35)). "The claimant's right to compensation for aggravation of a preexisting condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury." *Murphy v. Owens Corning*, 393 S.C. 77, 86, 710 S.E.2d 454, 458 (Ct. App. 2011).

We find the appellate panel did not err in reversing the single commissioner's conclusion that Frampton's claim was admitted. While DNR admitted an injury occurred on September 4, 2010, in its Form 51 and provided initial treatment, the inquiry into compensability under the Worker's Compensation Act does not end there. First, DNR's initial provision of treatment for Frampton's injury does not estop it from later contesting its compensability under the Act. *See Dozier v. Am. Red Cross*, 411 S.C. 274, 292–93, 768 S.E.2d 222, 231–32 (Ct. App. 2014) (holding employer did not waive its right to contest the compensability of the claimant's injury by providing treatment for 728 days and explaining a finding of waiver would discourage employers from providing treatment). Next, "preexisting condition," "§ 42-9-35," and "burden of proof" are not special or affirmative defenses that must be

raised in a Form 51 or be forever lost. *See* S.C. Code Ann. Regs. 67-603(C) (2012) (listing special and affirmative defenses allowed by the Act, which are forfeited if not specifically raised in a Form 51 or Form 53). Rather, we agree with the appellate panel that when the facts of a worker's compensation case give rise to a claim that falls under § 42-9-35, it is the burden of the claimant to prove "by a preponderance of the evidence, including medical evidence, that . . . the subsequent injury aggravated the preexisting condition or permanent physical impairment; or . . . the preexisting condition or the permanent physical impairment aggravates the subsequent injury" in order to be eligible for compensation for that injury. § 42-9-35. Accordingly, we read DNR's Form 51 as a general denial of liability, and as such, we find DNR's failure to specifically raise the issue of burden of proof does not preclude Frampton from having to prove his admitted injury was compensable at his contested-case hearing. *See Hargrove*, 389 S.C. at 124, 697 S.E.2d at 643 (holding employer's failure to raise the issue of causation in its Form 51 did not preclude the commission from denying the claim on that ground; the claimant has the burden to prove compensability and employer's Form 51 was a general denial of liability).

Next, we acknowledge this case did not proceed in a typical or ideal way. The Worker's Compensation Act is designed to expedite compensation for employees who are injured on the job. *See Machin v. Carus Corp.*, 419 S.C. 527, 534, 799 S.E.2d 468, 471 (2017) ("The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation."(quoting *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015))); *Parker v. Williams & Madjanik, Inc*., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) ("The South Carolina Workmen's Compensation [Act] created a comprehensive approach to provide compensation for employees injured by accidents arising out of and in the course of their employment. The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee. This quid pro quo approach to workmen's compensation has worked to the advantage of society as well as the employee and employer."). As such, the procedures in the Act and its accompanying regulations are designed so that once the Forms are completed and filed, only very narrow contested issues will proceed to a hearing—with abundant notice—so the single commissioner is able to make an expedient and fair compensation decision for both the employer and employee. *See e.g.* S.C. Code Ann. § 42-1-700 to -705 (2015) (statutes requiring the Form 50 and Form 51 be filled out with "as much specificity as possible"); S.C. Code Ann. Regs. 67-601 to -615 (2012 & Supp. 2019) (delineating detailed procedures for contested-case hearings including deadlines for raising issues, amending Forms, and requesting an adjournment of a hearing upon a showing of good cause).

In this case, although it should have been raised in the Form 50, Form 51, or the Form 58 pre-hearing briefs, the issue of Frampton's preexisting diagnosis and its effect on the compensability of his September 4, 2010 dove-field injury was not raised until the contested-case hearing itself. It appears Dr. Bailey's deposition had been postponed, and DNR had only received Dr. Bailey's treatment records on the eve of the hearing. Once the hearing began, Frampton's claim was structured as a § 42-9-35 claim without objection, and Frampton made no motion to adjourn the hearing pursuant to S.C. Code Ann. Reg. 67-613 (Supp. 2019) for good cause or for additional discovery. *See Morgan v. JPS Automotives*, 321 S.C. 201, 203, 467 S.E.2d 457, 459 (Ct. App. 1996) (finding that when claimant entered the contested-case hearing understanding the only the issue to be determined was eligibility for temporary benefits, but the issue of disability compensation was raised, claimant's oral motion for an adjournment to retrieve additional proof of disability should have been granted). The parties may have had valid reasons, strategic or otherwise, for wanting to press forward with the hearing. The issue of the relationship of the dove-field incident and Frampton's preexisting cervical radiculopathy was discussed extensively throughout the hearing, and the single commissioner ruled on the issue. While South Carolina's Rules of Civil Procedure do not govern worker's compensation claims, we find the doctrine of trial by implied consent to be persuasive in making sense of what happened in Frampton's case, especially considering worker's compensations hearings are designed to be more informal than civil litigation. *See Fore v. Griffco of Wampee, Inc*., 409 S.C. 360, 373, 762 S.E.2d 37, 44 (Ct. App. 2014) (finding an amendment to a Form 58 should be allowed if the amendment is made as promptly as possible even if the amendment is made within ten days of the contested-case hearing); *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 130 n. 2, 623 S.E.2d 860, 864 n. 2 (Ct. App. 2005) (recognizing "the informal nature of administrative proceedings before the Commission").

