THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From The
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC File No. 1908703
Appellate Case No. 2022-000067

KYLE R. BAGLEY, Employee..... Appellant,

v.

JN FIBERS, INC., D/B/A SUN FIBER, LLC, Employer, and
GREAT AMERICAN INSURANCE COMPANY, Carrier..... Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Other Authorities

STATEMENT OF ISSUE ON APPEAL

Whether the Workers' Compensation Commission's reversal of the single Commissioner's Order violates the substantial evidence rule, and/or, whether the Panel's denial of benefits for Claimant's left arm/hand contractures, left drop foot, aggravation to pre-existing psyche problems, and head injury is controlled by legal errors in requiring medical imaging to prove Claimant's injuries were related to his work-related accident.

STATEMENT OF THE CASE

A. Factual Background

Claimant, Kyle Bagley, has a seventh-grade education but was able to attain his GED. (R. p. 643, lines 1-3). Throughout his working life Claimant has done trade work, primarily construction related or maintenance related. (Id. lines 8-17). At the time of the accident at issue before the Court, Claimant worked as a maintenance technician at the Defendant-Employer, JN Fibers, dba Sun Fiber, LLC, where, on June 14, 2019, he was struck on the top of his head by a very large bale of fiber, weighing between 600-700 pounds, as it came down the roller ramp that he was knelt beside as he was in the process of welding a part of the ramp to the floor. (R. p. 667, lines 17-24 – R. p. 668, lines 1-22). The force of the impact to his head was so hard that it knocked the Claimant back several feet where he landed on his backside. *Id.*

Frustrated and stunned by the accident, Claimant got up off the floor turned the welder off and went out and sat in his truck for an hour or so to gather himself together after this injury. (R. p. 662, lines 14-20 – R. p. 663, lines 9-11). After coming back inside the plant from his truck, Claimant completed one more welding job that took 10 to 15 minutes to complete and finished his shift. (R. p. 663, lines 3-4, lines 14-16 – R. p. 664, lines 2-3). Following his shift, Claimant left to go home but returned to the Defendant-Employer around 8:20 a.m. to inform management about the accident that happened earlier that morning. (R. p. 667, lines 5-14). The manager he spoke

with, Mr. Winters, asked Claimant if he thought he needed medical attention, and Claimant replied, "no" because he "didn't feel like anything was broke." (*Id.*, line 25 – R. p. 668, lines 1-5).

When Claimant got home that Friday morning following the accident he went straight to bed and slept all day, and Saturday, he "didn't do nothing," "was just sluggish and sore." (*Id.*, lines 16-23 – R. p. 674, line 10). "Sunday was Father's Day and that's when I started feeling a little bit icky," "[e]verything started getting nasty feelings and you get to feeling nasty," with pain traveling from his neck, down his back, through his groin, down his left leg, and terminating in his foot." (R. p. 670, lines 2-4 – R. p. 673, lines 11-14 – R. p. 674 lines 13-15).

Because he is the only maintenance technician on his shift, Claimant attempted to return to work Monday evening, June 17, 2019. (R. p. 668, lines 23-25). Nauseous, Claimant left early that night and went to Chester Regional Medical Center concerned that maybe he had eaten something bad. (R. p. 669, lines 7-11). However, once at Chester Regional, Claimant explained to the doctor what had happened at work, the headache he had, and the sharp pain he was feeling down his back - the doctor ordered CT scans of Claimant's cervical, thoracic, and lumbar spine. (R. p. 670 lines 16-22 – R. pp. 254, 256).

Claimant was released from Chester Regional after review of the CT scans showed maintained disc height and no acute fracture. (R. pp. 254, 263). On June 25, 2019, Claimant presented to MUSC Lowry's Family Medicine, his primary car provider, for a post-ER follow-up and his primary care providers evaluation revealed the following:

> Left shoulder: He exhibits decreased range of motion, tenderness, bony tenderness, pain and decreased strength. He exhibits no swelling, no crepitus, no deformity, and normal pulse.
>
> Cervical back: He exhibits decreased range of motion, tenderness, bony tenderness, pain and spasm. He exhibits no swelling.

> Thoracic back: He exhibits decreased range of motion, tenderness, bony tenderness, pain and spasm.
>
> Lumbar back: He exhibits decreased range of motion, tenderness, bony tenderness, pain and spasm. He exhibits no swelling, no edema, no deformity, and normal pulse.
>
> (R. p. 276).

