South Carolina Law Review

Volume 47
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 13

Fall 1995

Workers' Compensation

WORKERS' COMPENSATION

I. COURT OVERRULES PREVIOUS PRECEDENT REGARDING VENUE FOR APPEAL OF WORKERS' COMPENSATION COMMISSION DECISIONS

In *Dove v. Gold Kist, Inc.*[1] the South Carolina Supreme Court held that a party may appeal a decision of the Workers' Compensation Commission in any county in which the employer resides, the county in which the accident occurred, or the county in which the employer had its principal office. *Dove* expressly overruled *Hedgepath v. Stanley Home Products, Inc.*,[2] which had been reaffirmed in *Chitty v. Allied Chemical Co.*[3] and *Williams v. South Carolina Department of Wildlife.*[4] Although *Dove* will probably not have a marked effect on Workers' Compensation practice in South Carolina, it will give attorneys appealing Workers' Compensation Commission decisions some leeway in choosing a forum in which to appeal and will ensure that a circuit court has at least limited jurisdiction to transfer an appeal which is not properly before it.

Cecil Dove (Dove) suffered an accidental injury in the course of his employment.[5] The injury occurred at the Lexington County, South Carolina, plant of his employer, Gold Kist, Inc. (Gold Kist). Gold Kist accepted liability for the injury and paid Dove temporary disability compensation during the time he was out of work.[6]

Dove filed a claim with the Workers' Compensation Commission regarding the extent of his disability.[7] At a hearing in Lexington County, the single commissioner found that Dove had sustained a twenty-five percent permanent impairment of his right arm.[8]

Both parties appealed to the full commission. On December 20, 1991, the full commission affirmed and amended the single commissioner's order, permitting Gold Kist to take a credit for overpayment of temporary total

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1. ___ S.C. ___, 442 S.E.2d 598 (1994).

2. 265 S.C 248, 217 S.E.2d 782 (1975), *overruled by* Dove v. Gold Kist, Inc., ___ S.C. ___, 442 S.E.2d 598 (1994).

3. 285 S.C. 106, 328 S.E.2d 476 (1985), *overruled by* Dove v. Gold Kist, Inc., ___ S.C. ___, 442 S.E.2d 598 (1994).

4. 295 S.C. 98, 367 S.E.2d 418 (1987), *overruled by* Dove v. Gold Kist, Inc., ___ S.C. ___, 442 S.E.2d 598 (1994).

5. *Dove*, ___ S.C. at ___, 442 S.E.2d at 599.

6. *Id.* at ___, 442 S.E.2d at 599.

7. *Id.* at ___, 442 S.E.2d at 599.

8. Record at 7.

disability compensation that it paid Dove after the commissioner determined that he had reached maximum medical improvement.[9]

On February 5, 1992, Dove filed a Petition and Notice of Appeal with the court of common pleas for Richland County.[10] Gold Kist filed a Motion to Dismiss, asserting in part that the court lacked subject matter jurisdiction under section 42-17-60.[11] The presiding judge granted the motion to dismiss, holding that the South Carolina Supreme Court's decision in *Hedgepath* precluded the court both from hearing the appeal and from transferring the appeal to the proper forum.[12]

Dove appealed the trial court's dismissal to the South Carolina Supreme Court.[13] Although the holding in *Hedgepath* was secure, having been reaffirmed as recently as 1985 and again in 1987, the *Dove* court adopted a different reading of section 42-17-60, which reads in pertinent part:

> [E]ither party to the dispute, within thirty days from the date of the award . . . may appeal from the decision of the commission to the court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.[14]

Previously, the court construed this section as jurisdictional, providing only two possible fora for an appeal from the Workers' Compensation Commission.[15] The first possible forum, which was undisputed in this case, was the county in which the accident happened. The second possible forum was the county in which "the employer resides or has his principal place of business."[16] Thus, for employers with principal offices outside the state, jurisdiction was held to be proper only in the county in which the accident occurred.[17]

Under this analysis, the court in *Hedgepath* denied the circuit court of Richland County jurisdiction to hear an appeal from the Industrial Commis-

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9. *Id.* at 7-9.