Accordingly, we find the issue of whether Frampton's dove-field injury was compensable under § 42-9-35 was litigated at the hearing by implied consent, and we find no error in the appellate panel's determination that Frampton's September 4, 2010 dove-field injury claim would only be compensable under the Worker's Compensation Act if Frampton satisfied his § 42-9-35 burden of proof. *See, e.g.*, Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("In order to be tried by implied consent, the issue must have been discussed extensively at trial."); *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 625, 819 S.E.2d 154, 159 (Ct. App. 2018) ("An issue cannot be tried by implied consent when one party expressly objects.");

Holroyd v. Requa, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

B. Substantial Evidence

Once the appellate panel concluded Frampton's claim was a § 42-9-35 aggravation of a preexisting condition claim, the appellate panel next reversed the single commissioner's award of compensation for Frampton's September 4, 2010 dove-field injury. First, the appellate panel found Frampton did not appeal the single commissioner's finding that he failed to satisfy his § 42-9-35 burden of proof; therefore, that finding was the law of the case,[3] and second, the appellate panel found the greater weight of the evidence presented at the hearing supported the conclusion that the September 4, 2010 dove-field injury was not compensable.

We find there is substantial evidence supporting the appellate panel's decision. *See Gadson*, 368 S.C. at 221, 628 S.E.2d at 266 ("Pursuant to the APA, this [c]ourt's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law."). Dr. Bailey's medical records from March 2010 and Frampton's own testimony demonstrate he had a preexisting neck condition (cervical radiculopathy) at least six months before the dove field incident. Section 42-9-35 provides a claimant "shall establish by a preponderance of the evidence" a subsequent work-related injury aggravated a preexisting condition. Frampton did not prove the dove field incident aggravated his preexisting neck condition and only referenced the existence of the preexisting condition when DNR presented him with Dr. Bailey's medical records at the hearing.

Nonetheless, even if Frampton had met his burden pursuant to § 42-9-35, he did not show his neck injury was proximately caused by the dove field accident pursuant to § 42-1-160(A). *See Crisp*, 401 S.C. at 641, 738 S.E.2d at 842 ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." (quoting *Clade*, 330 S.C. at 11, 496 S.E.2d at 857)); *see*

[3] Although we do not need to reach the issue of whether the single commissioner's finding that Frampton failed to meet his burden of proof is the law of his case, we express doubts the appellate panel applied the law of the case doctrine correctly in its order reversing the single commissioner. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (finding the preservation requirements for appeal are applied differently according to whether or not the party prevailed below).

also Turner, 419 S.C. at 105, 796 S.E.2d at 154 ("For an accidental injury to be compensable, it must 'aris[e] out of and in the course of employment.'" (quoting § 42-1-160(A))); *id.* ("An injury arises out of employment if it is proximately caused by the employment."). None of Dr. Bailey's medical records mention the dove field incident. This, taken with the fact that Frampton had already seen Dr. Bailey at least six months before the incident for the same injury, is substantial evidence supporting the appellate panel's conclusion that Frampton's treatment with Dr. Bailey, including his surgery, was not causally related to the dove field incident but was part of a long-term, ongoing course of treatment for Frampton's progressive, degenerative, disc disease, which had begun years prior. This conclusion is consistent with Frampton's own testimony before the single commissioner that he told Dr. Bailey his symptoms began gradually over a number of years and with Dr. Bailey's notes from the March 2010 visit in which he stated Frampton had a history of cervical radiculopathy.

C. Return to Work

Finally, we reject Frampton's argument the single commissioner erroneously considered his post-injury return to work and subsequent promotions in estimating the percentage of his impairment. This issue is unpreserved for this court's review because Frampton failed to raise it before the appellate panel, and the appellate panel made no ruling on it. *See Robbins v. Walgreens & Broadspire Servs., Inc.*, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (an issue not raised to the single commissioner or appellate panel is not appropriate for appellate review); *see also Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 428, 450 S.E.2d 112, 115 (Ct. App. 1994) (arguments not raised to the appellate panel or circuit court are not preserved for appeal). Nevertheless, it is clear from the single commissioner's order that she only considered Frampton's return to work, subsequent promotions, and earning capacity in the context of determining the lack of credibility of Dr. Bailey's revised Form 14B and in determining Frampton was not entitled to benefits under S.C. Code Ann. § 42-9-10 (2015), which is not at issue.

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, C.J., concurring in part and dissenting in part: I concur in part and respectfully dissent in part. I concur with the majority's finding that the single commissioner did not err by considering Frampton's post-injury return to work and subsequent promotion in determining he was not entitled to benefits under section 42-9-10. However, I would reverse the appellate panel's conclusion Frampton failed

to satisfy his burden of proof under section 42-9-35 and was therefore not entitled to any benefits under the Workers' Compensation Act.