Claimant's first work comp directed care came two days later when he was sent to Riverview Medical Center/Occumed where he was written out-of-work and MRI's of the cervical, thoracic, and lumbar spine were ordered. (R. p. 282). The intake paperwork from this appointment with the diagram of the human body, completed by Claimant, provides illustration of the areas of his body that were bothering him. (R. p. 279). Claimant was referred to see an Ortho specialist by this provider.

On July 5, 2019, Claimant was taken by his wife to Midlands Ortho and Neurosurgery where he was seen by newly licensed neurologist, Dr. Michael Brown. (R. p. 295 – R. p. 752, lines 17-19). Dr. Brown opined that Claimant's symptoms were consistent with occipital neuralgia and two occipital nerve block injections were recommended and then provided at his follow-up appointment on July 11, 2019. (R. pp. 294, 299 – R. p. 757, lines 15-25). At both visits, Dr. Brown observed the left arm/elbow/hand contracture and "extremity symptoms and muscular strain" that Claimant had, and physical therapy was prescribed to address these issues. (R. pp. 293, 296 – R. p. 754, lines 23-24 – R. p. 762, lines 6-7). At his second visit, prior to Claimant undergoing the prescribed physical therapy, Dr. Brown rated and released Claimant <u>from a neurosurgical standpoint</u> and assigned a 5% permanent physical impairment to the whole person for cervical injuries and filled out a Form 14B- wherein it is noted and indicated that Claimant did not need any surgical treatment but needed further, non-surgical, medical treatment as a result of his compensable injury. (R. pp. 55, 314). At his deposition, Dr. Brown clarified that his "release" was

only a release from a neurosurgical perspective and "he did still have issues, which were nonsurgical" in nature and therefore required further treatment... and testified in his deposition that "when I release the patient back to the care of another physician, it is with anticipation that they will manage those other nonsurgical issues." (R. p. 294 – R. p. 761, lines 18-24).

On July 22, 2019, Claimant, chaperoned by his wife, presented to Your Life Wellness Physical Therapy where the Objective Directed Timed Codes show the following was performed:

> Neuromuscular Re-Education – Proprioception/Balance Training; Posture; Standing posture and weight shift; Patient and wife education to consciously relax left UE and shift weight to the left LE; Instructed in postural ex. Inf front of mirror.
>
> Manual Therapy – General joint mobilization/oscillations to the left shoulder/elbow/hand to encourage normal tone and extension; General mobilization/oscillations to left hip and knee to encourage normal tone for WB/weight shifting.
>
> (R. p. 316)

With Claimant's symptoms persisting, he was seen by Dr. Jarrell at Carolina Neurosurgery and Spine on August 22, 2019, and a CT scan of the head/brain was ordered. (R. p. 391). With a CT scan that was normal, Dr. Jarrell concurred with Dr. Brown that Claimant's condition was not one that needed neurosurgical intervention and referred Claimant to OrthoCarolina for an orthopedic evaluation of his left upper extremity and left drop foot as a result of this injury to his head/cervical area. (R. p. 399).

Claimant, again chaperoned by his wife, was seen by Board Certified Orthopedic Surgeon, Dr. David DuPuy, of OrthoCarolina, on September 12, 2019. (R. p. 894, lines 17-25). Dr. DuPuy's physical examination of Claimant found the following:

> He has limited left lateral rotation and holds his head somewhat in flexion. He has the classic decorticate position of the left hand with tight finger flexion into the palm, thumb adduction, wrist flexion, forearm pronation...He has a dropfoot appearance on the left but does have some ability to dorsiflex nearly to neutral and has a 5- or 6-beat clonus when he does do the extension.

(R. p. 407)

Based on his physical examination, Dr. DuPuy ordered an MRI of the Claimant's brain, an extension brace for his fixed contracture on the left hand, a dropfoot brace for the left foot, and stated that "clearly, he [Claimant] is unable to work even at light duty at this time." (R. pp. 408, 406). Claimant's brain MRI revealed a single 4 mm bright spot in the right parietal subcortical white matter and mild lateral ventricle asymmetry that was within normal variation. (R. p. 416). The MRI results notwithstanding, Dr. DuPuy's medical record from September 26, 2019, still noted that Claimant's examination was of a decorticate injury to the right side. (R. p. 417). Because of this, Dr. DuPuy ordered an EMG nerve conduction study of the left upper extremity to be followed by a neurology evaluation to determine "whether any of this injury is related to cervical or more peripheral rather than central from the brain...and he is completely out of work..." *Id.*

At his April 29, 2020, deposition, Dr. DuPuy opined that while he was surprised by the lack of objective imaging that would overtly demonstrate a neurologic origin for Claimant's physical examination, "it doesn't mean that an injury can't have occurred at the cellular, microscopic level...and that's why he would defer to the **neurology** subspecialist." (R. p. 931, lines 18-24 – R. p. 932, lines 4-7).