10. *Id.* at 38.

11. S.C. CODE ANN. § 42-17-60 (Law. Co-op. Supp. 1994).

12. Record at 9-11.

13. *Dove*, ___ S.C. at ___, 442 S.E.2d at 598.

14. S.C. CODE ANN. § 42-17-60 (Law. Co-op. Supp. 1994).

15. *See Chitty*, 285 S.C at 107, 328 S.E.2d at 476; *Hedgepath*, 265 S.C at 250, 217 S.E.2d at 783.

16. S.C. CODE ANN. § 42-17-60 (Law. Co-op. Supp. 1994).

17. *See, e.g., Hedgepath*, 265 S.C. at 250, 217 S.E.2d at 783 (holding that because employer's principal office was in Massachusetts, claimant needed to bring appeal in county where accident occurred).

sion.[18] The claim concerned the death of Bessie Hedgepath (Hedgepath), which allegedly arose out of and in the course of her employment with Stanley Home Products, Inc. (Stanley) in Orangeburg County. Stanley asserted, and the circuit court found, that its principal office was located in Westfield, Massachusetts.[19] The court applied section 72-356 of the 1962 Code of Laws, which read: "either party to the dispute may . . . appeal from the decision of the commission to the court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office."[20] The court then explained that because the accident did not occur in Richland County, and because Stanley's principal office was not in Richland County, "the appeal was not to the court of common pleas in a county provided for in the pertinent code section."[21]

The court then addressed Hedgepath's contention that the statute was not jurisdictional, but merely controlled the venue of appeals from the Commission.[22] The effect of this construction would be that the lower court could take at least limited jurisdiction and transfer the case to the proper forum, rather than dismissing the case for lack of subject matter jurisdiction.

The *Hedgepath* court reasoned that the South Carolina venue statutes had consistently been construed as jurisdictional in nature.[23] Thus, under the venue statutes, absent some other specific provisions the circuit courts generally had no jurisdiction to transfer cases improperly before them. The court recognized such a provision in section 10-310,[24] which expressly gives courts that otherwise lack jurisdiction the limited jurisdiction to transfer a case to the proper forum when an action is not brought in the proper county.[25] Because there was no similar provision granting the court of common pleas this latitude in Workers' Compensation appeals, the *Hedgepath* court held that the applicable statute did not even confer upon the Richland County court the limited authority to transfer the appeal to Orangeburg County.[26]

The South Carolina Supreme Court reaffirmed the *Hedgepath* decision in *Chitty v. Allied Chemical Co.*[27] Louise Chitty (Chitty) appealed a ruling of the Industrial Commission to the Court of Common Pleas of Richland County. The parties agreed that Chitty's accident occurred in Lexington County and

18. *Id.* at 251-53, 217 S.E.2d at 783.

19. *Id.* at 250-51, 217 S.E.2d at 783.

20. S.C. CODE ANN. § 72-356 (1962). The 1962 Code provision is substantially similar to S.C. CODE ANN. § 42-17-60 (Law. Co-op. Supp. 1994).

21. *Hedgepath*, 265 S.C. at 251, 217 S.E.2d at 784.

22. *Id.* at 251-52, 217 S.E.2d at 784.

23. *Id.*

24. S.C. CODE ANN. § 10-310 (Law. Co-op. 1962).

25. *Hedgepath*, 265 S.C. at 251-52, 217 S.E.2d at 784.

26. *Id.* at 252-53, 217 S.E.2d at 784.

27. 285 S.C. 106, 328 S.E.2d 476 (1985).

that Allied Chemical Company's principal place of business was in Lexington County. Allied moved to dismiss for lack of jurisdiction. The motion was denied and Allied appealed.[28] In a brief opinion, the supreme court acknowledged that "[t]his precise question has been decided in *Hedgepath*."[29] Without addressing whether where "the employer resides or has his principal office" was potentially multiple locations or merely one location, the court held, once again, that the lower court lacked even the limited jurisdiction or authority to transfer the case to the proper forum.[30]