Frampton contends the appellate panel erred by requiring him to prove a compensable injury to his spine when DNR admitted liability for an injury to the cervical spine. I agree. "An appellate court may reverse a decision by the Appellate Panel if it is affected by an error of law or is clearly erroneous in view of the substantial evidence." *Harrison v. Owen Steel Co.*, 422 S.C. 132, 137, 810 S.E.2d 433, 435 (Ct. App. 2018).

Frampton alleged in his Form 50 that he suffered an injury to his neck and right arm when he was riding in a pickup truck through a dove field in September of 2010. In its Form 51, DNR admitted that Frampton sustained an injury on the date he alleged, and it stated it admitted "an injury to the cervical spine only" but denied the extent of the injury and all other body parts, including the arms. DNR denied Frampton was entitled to additional medical care for the injury because he suffered a subsequent injury to the cervical spine on June 16, 2011. In my view, by admitting an injury to the cervical spine, DNR agreed Frampton injured his spine as alleged in his Form 50. In addition, Frampton had been under a neurosurgeon's care for several years before he filed his Form 50, and DNR had paid for much of this treatment. The neurosurgeon completed a "physician's statement" describing his assessment of Frampton's "work related injury." All of this occurred before DNR filed its Form 51 admitting injury to Frampton's cervical spine. Further, in its Form 58, DNR argued the injury Frampton suffered in the June 2011 car accident either (1) aggravated his preexisting neck condition or (2) was a subsequent, intervening accident that severed the causal relationship between the September 4, 2010 accident and the alleged disability. As the majority acknowledged, DNR did not allege Frampton had been diagnosed with a preexisting condition prior to the September 2010 accident or refer to section 42-9-35 in either form. In addition, DNR did not mention section 42-9-35 during the hearing before the single commissioner.

The single commissioner found as a fact that, although Frampton failed to satisfy his burden of proof under section 42-9-35, DNR admitted the claim and provided medical treatment. The single commissioner found Frampton suffered a 20% permanent partial disability to his back as a result of his work injury. The appellate panel did not disturb the single commissioner's finding that DNR admitted the claim, and none of DNR's grounds for appeal from the single commissioner's order charged her with error in finding the claim was admitted. In my opinion, DNR admitted the September 4, 2010 injury to Frampton's spine and the only disputed issues at the hearing before the single commissioner were the extent of the injury and whether the arms were affected. Because this was an admitted case, I would hold the

appellate panel erred by concluding that, pursuant to section 42-9-35, Frampton was required to prove that either the September 4, 2010 injury aggravated his preexisting condition or the preexisting condition aggravated the injury. Nothing in DNR's Form 51 or Form 58 notified Frampton that he would be required to show his September 4, 2010 accident aggravated a preexisting neck condition. I would therefore reverse the appellate panel's holding that Frampton was not entitled to any benefits under the Workers' Compensation Act.

Further, I believe the appellate panel misapplied the law of the case doctrine. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997). "Failure to challenge the ruling 'is an abandonment of the issue and precludes consideration on appeal.'" *Id.* (quoting *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)). "The unchallenged ruling, 'right or wrong, is the law of the case and requires affirmance.'" *Id.* (quoting *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970)). Here, notwithstanding the single commissioner determined Frampton failed to meet his burden of proof pursuant to 42-9-35, she ruled in his favor on this issue, finding DNR admitted the claim. Without expressly addressing this finding, the appellate panel relied on the law of the case doctrine to affirm the single commissioner's conclusion that Frampton failed to satisfy his burden of proof under section 42-9-35. However, there was no reason for Frampton to appeal the single commissioner's ruling as to section 42-9-35 because he prevailed on the issue. Therefore, I believe the law of the case doctrine did not apply and the appellate panel erred by relying on this doctrine to support its holding.

For the foregoing reasons, I respectfully dissent from the majority opinion and would reverse the appellate panel in part.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Randy Wright, Appellant.

Appellate Case No. 2017-002130

Appeal From Berkeley County
Maitè Murphy, Circuit Court Judge

Opinion No. 5782
Heard August 19, 2020 – Filed November 18, 2020

REVERSED AND REMANDED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

HILL, J.: After deliberating two hours in Randy Wright's trial for assault and battery of a high and aggravated nature (ABHAN), the jury signaled it had reached a verdict. When the jury returned to the courtroom, the trial court directed the courtroom clerk to publish the verdict. The clerk read the verdict form, announcing the jury had found Wright guilty of ABHAN and that the form had been signed by

the forelady. The clerk then stated: "Ladies and gentlemen of the jury if this is your verdict, would you please signify by raising your right hand?" In response, each juror raised his or her right hand. Wright then asked the trial court to poll each juror individually. The court declined, explaining that, in response to the clerk's inquiry "each of the jurors raised their hand individually." Wright appeals, asserting the clerk's collective inquiry did not satisfy his polling right. We agree and reverse.

I.