On Dr. DuPuy's referral, Claimant presented to the Neurological Institute on October 31, 2019, for evaluation by Dr. T. Hemanth Rao. (R. pp. 431-433). Consistent with his prior evaluations, Dr. Rao's examination found the following:

> Musculoskeletal - Tenderness of the cervical, thoracic, and lumbar spines with very tight muscles.

> Motor – The left upper extremity is held in flexion especially at the wrist and long, ring, and 5th digits. The left foot is held in inversion. He has decreased muscle strength of the left upper and lower extremities and a partial left drop.
>
> Sensation – Decreased in the left upper extremity especially of the palm of the hand, long, right and 5th digits. Decreased sensation of the left lower extremity on the plantar and dorsal foot as well in the [left] lower leg.
>
> Reflexes – Brisk of the left upper and lower extremities. Plantar response was silent on the L side.
>
> (R. p. 433).

Dr. Rao ordered an EEG for the Claimant, which revealed a 'left frontal slow wave focus' but was otherwise normal and given the Claimant's presentation, Dr. Rao ordered a 96-hour video monitored EEG and participation in the clinic's outpatient brain injury program for further targeting of the exact issues/injuries sustained in this workplace accident. (R. pp. 435, 437, 439). Because Defendants denied that Claimant's ongoing condition were the result of the admittedly compensable work-related injury, Claimant has not undergone the 96-hour video monitored EEG nor participated in the brain injury program- as he also does not have any health insurance nor the financial resources to afford/pay for such on his own.

Several of the providers treating the Claimant for his physical limitations/problems also noted that the Claimant was experiencing anxiety, depression, and mood disorder, that was at the very least exacerbated by Claimant's physical condition. It is uncontested that Claimant had prior anxiety related to stressor at work but that he was significantly more depressed now and that was "more than ever." (R. p. 165, lines 2-15 – R. pp. 553-561). Defendants sent Claimant to be evaluated by Dr. Paez, who evaluated the Claimant and recommended that he "attend psychotherapy to address his adjustment issues" and to get used to his "new normal" because of this workplace incident and the injuries he sustained. (R. pp. 553-561).

At Defendants' direction, Claimant had two IMEs with neurosurgeon, Dr. Brett Gunter at Lexington Brain and Spine Center. The first of which took place on March 10, 2020 and the second on July 8, 2020. (R. pp. 621-629). The March 10, 2020, examination was limited to Claimant's lumbar spine only. Dr. Gunter's review of the Claimant's MRI of his Lumbar Spine did not reveal the need for surgical intervention to such. (R. p. 951, lines 15-16). The 2nd IME of July 8, 2020, was focused on the Claimant's cervical spine but Dr. Gunter was "unable to identify either a cervical spinal disease or intracranial disease to explain his current condition" given the limited evidence/diagnostics at hand so far (*Id.*, lines 11-13). Dr. Gunter, like every provider who treated Claimant before him, opined that "[h]e will need continued rehabilitation for the contractures of his left upper and left lower…left upper and lower extremity." (*Id.*, lines 16-18).

Since leaving work shortly after arriving on June 17, 2019, Claimant has not worked in any capacity for any employer, given his physical limitations he faces as a result of this compensable injury.

B. Initial Hearing Before the Hearing Commissioner

An initial hearing in this claim was held on September 28, 2020, before the Honorable Gene McCaskill, wherein the parties stipulated to, among other things, that Defendants admitted that Claimant sustained a back/spine injury while employed by the Defendants on June 14, 2019, and that Claimant's Average Weekly Wage ("AWW") was $877.79 with a corresponding Compensation Rate ("CR") of $ 585.20. (R. p. 4).

Three witnesses gave live testimony at the hearing and depositions of Drs' Brown, DuPuy, Rao, and Gunter, as well as the deposition of Claimant, were submitted for consideration, along with all of the parties' APA's they submitted. (R. pp. 117, 128, 140, 151).

Claimant's wife testified that since the date of injury, Claimant has "a lot of limitations" that were not present prior to that date. (R. p. 129, lines 3-11, 18-21). Next, the Claimant's mother, and recipient of the Order of Palmetto Award in South Carolina, testified that prior to the work-related injury her "son was very energetic, and he was a very hard worker" that did not have the left arm/elbow/hand contracture and left dropfoot prior to this work-related injury. (R. p. 141, lines 1-2 – R. p. 142, lines 24-25 – R. p. 143, lines 10-12). Both the Claimant's wife and his mother testified that he had no pre-existing "mental issues" of concern and that following his injury he has become depressed (among many other issues/limitations he faced due to this injury at hand). (R. p. 136, lines 17-23 – R. p. 137, lines 4-7 – R. p. 147, lines 8-13).