The same question came before the court for a third time in *Williams v. South Carolina Department of Wildlife*.[31] The claimant, Josephine Williams (Williams) alleged that she suffered a permanent disability arising out of and in the scope of her employment with the Department of Wildlife.[32] After a determination that her injury did not arise out of and in the course of her employment,[33] Williams appealed in the circuit court of Fairfield County, where she moved after terminating her employment.[34] Williams contended that, although the holdings in *Hedgepath* and *Chitty* were correct, those holdings had been superseded by the Administrative Procedures Act (APA)[35] and subsequent decisions based on the APA.[36]

The South Carolina Supreme Court decided several cases under the APA that broadened the jurisdictional scope of the circuit courts. Williams argued that these cases gave the circuit court in Fairfield County jurisdiction over the appeal. In *1972 Capri v. South Carolina Department of Highways & Public Transportation*[37] the court held that petitions for review under the APA could be brought in any court that was not arbitrary or unreasonable.[38] In *Lark v. Bi-Lo, Inc.*[39] the court determined that the scope of review provisions in the APA implicitly repealed the conflicting provisions in the Workers' Compensation Act.[40] Williams asserted that this construction of the APA should permit Industrial Commission appeals to be brought in any county that bears a rational relation to the controversy.[41]

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28. *Id.*
29. *Id.* at 107, 328 S.E.2d at 476.
30. *Id.* at 107, 328 S.E.2d at 477.
31. 295 S.C. 98, 367 S.E.2d 418 (1987).
32. *Id.* at 98-99, 367 S.E.2d at 418.
33. *Id.* at 99, 367 S.E.2d at 418.
34. *Id.*
35. S.C. CODE ANN. § 1-23-310 to -400 (Law. Co-op. 1976).
36. *Williams*, 295 S.C. at 99, 367 S.E.2d at 418.
37. 274 S.C. 88, 261 S.E.2d 307 (1979).
38. *Id.* at 91, 261 S.E.2d at 308.
39. 276 S.C. 130, 276 S.E.2d 304 (1981).
40. *Id.* at 134, 276 S.E.2d at 306.
41. *Williams*, 295 S.C. at 99-100, 367 S.E.2d at 419.

However, the court dismissed Williams' argument, explaining that the APA would control only where it specifically provided for the proper forum for judicial review.[42] The court found that because the APA was silent with regard to judicial review of Workers' Compensation appeals, the applicable Workers' Compensation Act section governed.[43] The court relied on its holdings in *Hedgepath* and *Chitty* to deny the appeal,[44] again without addressing the issue of whether where an "employer resides or has his principal office" is merely one, or potentially multiple, locations.

In *Dove* the court adopted a new interpretation of the statute, distinguishing an employer's residence from its principal office, a distinction that had been ignored in *Hedgepath* and its progeny.[45] Thus, an appeal could properly be brought where the accident occurred, where the employer has its principal office, or where the employer resides. An employer was held to reside in any county in which the employer maintained an office and an agent for the transaction of business, or where the employer owned property and transacts business.[46]

The court used a dual-pronged analysis in reversing the trial court's dismissal of Dove's appeal. First, the court determined that section 42-17-60 gave the court of common pleas of Richland County jurisdiction over the subject matter. The court distinguished subject matter jurisdiction, which is the power to hear and determine cases of the general class to which the proceedings in question belong, from venue, which is the geographical location or place of a trial.[47] The court stated that because there is "but one Circuit Court in South Carolina, with uniform subject matter jurisdiction *throughout the State,*" the statutory reference to the "court of common pleas" referred to the South Carolina Court of Common Pleas as a whole, not to a particular circuit or county.[48] Accordingly, the courts of common pleas throughout the state were held to have subject matter jurisdiction to hear appeals from the decisions of the Workers' Compensation Commission.[49] The court found that because the circuit court of Richland County had subject matter jurisdiction over the appeal, the dismissal was error.[50]

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42. *Id.* at 100, 367 S.E.2d at 419.

43. *Id.*

44. *Id.*

45. *Dove*, ___ S.C. at ___, 442 S.E.2d at 600-01; *see Hedgepath*, 285 S.C. 106, 328 S.E.2d 476 (1975). This was Dove's argument before the lower court as well. *See* Record at 26-27.