The custom of polling a jury after a verdict developed in English practice, although no precise method predominated. *See* Matthew Hale, *Pleas of the Crown*, 299–300 (Vol. II, 1800) ("[I]f the jury say they are agreed, the court may examine them by poll . . . ."). Early South Carolina cases permitted polling in the trial court's discretion. *State v. Wyse*, 32 S.C. 45, 10 S.E. 612, 615 (1890); *State v. Allen*, 12 S.C.L. (1 McCord) 525, 526–27 (1822). The trial court's discretion ended in *State v. Linder*, which held a poll must be taken if requested and implied each juror must be polled individually. 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981).

The right to poll the jury is not in itself a constitutional right but a procedural protection of the defendant's constitutional right to a unanimous verdict. *State v. Pare*, 755 A.2d 180, 188 (Conn. 2000). It also safeguards the right to a public trial. If the poll reveals the jury's announced verdict is not in fact unanimous, the verdict cannot stand, and the trial court may, as circumstances warrant, direct further deliberation or declare a mistrial. *State v. Kelly*, 372 S.C. 167, 170–71, 641 S.E.2d 468, 470 (Ct. App. 2007). Just as trial counsel has no duty to request a poll, the trial court has no duty to conduct one without a request. *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002); *Linder*, 276 S.C. at 308–09, 278 S.E.2d at 338.

Besides shoring up these rights, individual polling supports several other interests of justice. The courtroom air thins when the jury returns to deliver its verdict. No other trial moment demands the solemn clarity individualized inquiry provides. Individual polling promotes finality and accountability of the verdict stage and enhances the integrity of the deliberative process by ensuring no juror was coerced in the jury room. *See Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899) (observing object of poll "is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent"). We note Rule 31 of the Federal Rules of Criminal Procedure was amended in 1998 to require individual rather than collective polling. Fed. R. Crim. P. 31(d). The Advisory Committee note accompanying the change

points out collective polling "saves little time and does not always adequately ensure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response." Fed. R Crim. P. 31 Advisory Committee Notes. We agree; as the proverb goes, valor delights in the test.

Even before the 1998 rule change, several federal circuits held a collective question to the jury asking them to affirm their verdict (by show of hands or by verbal assent), even if asked in open court, is not the best method for accomplishing the purpose of a jury poll. *United States v. Miller*, 59 F.3d 417, 421 (3d Cir. 1995); *United States v. Carter*, 772 F.2d 66, 68 (4th Cir. 1985). In states requiring individual polling upon request, it has been held a collective polling question does not suffice. *State v. Coulthard*, 492 N.W.2d 329, 333 (Wis. Ct. App. 1992); *Miles v. Com*., 256 S.W.3d 46, 46 (Ky. Ct. App. 2008). As the Connecticut Supreme Court has observed:

> These cases reflect the understanding, based on common human experience, that members of a group may react differently when addressed as a group, and when addressed individually. They also reflect the notion that the concept of jury unanimity is sufficiently significant so as to require that, upon request, each juror be required to state his or her verdict in open court—individually—to face the defendant and the state, and confirm, on his or her own, that the collectively reported verdict is truly his or hers.

Pare, 755 A.2d at 193 (collecting cases).

Linder did not endorse a particular method of individually polling the jurors, stating only, "Polling is a practice whereby the court determines from the jurors individually whether they assented and still assent to the verdict." 276 S.C. at 308, 278 S.E.2d at 338. Because *Linder* provided no guidance on the mechanics of proper individual polling, we understand how the trial court could have concluded the clerk's inquiry was enough. But it was not. We conclude individual polling means each juror must be separately asked to confirm verbally on the record that the verdict announced is still his or her verdict. We believe this person-by-person inquiry best advances the prime reason for individual polling: "to dispel any doubt a party might entertain as to the propriety of a jury verdict as rendered." 276 S.C. at 309, 278 S.E.2d at 338. The trial court therefore erred in denying Wright's request for such a poll.

II.

Whether the denial of a jury poll request automatically requires a new trial is a novel question in South Carolina. *Linder* does not say, and we have no controlling statute or rule.

In the past half century, courts have attempted to divide constitutional errors into two categories: trial errors and structural errors. In general, trial errors that are harmless do not justify reversal. Structural errors, on the other hand, are reversible *per se*, unredeemable by the harmless error doctrine. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (delineating three broad rationales for classifying an error as structural); *State v. Rivera*, 402 S.C. 225, 246–47, 741 S.E.2d 694, 705–06 (2013) (differentiating between structural errors and trial errors subject to harmless error review). The structural/trial error dichotomy does not cover all trial mistakes; some, like the polling error here, elude neat classification. *See, e.g.*, *Weaver*, 137 S. Ct. at 1911 (noting the Court "has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, though the Court has yet to label those errors structural in express terms" (citations omitted)); *State v. Short*, 333 S.C. 473, 476–78, 511 S.E.2d 358, 360–61 (1999) (holding no showing of prejudice required when trial court erred in denying defendant's right to exercise peremptory challenges—a statutory procedural right designed to ensure constitutional right to an impartial jury; instead, error was reversible *per se*).