At the hearing, Commissioner McCaskill was able to observe Claimant firsthand, likewise his wife and mother. Commissioner McCaskill also went through every single page of medical records and deposition testimony, all of which is contained in the parties APA's they submitted, before weighing/balancing the evidence before him in rendering his final decision.

Based on a preponderance of the evidence, Hearing Commissioner McCaskill found as fact that "Claimant is clearly not today as he was before the accident," and that "Claimant was clearly hurt at work" but that the question was whether Claimant's physical issues were causally related to the work-related accident. (R. p. 5). Finding of Fact No. 41 states "It must be noted that the contractures that the Claimant now presents with were not present until after this work-related injury." (R. p. 8). Finding further that based on the evidence before him, Claimant had not yet reached MMI for the injuries suffered in the admittedly compensable work-related accident and that he was entitled to medical treatment for both his physical and mental conditions, and indemnity benefits from the date last paid to current and ongoing. (R. pp. 8-9 – See also Conclusion of Law 2-5, R. p. 10-11).

C. Respondents Appeal to the Appellate Panel

The Respondents appealed the single commissioner's decision raising these four issues in their brief to the Appellate Panel:

1) Whether the Hearing Commissioner erred in finding Claimant met his burden of proving he sustained compensable physical injuries to his brain, left hand, left foot, and a compensable aggravation of a pre-existing psychological condition.
2) Whether the Hearing Commissioner erred in finding, as a matter of fact, that Claimant's orthopedist (Dr. David DuPuy) is a neurosurgeon, who as qualified to opine beyond his scope of expertise concerning Claimant's brain and psychological condition.
3) Whether the Hearing Commissioner erred in finding, as a matter of fact, that the opinion of Claimant's neurologist (Dr. T. Hemanth Rao) was entitled to greater weight than the opinions of three neurosurgeons (Dr. Matthew Brown, Dr. Taylor Jarrell, and Dr. Brett Gunter) concerning whether Claimant sustained a physical injury to the brain.
4) Whether the Hearing Commissioner erred in finding, as a matter of fact, that Claimant was not at maximum medical improvement, and that Claimant has met his burden of proving he is entitled to temporary benefits and medical treatment.

(R. pp. 34-35).

The Appellate Panel reversed the single commissioner's order, giving greater weight to the opinions of Dr. Brown and Dr. Gunter, over the opinions of Dr. Dupuy and Dr. Rao, despite the evidence to the contrary. This re-weighing of medical testimony was based on the fact that Dr. DuPuy is an orthopedic surgeon whereas Dr. Brown and Dr. Gunter are neurosurgeons and Dr. Rao's testimony was given less weight due to a prior settlement entered into by Dr. Rao and the Department of Justice regarding Medicare reimbursement and that "Dr. Rao bases his opinion primarily upon Claimant's subjective statements concerning the timeline of symptoms...and Dr. Rao's admission that there was no objective evidence to support his opinion." (R. p. 47).

Following a purported summation of the medical evidence and testimony, Finding of Fact No. 67 then finds:

> Based upon a preponderance of the evidence, including the medical evidence and testimony, we find and conclude Claimant's alleged symptoms of left hand

> contracture and left foot drop are medically inconsistent with the mechanism of injury due to: the anatomical layout of the brain; the absence of the objective diagnostic evidence of brain injury; the fact that Claimant did not lose consciousness, and; the presentation of symptoms which were clinically inconsistent with the progression of long term functional symptoms from a closed head injury.

(R. p. 49). That finding lays the groundwork for Findings of Fact 68, 69, 70, and 72, as well as Conclusions of Law 6, 7, 9. (R. pp. 49-51).

ARGUMENT

An appellate court's review is limited to the determination of whether or not the Commission's decision is supported by substantial evidence or is controlled by an error of law. *Hartzell v. Palmetto Collision, LLC,* 415 S.C. 617, 785 S.E.2d 194 (2016). The Appellate Panel's decision in this case is clearly erroneous in view of the reliable and substantial evidence on the whole records as it is not supported by the material evidence presented at these hearings, nor the testimony presented, and the Panel committed various errors of law as well; of which will be addressed in turn below.

I. The decision of the Workers' Compensation Commission violates the substantial evidence rule because the single pillar upon which the decision rests is the absence of imaging and ignores Claimants uncontested, objective, physical presentation when viewed as whole.

"Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the commission reached in order to justify its action." *Getsinger v. Owens-Corning Fiberglas Corp.,* 335 S.C. 77, 80, 515 S.E.2d 104, 106 (Ct.App.1999) (internal citation omitted).

Unchallenged by the Respondents in their appeal to the Appellate Panel were those findings that found that Claimant presented to the providers of record with left upper extremity contracture

and left drop foot. (R. pp. 14-15). Also unchallenged were those findings that those symptoms were not present prior to Claimant's work-related injury. "The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission." *Green v. City of Columbia,* 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct.App.1993). That being the case, the Appellate Panel's choice of words belies their misunderstanding, or otherwise misinterpretation, of the medical evidence and testimony at hand when viewed as a whole. For example, the panel's use of the phrase "alleged symptoms" in their Finding of Fact 29, wherein the testimony they cited does not in fact say that. (R. p.41 - R. p. 780, lines 2-23). See also, Finding of Fact 63, "symptoms as alleged," and Finding of Fact 67, "alleged symptoms." (R. pp. 48-49).

No provider who has treated the Claimant has stated that Claimant's left upper extremity contracture and left drop foot were not authentic, nor did they feel it was made up or faked for that matter. None. On that issue, Dr. David DuPuy who is a Board-Certified Orthopedic surgeon for over 40 years and has treated approximately 300,000 patients, was unequivocal, "[a]nd it is very easily determined if they're sandbagging you, when they're making it up, called 'symptom magnification,' 'exaggerated,' 'malingering,' whatever you want. I saw no indication of that in physical exam." (R. p. 894, lines 19-20 -R. p. 896, lines 20-22 – R. p. 934, line 25 – R. p. 935, line 1-4). Dr. DuPuy then went further, "[b]ut those contractures, in my opinion, were absolutely organic, physiologic, and accurate. In other words, no symptom magnification or exaggeration…" (thus the only explanation being that it came from an injury). (R. p. 909, lines 2-6).

Dr. Brown, who the Appellate Panel gave greater weight than they did to Dr. DuPuy, was not even licensed long enough to become Board Certified let alone have anywhere near the amount of experience of Dr. DuPuy. That aside, Dr. Brown also found that Claimant presented with left

upper and lower extremity symptoms (i.e. that his left-arm was in a flexed/contracture position at his fist and pain into his legs … that Dr. Brown diagnosed him with Occipital Neuralgia and a closed head injury). (R. p. 754, lines 18-24). The assignment of the relative weight given to the opinion of Dr. DuPuy fails to appreciate that as an orthopedist with extensive clinical experience, knowledge and training (which is much more than Dr. Brown and Dr. Gunter combined), Dr. DuPuy has treated patients orthopedically for upper extremity contractures and drop foot, regardless of etiology and is therefore in the best positio to address such as he did here.

Ignoring the contention by Claimant that Dr. Brown's evaluation was cursory, the record itself points to that conclusion. Dr. Brown's records were recited to Dr. Gunter at his deposition and stated that "Claimant has 5 out of 5 bilateral upper and bilateral lower extremity strength." (R. p. 957, lines 2-9). This record is unreliable because it was on Dr. Brown's referral that Claimant presented to physical therapy just eleven days later and the following treatment was provided:

> Neuromuscular Re-Education – Proprioception/Balance Training; Posture; Standing posture and weight shift; Patient and wife education to consciously relax left UE and shift weight to the left LE; Instructed in postural ex. Inf front of mirror.
>
> Manual Therapy – General joint mobilization/oscillations to the left shoulder/elbow/hand to encourage normal tone and extension; General mobilization/oscillations to left hip and knee to encourage normal tone for WB/weight shifting.
>
> (R. p. 316).

The record recited to Dr. Gunter in his deposition and this physical therapy record are inconsistent. Further, based on the testimony of the Claimant, his wife, his mother, and the physical therapy record, Dr. Brown's "record" is the outlier and the inference to be drawn is that the physical examination, to the extent there was one, is not accurately reflected in the record.

Dr. Gunter's causation opinion is based on the initial records of Dr. Brown as illustrated by this exchange:

Q: And so based on [Claimant's] mechanism of injury, would you consider it unusual for him to have five out of five strength a month after the accident, but then a year later have reduced strength?

A: Yes.

Q: And why is that?

A: Well, an acute injury should produce an acute change in neurologic exam, and so you would expect to see the signs and symptoms of a neurologic injury immediate and proximate to the injury.

(R. p. 958, lines 10-19).