46. *Dove*, ___ S.C. at ___, 442 S.E.2d at 600-01.

47. *Id.* at ___, 442 S.E.2d at 600.

48. *Id.* at ___, 442 S.E.2d at 600 (citing Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980)).

49. *Id.* at ___, 442 S.E.2d at 600.

50. *Id.* at ___, 442 S.E.2d at 600.

After determining that the court of common pleas sitting in Richland County had subject matter jurisdiction, the court next analyzed the proper venue under section 42-17-60 for such an appeal. The court adopted Dove's proposed reading of the statute: that the statute also provided that venue was proper in any county in which the employer resides, as well as where the injury occurred and where the employer has its principal office.[51] The court determined that traditional definitions of the "residence" of a corporation were applicable and adopted the definitions applied in *Lucas v. Atlantic Greyhound Federal Credit Union*[52] and *Thomas & Howard Co. v. Wetterau, Inc.*,[53] which held that a corporation resides anywhere it maintains an office and agent for the transaction of business or anywhere it owns property and transacts business.[54] The court then remanded the appeal for a determination as to whether Gold Kist maintained an agent in Richland County such that the circuit court in Richland County would be the proper venue for the appeal.[55]

The court's departure from *Hedgepath* and its progeny may be surprising given this state's tendency to construe venue statutes as jurisdictional in nature. Indeed, the court's reinterpretation of the statute as providing jurisdiction over appeals from the full commission to circuit courts in every county throughout the state is arguably a strained construction because it fails to account for the words of limitation which follow the term "court of common pleas" in section 42-17-60. Now, the first determination for a court in such an appeal is to determine whether the appeal has been brought in the proper venue. If the circuit court decides that the appeal has indeed been brought in the wrong venue, then it must transfer the appeal. This avoids the problem a claimant may face if the court were to dismiss the case, after which the claimant may be barred from refiling in the appropriate court by the thirty-day statutory limitation.

The holding not only gives the court of common pleas jurisdiction to hear the case, but also effectively broadens the likelihood that a specific circuit court will have proper venue. If an employer "resides" in the county where the appeal is brought, venue will be proper. Thus, a court will have authority to adjudicate appeals as long as the employer maintains an office, an agent, and transacts business in the county, or owns property and transacts business there.

It is unlikely that the holding in *Dove* will have any marked impact on Workers' Compensation practice in South Carolina. Although the holding removes the danger that an improperly-filed appeal will be dismissed and then

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51. *Dove*, ___ S.C. at ___, 442 S.E.2d at 600.
52. 268 S.C. 30, 231 S.E.2d 302 (1977).
53. 291 S.C. 237, 353 S.E.2d 141 (1987).
54. *Dove*, ___ S.C. at ___, 442 S.E.2d at 600-01.
55. *Id.* at ___, 442 S.E.2d at 601.

barred by the thirty-day limitation, this currently occurs in very few cases. Thus, the only likely practical effect of the holding is that it allows appeals to be brought in locations more convenient to the appealing party. An appealing party who wishes, for example, to sue where costs would be low will be able to do so as long as the employer has an agent for the transaction of business present in the county or owns property and transacts business in the county.

E. Raymond Moore, III

II. COURT CONSIDERS EXCLUSIVITY OF REMEDY UNDER SOUTH CAROLINA WORKERS' COMPENSATION ACT

In *Brown v. Owen Steel Co.*[1] the South Carolina Court of Appeals held that a claimant is limited to scheduled compensation when the claimant suffers a scheduled loss not accompanied by additional complications affecting other parts of the body.[2] In so holding, the court of appeals reinforced the validity in South Carolina, at least under certain circumstances, of the doctrine of exclusiveness of scheduled allowances, bucking the trend in other jurisdictions away from an exclusiveness rule.[3]

Brown injured his back in an on-the-job accident on February 16, 1990. His employer, Owen Steel, and its insurance carrier subsequently sought permission from the Workers' Compensation Commission (Commission) to cease payment of temporary disability benefits. The full Commission affirmed the single Commissioner and found that Brown had reached maximum medical improvement on January 31, 1992. The Commission awarded 35 percent permanent partial disability to the back under section 42-9-30, the scheduled member section of the South Carolina Code.[4] Brown appealed to the circuit

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1. ___ S.C. ___, 450 S.E.2d 57 (Ct. App. 1994), *cert. denied,* (Nov. 4, 1994).