The structural/trial error distinction is not pivotal to Wright's appeal, for a polling error is not a pure constitutional error, and resembles both an error affecting the "framework within which the trial proceeds" (structural error) and "an error in the trial process itself" (trial error). *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The reasoning of *Weaver*, however, offers a rational way out of our classification dilemma. In *Weaver*, the Court noted that in addition to relating to a trial's framework, an error is structural if: (1) the right at issue is designed to protect an interest other than the defendant's interest in being wrongly convicted; (2) the effects of the error are "simply too hard to measure"; or (3) the error always results in fundamental unfairness. 137 S. Ct. at 1908. We believe the denial of the right to individual polling bears all three of these traits. The polling right protects not only the defendant from being wrongfully convicted, but also the public's interest in ensuring the outcome of the criminal trial process is reliable. Denial of the polling right also defies harmless error analysis. To find the error harmless, we would have to conclude the lack of a valid poll was an "error which occurred during the

presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307–08 (1991). We cannot say the lack of a valid poll contributed to the verdict, as the error occurred after a verdict was announced. It would be an odd end to the matter to deem it harmless, for in effect we would be presuming the unanimity of the verdict while simultaneously denying the defendant the only real right he has to check behind the presumption. Finally, the denial of the polling right caused fundamental unfairness by "undermining . . . the systemic requirements of a fair and open judicial process." *Weaver*, 137 S. Ct. at 1911. If an announced verdict lacks unanimity in fact, then the harm to the integrity and fundamental legitimacy of the entire trial is total.

We are mindful of the general rule that a conviction may not be reversed due to "insubstantial errors not affecting the result." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). It is our firm view that depriving a defendant of his or her polling right is not a technicality, but a material and prejudicial error. *See id.* at 110 n.7, 771 S.E.2d at 340 n.7 ("[W]e readily acknowledge that there are some errors, particularly errors of law, which cannot be rendered harmless by overwhelming evidence."). The individual poll is the best chance the trial court and the parties have to ensure the sanctity and unanimity of the verdict. It is not enough to say, as the State does, that jurors seldom recant upon polling. Experience—and case law—proves they do. *Kelly*, 372 S.C. at 171–72, 641 S.E.2d at 470–71 (involving a juror's recant and citing other cases where it has occurred). The rarity of an episode so threatening to the vital center of our jury system is no reason to ignore it.

Because of the importance of the polling right and the difficulty of deciphering the harm its denial has caused, many federal circuits and state appellate courts have deemed the denial reversible *per se*. *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1522–23 (7th Cir. 1993); *Virgin Islands v. Hercules*, 875 F.2d 414, 419 (3d Cir. 1989); *Miranda v. United States*, 255 F.2d 9, 18 (1st Cir. 1958); *Pare*, 755 A.2d at 194; *Commonwealth. v. Downey*, 732 A.2d 593, 595–96 (Pa. 1999); *Miles*, 256 S.W.3d 46, 46–47. We are persuaded by the sound reasoning of these decisions and therefore hold the denial of the defendant's substantial right to an individual poll of each juror in open court—where each juror must express his or her continued assent

in the announced verdict—is reversible error *per se*, not subject to a harmless error analysis. We are convinced such a rule incentivizes compliance with proper polling procedure and best honors the value of the right itself.

We are aware retrials are costly and impede judicial efficiency. We are equally aware that appellate reviews requiring lengthy searches through thick transcripts to sense the net impact of an error on the whole trial can also be costly and inefficient where, as here, the error is not in what was done, but what was not done.

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Commerce, Division of Public Railways, Respondent,

v.

Clemson University, Respondent,

And

Charleston County School District, Appellant.

Appellate Case No. 2017-000060

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5783
Heard February 4, 2020 – Filed November 18, 2020

AFFIRMED

M. Dawes Cooke, Jr. and John William Fletcher, both of Barnwell Whaley Patterson & Helms, LLC; Abigail Budd Walsh, of Williams & Walsh, LLC; and Christopher L. Murphy, of Murphy Law Offices, LLC, all of Charleston, for Appellant.

Keith M. Babcock and Ariail Elizabeth King, both of Lewis Babcock L.L.P., of Columbia; Derek Farrell Dean, of Simons & Dean, of Charleston; Stephen A. Spitz, of

Spitz & Neville, LLC, of Charleston; and Karen Blair Manning, of the South Carolina Department of Commerce, of Columbia, for Respondent South Carolina Department of Commerce, Division of Public Railways.

Newman Jackson Smith, Jr., of Nelson Mullins Riley & Scarborough, LLP, of Charleston, and Wendy Wilkie Parker, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent Clemson University.

LOCKEMY, C.J.: In this condemnation action, Charleston County School District (the School District) appeals the circuit court's order transferring the case to the non-jury trial roster. The School District argues the circuit court erred by depriving it of its right to a jury trial because (1) it was entitled to a jury trial pursuant to the South Carolina Eminent Domain Procedure Act[1] (the Act), (2) section 28-2-460 of the Act did not require a non-jury trial, and (3) a non-jury trial was not required notwithstanding the equitable nature of the School District's interest in the property at issue. We affirm.