Taken as a whole, Dr. Brown's records and his testimony, are not credible. Having built the foundation of his opinion on Dr. Brown's "records," Dr. Gunter's causation opinion is fundamentally flawed as well.

Because it's inclusion in the decision of the Panel has no value except to diminish the credibility of the Claimant and Dr. DuPuy, Finding of Fact No. 38 needs to be addressed. (R. pp. 43-44). The recitation of Claimant's deposition testimony regarding what Dr. DuPuy had told him ignores Claimant's education level, post-injury cognitive deficits, the context of the question posed to Claimant, Claimant's clarification, and the testimony of Dr. Dupuy, all of which must be taken as a whole. A 'more accurate' recitation of Claimant's testimony would have included the following: "said not that I had a mini stroke. It's just the body has a memory and therefore the brain's not translating to the hand or the foot. And so it's kind of like how stroke when their whole left side of their body goes and slurred speech and vision and their hands turn in. He's saying similar to a mini stroke." (R. p. 730, lines 21-25 – R. p. 731, lines 1-2). Moving on to the testimony of Dr. DuPuy, "[b]ut if you have an – a flexed contracture because of this, as we talked, hypertonic contraction, it's like when somebody has had a stroke and their hand is all shrunk down on one

side, which is what you see." (R. p. 934, lines 19-23). When viewed side-by-side, these statements are not incongruent, in fact they are quite demonstrative into what is really going on.

Dr. Rao has been a Board-Certified neurologist for over thirty years, with additional subspecialty certification in nerve and muscle, and electrodiagnostics. (R. p. 794, lines 5-8). Unmoved by Dr. Rao's vast experience in treating patients with head injuries, the Appellate Panel found in Finding of Fact 55 that:

> Notwithstanding any potential credibility issues, we also give less weight to Dr. Rao's opinion because of the evidence he relies upon to support his conclusions. Dr. Rao bases his opinion primarily upon Claimant's subjective statements concerning the timeline of symptoms. In his deposition, Dr. Rao admitted there was no objective evidence to support his opinion aside from an EEG that '**seemed**' to show some slowing which '**could**' be a sign of a head injury. (Rao Depo.p.11:20-23, emphasis added in decision). However, Dr. Rao was not able to identify a diagnosis beyond a description of Claimant's symptoms...

(R. p. 47 – citing R. p. 852, lines 20-23).

Here again, the Appellate Panel misunderstood the facts and misstated the opinion of a provider in order diminish the weight afforded that providers opinion. As such, it is important to reiterate, once again, that Claimant's physical presentation was consistent before every provider that examined him, that the Respondents did not challenge the findings that Claimant had left upper extremity contracture and left drop foot, AND, that the Claimant had neither of these objective physical impairments prior to his work-related accident. The Appellate Panel therefore committed the same error here, as the panel did in *Clark v. Philips Electronics/Shakespeare*. "The Panel concluded the doctors' opinions were based upon 'self-serving assertions of the claimant,' but no doctor has said this. What people say when seeking medical help is usually self-serving and sometimes unreliable. Doctors are trained to detect such things, and we are confident that if

the doctors believed they were duped into their opinions they would have said so." 433 S.C. 186, 193-194, 857 SE 2d 378, 385 (2021).

Additionally, Dr. Rao also diagnosed Claimant with post concussive syndrome and opined that "whether the MRI shows it or not," there is still an injury that "gives rise to (these) symptoms." (R. p. 798, lines 10-11 – R. p. 799, lines 9-11). As an expert neurological specialist who has, from the start of his career, focused on the evaluation of head injuries and in the development of treatment protocols for them, stated that in his opinion, based upon his experience, an individual can have head injuries without imaging of same, is not speculative. (R. p. 808, lines 3-23).

Doctors Brown and Gunter, whom the Respondents and Appellate Panel relied upon equated the unexplained (by imaging) with the impossible (that is not how medicine works). These two things are not the same and conflating them is a dangerous misunderstanding of fact, all to the detriment of the Claimant in this claim. "The Panel must anchor its ruling on evidence substantial enough to provide a reasonable basis for its findings." *Hutson v. S.C. State Ports Auth.,* 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Especially when confronted by the opinions of doctors, with vastly more clinical experience (Dr. Dupuy and Dr. Rao), both of whom opined that even today, an injury can be present despite such not being detected by imaging.

There is simply no evidence of record to support the decision of the Appellate Panel, much less substantial evidence. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Shealy v. Aiken Cnty.,* 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (*emphasis added*). S.C. Code Ann. § 1-23-380(5)(e); thus, it requires the reversal of the Appellate Panel decision and order.