2. *Id.* at ___, 450 S.E.2d at 58.

3. For a discussion of the majority and minority approaches, see *infra* notes 28-31 and accompanying text.

4. *Brown,* ___ S.C. at ___, 450 S.E.2d at 57. Section 42-9-30 provides in part:

> In cases included in the following schedule, the disability in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein, to wit:
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> . . . .
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> (19) For the total loss of use of the back, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks. The compensation for partial loss of use of the back shall be such proportions of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is fifty percent or more loss of use of the back, in which event the injured employee shall be deemed to have suffered total and permanent disability and compensated therefor under . . . § 42-9-10.

S.C. CODE ANN. § 42-9-30 (Law. Co-op. 1976 & Supp. 1994).

court, arguing that he should have been awarded benefits under section 42-9-20 instead of section 42-9-30.[5] The circuit court affirmed the full Commission and Brown appealed.[6]

On appeal, Brown claimed that an injured employee who meets the criteria for benefits under two sections of the code should be allowed to receive compensation under the section providing greater benefits. Brown first urged the court to invoke the "pervasive canon of statutory construction" that, where a statute creates two side-by-side remedies, the claimant should benefit from the more favorable one.[7] Brown also noted that this approach has been embraced in North Carolina.[8] Because South Carolina modeled its Workers' Compensation Act after the North Carolina Code and because South Carolina courts have held that North Carolina decisions interpreting the North Carolina Code should be given great weight in South Carolina, Brown argued that South Carolina should follow the North Carolina rule.[9]

The court of appeals refused to construe the South Carolina Code as automatically allowing a claimant eligible for scheduled injury benefits to proceed under the code sections dealing with general disability. Rather, the court cited the rule expressed in two earlier South Carolina Supreme Court cases, *Singleton v. Young Lumber Co.*[10] and *Moss v. Davey Tree Expert Co.*,[11] and denied Brown the relief sought.[12]

In *Singleton* and *Moss* the South Carolina Supreme Court expressly adopted the exclusivity rule in cases where the scheduled loss is not accompa-

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5. *Brown*, ___ S.C. at ___, 450 S.E.2d at 58. Section 42-9-20 provides in part:

> Except as otherwise provided in § 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay . . . a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury.

S.C. CODE ANN. § 42-9-20 (Law. Co-op. 1976).

6. *Brown*, ___ S.C. at ___, 450 S.E.2d at 58.

7. Brief of Appellant at 3 (quoting 1C ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 58.25 (1987)).

8. *Id.; see also* Gupton v. Builders Transp., 357 S.E.2d 674, 678 (N.C. 1987) (holding that a claimant eligible for either scheduled injury benefits or partial incapacity benefits may elect the more generous remedy); Whitley v. Columbia Lumber Mfg. Co., 348 S.E.2d 336, 340-42 (N.C. 1986) (rejecting the notion that the statutory section governing scheduled injuries provides an exclusive remedy).

9. Brief of Appellant at 4; *see, e.g.*, Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 348, 200 S.E.2d 64, 67 (1973) (stating that North Carolina decisions construing the Act are "entitled to great weight").

10. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

11. 245 S.C. 127, 132, 139 S.E.2d 532, 535 (1964).