FACTS/PROCEDURAL HISTORY

In December 2010, the South Carolina Department of Commerce, Division of Public Railways (the Department), filed a condemnation notice to acquire property consisting of 69.96 acres (the Entire Tract) and owned by Clemson University (Clemson). The Department named Clemson as the landowner and the School District as one of eight "other condemnees" in the action.[2] The Department elected not to utilize the appraisal panel procedure, offered tender of $9,645,000 to Clemson as just compensation for the Entire Tract, and demanded a jury trial. The School District subsequently filed a notice of appearance and demanded a jury trial on the issue of just compensation.

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[1] S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2019).

[2] S.C. Code Ann. § 28-2-280(C)(2) (2007) (requiring the condemnor to "designate as 'landowner' all persons who are record owners of fee simple title and as 'other condemnees' all persons who, to condemnor's knowledge, have or claim any record interest in the property to be taken"). The remaining other condemnees were dismissed from the action by consent order.

The circuit court issued a consent order of limited reference in April of 2014, which stayed the underlying condemnation action. According to the order, all parties agreed that in 1996, the Charleston Naval Complex Redevelopment Authority (the RDA) and the School District entered into a sublease concerning an Academic Magnet High School.[3] However, the parties submitted the following matters to a limited special referee: (1) whether the sublease expired, (2) how much property was included in the sublease, (3) whether the School District had any rights to such property after it was conveyed from the RDA to the City of North Charleston, (4) whether the School District had any rights in such property after North Charleston conveyed it to Clemson, and (5) whether the School District had any rights in the property when the condemnation notice was filed.

After hearing the matter, the special referee found the sublease expired in September of 2001 and the School District continued as a tenant at will thereafter. The special referee determined the School District had no equitable title in the property but found it had an equitable interest in the 3.74-acre parcel consisting of the campus of the Academic Magnet High School. The special referee concluded the School District made improvements to that property during the term of its sublease and its use of the property thereafter "with the reasonable expectation it would occupy and use the property for an extended period." Additionally, he found the School District's interest "extended up to and include[ed]" the date the condemnation action was filed but noted his authority did "not include whether that interest ha[d] any monetary value, and if so, how much." The City of North Charleston, Clemson, and the Department moved to alter or amend the special referee's order, and the special referee denied the motion.

The Department then moved the circuit court to transfer the case to the non-jury trial roster. Clemson advised the circuit court that it had reached an agreement with the Department pursuant to which Clemson was to receive land in exchange for the condemnation of the Entire Tract in lieu of financial consideration and waived its right to any monetary compensation. The School District acknowledged it was not a "lessee" but stated it had a "possessory interest in the property." It argued because Clemson and the Department agreed to exchange land in place of compensation, the Act required a jury trial on the issue of just compensation for the Entire Tract and a subsequent apportionment hearing.

[3] The RDA was one of the named "other condemnees" in the condemnation action.

The circuit court issued an order transferring the case to the non-jury trial roster. The court concluded the School District had no right to a jury trial. It found (1) state law provided only the landowner, not other condemnees, the right to a jury trial; (2) the equitable nature of the School District's interest called for the court to decide the matter sitting in equity; and (3) any compensation owed to the School District should be determined in an equitable proceeding similar to that provided in section 28-2-460.[4]

The School District moved the circuit court to reconsider its order and clarified it did not demand a jury trial as to the Entire Tract but only as to the value of its equitable interest.[5] The circuit court denied the motion. This appeal followed.

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Likewise, "[a]n issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). "[T]his Court reviews questions of law de novo." *Id.* (alteration in original) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

I. Entitlement to Jury Trial Under the Act

The School District argues the Act provided it a statutory right to a jury trial on the issue of just compensation and a jury trial was the mandatory default under the Act unless the parties unanimously demanded a non-jury trial. In addition, it asserts that pursuant to Rules 38 and 39, SCRCP, the Department could not withdraw its jury trial demand without the consent of all parties. We disagree.

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[4] S.C. Code Ann. § 28-2-460 (2007) (providing the procedure for dividing a just compensation award among the parties).

[5] The settlement agreement between Clemson and the Department was also filed on this date, and it provided the Department would dismiss Clemson from the action.

"The right of trial by jury, guaranteed by our Constitution, is only applicable to those cases in which a jury trial was required at the time of the adoption of the Constitution." *McGlohon v. Harlan*, 254 S.C. 207, 215, 174 S.E.2d 753, 757 (1970). Our appellate courts "have specifically held there is no constitutional right to a jury trial in an eminent domain case because there was no such right when our constitution was adopted." *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005); *see also* 18 S.C. Jur. *Eminent Domain* § 41 (1993) ("At common law, there was no right to a trial by jury, and none was established under the South Carolina constitution."). However, "such a right is provided by statute." *Cobb*, 365 S.C. at 365, 618 S.E.2d at 301. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 519 (Ct. App. 2011) (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)). "If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning." *Id.* at 188, 720 S.E.2d at 519-20. "In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute." *Id.* at 188, 720 S.E.2d at 520.