II. The Appellate Panel did not apply the law of causation, instead, it found that medical imaging was required, and that all circumstantial evidence was speculative.

This Court, and this State's Supreme Court have held that a claimant can meet his burden of proving causation between a work-related accident and subsequent condition through the presentation of circumstantial evidence and that definitive imaging evidence is not required.

> We have held that circumstantial evidence may be sufficient to support a finding of fact or an award in Workmen's Compensation cases. Circumstantial evidence has as much probative value in these type cases as in any other class of cases... It is sufficient if the facts or sequence of events proved give rise to a reasonable inference that there was a causal connection between claimant's disability and his prior injury. *Kennedy v. Williambsburg County*, 242 S.C. 477, 484, 131 S.E.2d 512, 515 (1963) (internal citations omitted).

Nevertheless, we are here because the Appellate Panel wholly disregarded the circumstantial evidence, the validity of that evidence, the record as a whole and concluded that objective evidence in the form of imaging, was required. In doing so, the Appellate Panel ignored the direction provided by this Court in *Russell v. Wal-Mart Stores, Inc.* "The appellate panel erred in requiring a change of condition to be established by objective evidence." 415 S.C. 395, 398, 782 S.E.2d 753, 755 (Ct. App. 2016).

"Proof that a claimant sustained an injury may be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident." *Tiller v. Nat'l Health Care Ctr. of Sumter,* 334 S.C. 333, 341, 513 S.E.2d 843, 847 (1999) citing: *Grice v. Dickerson, Inc.,* 241 S.C. 225, 127 S.E.2d 722 (1962). Even more relevant to the Appellate Panel's "findings of fact," is the following: "despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly in claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the

accident was sufficient to support an award); *Tiller, supra*, citing: *Poston v. Southeastern Construction Co.,* 208 S.C. 35, 36 S.E.2d 858 (1946).

In *Mullinax v. Winn-Dixie Stores, Inc.*, the Court held "[t]he causal sequence ... may be more indirect or complex, but as long as the causal connection is in fact present the compensability of the subsequent condition is beyond question." 318 S.C. 431, 43-437, S.E.2d 76, 79-80 (Ct. App. 1995) (quoting Arthur Larson, *The Law of Workmen's Compensation* § 13.11(b) (1994). While admittedly complex, the causal connection is firmly rooted in the testimony and record before the Court and when viewed as a whole it more than supports the need for the reversal of the Full Commission's Order, as the First Hearing Commissioner correctly viewed the record and found in favor of the Claimant.

The Claimant testified at his deposition and at hearing that he did not have the left upper extremity contracture and left drop foot prior to the accident but did afterwards and this unchallenged Fact can be found in the Single Commissioner Order (R. p. 14-15). Claimant's wife testified at hearing that Claimant did not have the left upper extremity contracture and left drop foot prior to the accident but did afterwards. (R. p. 129, lines 3-11). Claimant's mother testified at hearing that Claimant did not have the left upper extremity contracture and left drop foot prior to the accident but did afterwards. (R. p. 141, lines 1-2 – R. p. 142, lines 24-25 – R. p. 143, lines 10-12). This lay testimony was left unaddressed in the Order of the Single Commissioner and that of the Appellate Panel. And, the omission is even more concerning given that the lay observations of Claimant's post-injury left upper extremity contracture and left drop foot were corroborated by the physical examination of Claimant by every provider of record, which was not 'faked/made up' so to speak either.

As noted above, the Appellate Panel's decision to characterize the unchallenged finding that Claimant has left upper extremity contracture and left drop foot as "Claimant's alleged symptoms" implies that they are disregarding the testimony of EVERY witness who has testified in this matter, whether lay or expert. The etiology of Claimant's left upper extremity contracture and left drop foot has fallen into one of two categories amongst the doctors – Dr. Brown and Dr. Gunter, being in the 'unexplained category' (noting again, however, that Dr. Gunter's causation opinion is founded on the inconsistent record of Dr. Brown); whereas Dr. DuPuy and Dr. Rao are in the 'as a whole this supports that it is connected to the incident' and opined such to be causally related to Claimant's compensable work injury and the presence of these conditions is undisputed. Except by the Appellate Panel.

These are errors of fact and of law more importantly and they warrant/require the reversal of the Appellate Panel's decision and order, as required when an award is controlled by an error of either. S.C. Code Ann. § 1-23-380(5)(d)-(e).

III. Claimant suffered an aggravation of his pre-existing psyche condition as a result of this admittedly compensable injury.