12. *Brown*, ___ S.C. at ___, 450 S.E.2d at 58.

nied by additional complications affecting other parts of the body.[13] If, however, the claimant shows that some other part of the body is affected by the loss of the scheduled member, the schedule allowance for the lost member is not exclusive.[14] The court of appeals in *Brown* reasoned that the policy underlying the rule is that when the injury affects other parts of the body beyond the scheduled member, the resulting incapacity is greater than that flowing from an injury exclusive to the scheduled member. Accordingly, a claimant should be provided with an opportunity to establish a disability greater than the presumptive default provided by the scheduled member section.[15] If, however, the disabling condition is limited to the scheduled member, South Carolina courts "are not at liberty to extend by construction the meaning implicit in the language found in the Workmen's Compensation Act in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt."[16] As a result, because Brown did not argue on appeal that his back injury had affected other parts of his body or had contributed to an impairment beyond the scheduled member, the court of appeals concluded that the Commission and circuit court had rightfully required him to proceed under scheduled member section 42-9-30.[17]

By reiterating the validity of the *Singleton* rule, the court of appeals apparently satisfied itself that this rule is not inconsistent with language previously expressed by the South Carolina Supreme Court[18] in *Fields v. Owens Corning Fiberglas*.[19] In *Fields* the supreme court stated:

> Under our Worker's [sic] Compensation Act, a claimant may proceed under § 42-9-10 or § 42-9-20 to prove a general disability; *alternatively*, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. It is well-settled that an award under the general disability

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13. *Moss*, 245 S.C. at 132, 139 S.E.2d at 535 (citing *Singleton*, 236 S.C. 454, 114 S.E.2d 837); *Singleton*, 236 S.C. at 471, 114 S.E.2d at 845.

14. *Singleton*, 236 S.C. at 471, 114 S.E.2d at 845 (citing, *inter alia*, Armour & Co. v. Walker, 107 S.E.2d 691 (Ga. Ct. App. 1959); Godbee v. American Mut. Liab. Ins. Co., 96 S.E.2d 648 (Ga. Ct. App. 1957); and Consolidated Underwriters v. Langley, 170 S.W.2d 463 (Tex. 1943)).

15. *Brown*, ___ S.C. at ___, 450 S.E.2d at 58 (citing 1C LARSON, *supra* note 7, § 58.21 (1992)).

16. *Singleton*, 236 S.C. at 473, 114 S.E.2d at 846 (citing Rudd v. Fairforest Finishing Co., 189 S.C. 188, 200 S.E. 727 (1939)).

17. *Brown*, ___ S.C. at ___, 450 S.E.2d at 58. Brown also suffered from sexual dysfunction "triggered" by his back injury. The single Commissioner characterized this dysfunction as a non-disability "side effect," but nonetheless held that Brown was entitled to additional medical treatment for that condition under South Carolina Code § 42-15-60. Record at 4-7.

18. *See Brown*, ___ S.C. at ___, 450 S.E.2d at 58.

19. 301 S.C. 554, 393 S.E.2d 172 (1990).

> statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. The commission may award compensation to a claimant under the scheduled loss statute rather than the general disability statutes so long as there is substantial evidence to support such an award.[20]

The court of appeals previously had occasion to examine *Field*'s "alternatively" language in *Green v. City of Columbia*.[21] In *Green* the single Commissioner required the claimant to elect between pursuing a wage loss claim for general disability under section 42-9-20 or pursuing compensation for disability to a scheduled member under section 42-9-30.[22] Because the claimant did not raise the election issue in his application for review, it was not preserved on appeal and the Commissioner's ruling accordingly became the law of the case.[23] Nonetheless, the court of appeals, citing *Fields* in a footnote, opined that requiring the claimant to elect between section 42-9-20 and section 42-9-30 may have been in error.[24] In assessing the meaning of the term "alternatively," the court of appeals stated: "The Supreme Court [in *Fields*] did not hold that the remedies afforded by these sections were mutually exclusive. In fact, the implication is that the remedies available under § 42-9-30 are also available under §§ 42-9-10 or 42-9-20."[25]

By its very nature, an alternative implies a choice between one of a number of things from which one must choose.[26] Thus, a literal reading of *Fields* suggests that a claimant suffering a clear-cut injury to a scheduled member cannot be forced to proceed under section 42-9-30. Such a contention is the antithesis of the rule expressed in *Singleton*, where the legislative presumption of lost earning capacity corresponding to a claimant's degree of impairment controls.[27] If, however, the supreme court used the term "alternatively" merely to juxtapose the different manners of proof demanded by the general disability statutes on the one hand and the scheduled member

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20. *Id.* at 555, 393 S.E.2d at 173 (citing Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)) (citation omitted) (emphasis added).