Section 28-2-240 of the Act (2007) provides,

> (A) If the condemnor elects to proceed under this section, and the amount tendered in the Condemnation Notice is rejected, the condemnor shall file the Condemnation Notice with the clerk of court, if not already filed, and shall serve upon the landowner and file with the clerk an affidavit stating:
>
> > (1) that the amount tendered . . . has been rejected;
> >
> > (2) that the condemnor demands a trial not earlier than sixty days after the date of service of the affidavit, which date must be certified on the copy filed with the clerk;

> (3) whether the condemnor demands a trial by jury or by the court;
>
> (4) whether the condemnor demands that the trial be given priority over other cases; and
>
> (5) the name and known address of each landowner whom the clerk should notify of the call of the case for trial. The affidavit may be executed by the condemnor or by its attorney.
>
> (B) After the filing of the affidavit, the case shall proceed as provided in Article 3.

Regarding the mode of trial, Article 3 of the Act provides:

> (A) Upon the filing of the affidavit described in § 28-2-240(A) . . . the action must be tried as provided in this article.
>
> (B) If the condemnor and the landowner have demanded trial by the court without a jury, the clerk shall place the action on the nonjury trial roster. Otherwise, the action must be placed on the jury trial roster.

S.C. Code Ann. § 28-2-310(A)-(B) (2007). Additionally, section 28-2-280, states that when a condemnor elects to proceed under section 28-2-240, its condemnation notice shall state whether the condemnor "demands a trial by jury or by the court without a jury" and "[t]he landowner has the right to demand a trial by jury." S.C. Code Ann. § 28-2-280(C)(8) (2007); *see also Cobb*, 365 S.C. at 365, 618 S.E.2d at 301 (noting section 28-2-310 "provides in an eminent domain action a property owner or the condemnor may elect a jury trial on the issue of compensation"); *Richland County v. Lowman*, 307 S.C. 422, 424, 415 S.E.2d 433, 434 (Ct. App. 1992) (noting "a landowner has the right to demand a trial by jury"); 18 S.C. Jur. *Eminent Domain* § 41 ("Under the Act, either side may elect for a jury trial in the condemnation action to determine just compensation."); *id.* ("Actions in condemnation are to be placed on the jury roster unless the condemnor and landowner demand trial by the court without a jury.").

The Act defines a "condemnee" as "a person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. § 28-2-30(6) (2007).

> "Landowner" means one or more condemnees having a record fee simple interest in the property condemned or any part thereof, *as distinguished from condemnees who possess a lien or other nonownership interest in the property*; where there are more than one, the term means the condemnees collectively, unless expressly provided otherwise.

S.C. Code Ann. § 28-2-30(12) (2007) (emphasis added); *see also* 18 S.C. Jur. *Eminent Domain* § 44 (1993) (noting "[t]he Act distinguishes between other condemnees and the landowners"); S.C. Code Ann. § 28-2-30(17) (2007) ("'Property' . . . means all lands, including improvements and fixtures thereon, . . . easements and hereditaments, . . . every estate, interest and right, legal or equitable, in lands or water and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto . . . .").

> The statutory scheme of the Act contemplates that the landowner, and not other condemnees, is the interested party in most phases of the action. Thus, the landowner alone is served with the condemnation notice and accepts or rejects the tender or challenges the right to condemn, is served with the condemnor's election to proceed with trial, and consents to abandonment of the action. If an appraisal panel is used, the landowner appoints a member of the appraisal panel, receives notice of its decision, and has the right to appeal to court. Similarly, the landowner receives the notice of trial, if any issues. The other condemnees receive notice only of filing the action and of any proceedings to disburse the proceeds.

18 S.C. Jur. *Eminent Domain* § 44 (footnotes omitted) (summarizing the provisions of sections 28-2-220 to -260, 28-2-290, and 28-2-460 of the Act (2007 & Supp. 2019)).

We conclude the Act provides only the landowner and condemnor—as opposed to other condemnees—the right to a jury trial in a condemnation action. Section 28-2-310(B) provides, "If the condemnor and the landowner have demanded trial by the court without a jury, the clerk shall place the action on the nonjury trial roster. Otherwise, the action must be placed on the jury trial roster." The definition of landowner does not include "condemnees who possess a lien or other nonownership interest." *See* § 28-2-30(12). Rather, the term encompasses only those condemnees "having a record fee simple interest in the property condemned or any part thereof." *Id.* By definition, the term "landowner," regardless of whether it includes multiple condemnees, does not include *all* condemnees. Based on a plain reading of the Act, we conclude it contemplates the parties entitled to participate in trial are limited to the landowner and the condemnor, and only those parties who are entitled to participate in trial are entitled to a jury trial. *See* S.C. Code Ann. § 28-2-240 (2007); S.C. Code Ann. § 28-2-280 (2007); § 28-2-310. The School District—having only an equitable interest in a 3.74-acre portion of the Entire Tract—is not a landowner under the Act and is therefore not entitled to participate in trial. Accordingly, we conclude the School District is not entitled to a jury trial under the Act.