21. ___ S.C. ___, 427 S.E.2d 685 (Ct. App. 1993) (per curiam).

22. *Id.* at ___, 427 S.E.2d at 686.

23. *Id.* at ___, 427 S.E.2d at 686-87; *see* S.C. CODE ANN. § 42-17-50 (Law. Co-op. 1976 & Supp. 1994) (establishing the procedures for review and rehearing by the Commission).

24. *Id.* at ___ n.2, 427 S.E.2d at 687 n.2.

25. *Id.* at ___ n.2, 427 S.E.2d at 687 n.2.

26. The word "alternative" can be defined as "the *choice* between two *mutually exclusive* possibilities." THE AMERICAN HERITAGE DICTIONARY 99 (2d. Ed. 1976) (emphasis added).

27. *See* Lyles v. Quantum Chem. Co., ___ S.C. ___, ___, 434 S.E.2d 292, 295 (Ct. App. 1993) (stating that by including specific body members within § 42-9-30, the legislature presumes that a claimant has lost earning capacity to a degree which corresponds to the claimant's degree of impairment), *cert. denied*, (Apr. 8, 1994).

section on the other, then *Fields*, *Brown*, and *Green* may be, from a doctrinal standpoint, reconcilable.

By ruling out exclusivity of remedy when the effect of the loss of the scheduled member extends to other parts of the body, the court of appeals' decision in *Brown* is in accord with most other jurisdictions that have considered the issue.[28] In cases where there has been a clear-cut loss of the scheduled member with no complications affecting another part of the body, however, most jurisdictions now hold that scheduled recovery is not exclusive and that a scheduled loss may be treated as a partial or total disability of the body as a whole.[29] Accordingly, the South Carolina rule as articulated in *Singleton*, *Moss*, and *Brown* expresses a minority view on this latter issue.

Other jurisdictions rejecting the South Carolina approach have reasoned that where the workers' compensation act provides for both general disability and scheduled loss and does not expressly provide that either is exclusive, the act should be liberally construed. That is, "destruction of the more favorable remedy should not be read into the act by implication in a case when [the] claimant is able to prove a case coming under either [alternative] heading[s]."[30] The North Carolina Code, for example, contains the limiting phrase "in lieu of all other compensation" in the statutory section dealing with scheduled injuries.[31] The North Carolina Supreme Court has read this phrase as precluding only multiple recovery, but not as precluding a worker from recovering exclusively under an alternative statutory section where the remedy is more generous.[32]

By rejecting the North Carolina approach and refusing to follow the trend toward liberal interpretation of workers' compensation statutes, the *Brown* decision demonstrates a reliance upon established precedent as well as a reluctance to engage in judicial enlargement of the South Carolina Workers' Compensation Act. In essence, the court of appeals has deferred to the perceived intention of the General Assembly to specify with certainty the amount of compensation paid to a worker who sustains a scheduled injury set forth in section 42-9-30. Because of the continued uncertainty surrounding the

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28. *See, e.g.*, Liberty Mut. Ins. Co. v. Hayes, 160 S.E.2d 902, 903 (Ga. Ct. App. 1968) (claimant not limited to schedule benefits for back sprain which aggravated congenital defect and resulted in permanent disability to hip); Jones v. Murdoch Ctr., 327 S.E.2d 294 (N.C. Ct. App. 1985) (claimant not limited to schedule benefits for back injury which caused severe pain radiating into claimant's arms and legs). *See generally* 1C LARSON, *supra* note 7, § 58.21 (explaining that the great majority of modern decisions agree that the schedule allowance is not exclusive when the effects of the loss extend to other parts of the body and interfere with their efficiency).

29. 1C LARSON, *supra* note 7, § 58.23.

30. *Id.*

31. N.C. GEN. STAT. § 97-31 (1991).

32. Gupton v. Builders Transp., 357 S.E.2d 674, 678 (N.C. 1987).

use of the term "alternatively" in *Fields*, in future decisions the court should further clarify the relationship between the general disability and scheduled member sections.

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