Furthermore, even if the School District were entitled to a jury trial, nothing in the Act entitled it to a jury trial to determine the value of the Entire Tract. Had the Department and Clemson not settled and the case proceeded to trial on the issue of just compensation for the taking of the Entire Tract, the issue before the jury would have been the value of the Entire Tract. The court would have then apportioned that amount among the landowner and any existing other condemnees—in this case, the School District—in an equity proceeding pursuant to section 28-2-460 of the Act. *See* § 28-2-460 (providing that when the persons served with the condemnation notice do not agree to whom just compensation must be made and paid, the verdict or judgment must be made jointly to all parties and paid to the clerk of court); *id.* ("The payment of the funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties."). Here, the amount of just compensation for the Entire Tract is not at issue because the landowner and the condemnor have settled that dispute. The School District has only an equitable interest in 3.74 acres of the Entire Tract, informed the circuit court it did not demand a jury trial on the Entire Tract, and admitted on appeal that the only remaining question was "what, if any, just

compensation" it should be paid for its equitable interest. Therefore, we conclude that even if the School District were entitled to a jury trial, it would not be entitled to a jury trial as to the value of the Entire Tract.

Next, having concluded the School District had no statutory right to a jury trial, we find the Department's initial demand for a jury trial in the condemnation action was not dispositive.

> The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.

Rule 38(a), SCRCP; *see also* Rule 38(d), SCRCP ("A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties . . . .").

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated . . . as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record . . . consent to trial by the court sitting without a jury *or* (2) *the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist*.

Rule 39(a), SCRCP (emphasis added); *see also* S.C. Code Ann. § 28-2-120 (2007) ("In the event of conflict between this act and the South Carolina Rules of Civil Procedure, this act shall prevail.").

Rules 38 and 39, SCRCP, in and of themselves, do not create the right to a jury trial. Rather, pursuant to Rule 39(a)(2), SCRCP, if the circuit court finds a right of trial by jury of some or all of the issues does not exist, a jury trial is not required even if the parties have demanded one. Thus, notwithstanding the Department's initial demand for a jury trial, Rule 39(a), SCRCP, did not confer upon the School District the right to a jury trial. Further, under the School District's suggested

reading of the Act, any other condemnee having a nonownership interest in the property at issue could demand a jury trial even if both the landowner and the condemnor have elected a non-jury trial. We do not believe the legislature intended this result. *See Johnson*, 396 S.C. at 188, 720 S.E.2d at 519 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (quoting *Sweat*, 386 S.C. at 350, 688 S.E.2d at 575)). Accordingly, we hold the circuit court did not err by placing the action on the non-jury trial roster.

II. Section 28-2-460 of the Act

The School District argues the equitable procedure of section 28-2-460 did not apply because the value of the Entire Tract had not been determined and the condemnor, landowner, and all other condemnees had not agreed to an award as to the Entire Tract. It therefore argues the circuit court erred by using the settlement between Clemson and the Department to side-step the requirement that the value of the Entire Tract be determined. We disagree.

Section 28-2-460 of the Act provides,

> Unless the persons served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, the appraisal panel determination, verdict, or judgment *must be made jointly to all the parties* and *may* be paid to the clerk of court. Upon making the payment, the condemnor's obligation to pay interest upon the funds shall terminate. The payment of the funds so awarded must be held by the clerk of court *pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties*. From the order of the court of common pleas there may be an appeal as provided for appeals from the court in equity cases.

(emphases added). Here, the circuit court found section 28-2-460 required an equitable proceeding to determine the rights of a landowner and other condemnees

when a dispute existed between them concerning the division of condemnation proceeds. The circuit court noted a court should determine the School District's equitable interest in a proceeding similar to that provided in section 28-2-460 but acknowledged it could not use this precise procedure because the landowner received no monetary payment in this case. Section 28-2-460 has no bearing upon whether the School District had a statutory right to a jury trial. As we stated, the value of the Entire Tract is not at issue. Further, nothing in section 28-2-460 requires a jury to determine just compensation or the value of an equitable interest in a portion of the condemned property. Rather, it provides the method for apportioning the amount of compensation, once determined, among the parties. *See* § 28-2-460 (stating "the appraisal panel determination, verdict, *or* judgment must be made jointly to all the parties" (emphasis added)). However, section 28-2-460 does suggest the value of the School District's interest in a small portion of the Entire Tract—the issue to be decided in this case—is an equitable, rather than a legal, issue. Section 28-2-460 therefore further demonstrates the legislature's intent that only the landowner and condemnor have the right to elect a jury trial on the issue of just compensation. Accordingly, we find the circuit court did not err by applying section 28-2-460.

III. Equitable Interest

Finally, the School District asserts the equitable nature of its interest does not preclude it from having a jury trial. We disagree. As we stated, the parties entitled to a jury trial in a condemnation action are the landowner and condemnor. When, as here, the landowner and condemnor have settled their dispute, the Act does not require a jury trial on the issue of just compensation for any other parties that do not fall into one of these categories. Therefore, we find the circuit court did not err by finding the School District was not entitled to a jury trial to determine the value, if any, of its equitable interest in the 3.74-acre portion of the property.

CONCLUSION

For the foregoing reasons, the circuit court's order transferring the action to the non-jury trial roster is

AFFIRMED.

HILL and HEWITT, JJ., concur.