"[M]ental injuries are compensable if ... the mental injury is induced either by physical injury as in *Kennedy* or by unusual or extraordinary conditions of employment." *Stokes v. First Nat'l Bank,* 298 S.C. 13, 21, 377 S.E.2d 922, 926 (Ct. App. 1988). Which is viewed in combination with, "[w]hen a previously diseased condition is aggravated by injury or accident arising out of and in the course of the employment, disability is a compensable injury." *Brown v. R.L. Jordan Oil Co.,* 291 S.C. 272, 275, 353 S.E.2d 280, 283 (1987). On this issue, the record is limited. However, the recommendations following Claimant's neuropsychological evaluation are informative. "Mr. Bagley would be an excellent candidate for individual cognitive behavioral therapy that would focus on providing emotional support, addressing his thoughts that lead to

depressive symptoms, **assisting with his 'new normal' routing and identity**, and teach stress-management and coping skills to deal with physical recovery." (R. p. 553-561; emphasis added). While Claimant did not receive psychological care prior to this accident, he needs to now. This need where one did not previously exists, demonstrates that Claimant suffered an aggravation to his pre-existing psychological issues.

Under the caselaw establishing an aggravation of a pre-existing condition as compensable, Claimant's aggravation here, is compensable. Thus, how the Appellate Panel could find otherwise is not supported by the evidence at all.

IV. The Appellate Panel disregarded the record in finding that Claimant had reached MMI on August 28, 2019.

In addition to the reasons provided in sections I-III above, the Appellate Panel's Finding of Fact No. 69 is completely untethered to any fact or opinion before it. Because:

1) Finding of Fact No. 69 states: We find Claimant is at maximum medical improvement from his back injury as of August 28, 2019. This finding is based upon a preponderance of the medical evidence as a whole. (R. p. 49).

2) The Form 14B completed by Dr. Brown **on August 28, 2019,** answers affirmatively the question "[i]s there medical, surgical, hospital or other treatment that the Claimant needs as a result of the injury for an additional time that will tend to lessen the period of disability or maintain the current level of function? (R. p. 55; emphasis added).

3) As directed by the Form 14B, Dr. Brown stated on the Form, "[p]atient is at point of maximal medical improvement **from a neurosurgical perspective** and we do not anticipate that he will need any further neurosurgical intervention or recommendations in the future. As previously noted, **we will defer further nonoperative management for patient's muscular complaints to his occupational medicine physician and team.**" Id. (R. p. 55; emphasis added).

4) At his deposition, Dr. Brown clarified that his "release" was only a release from a neurosurgical perspective and "**he did still have issues**, which were nonsurgical in nature. And when I release the patient back to the care of another physician, **it is with**

anticipation that they will manage those other nonsurgical issues." (R. p. 294 – R. p. 761, lines 18-24; emphasis added).

5) Claimant attended 16 sessions of physical therapy prescribed/ordered by Dr. Brown, with the last occurring on September 16, 2019. (R. p. 387-389).

6) Claimant was discharged from physical therapy because the Respondents did not authorize any further care. (R. p. 390).

7) Since September 26, 2019, Respondents have provided no medical care for Claimant.

Further, it is a shame that his providers, namely Dr. Rao, have ordered the Claimant to have additional testing/evaluations to futher develop the extent of his issues/injuries but given his financial constraints (no insurance and cannot afford to pay for such himself as he does not having any income coming in) are now being used against him. Dr. Rao testified about what he has before him at the time of his deposition (some records, some diagnostics and the Claimant's presentation/his objective evaluations), he realized that he needed to have more data but at the time of his deposition he did not have such and thus did not want to lose any credibility as an expert witness by going too far on things.

Even conceding that Claimant's work-related injury is nonsurgical, Claimant has not reached MMI based on the record and testimony before the Appellate Panel, and this Court (namely the depositions of his providers and the Form 14B stating as much). Inexplicable the appellate panel disregarded this evidence in entering the Order that is presently being appealed.

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"An appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and conclusions of the agency are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record..." *Gray v. Club Group, Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (CT. App. 2000); S.C. Code

Ann. § 1-23-380(5)(d)-(e). Under either (1) or (2) above, this Court has the power to reverse the decision of the Appellate Panel. Here, grounds exist under both. The substantial evidence supports the decision of the single commissioner whereas the Appellate Panel's decision if founded on misstatements of fact that undermine the opinions of the doctors relied thereon and ignores well founded principles of law regarding causation.

The Claimant suffered injuries to his: neck, back, head, left upper extremity (contractures), left lower extremity (drop foot) and mental/psyche (an aggravation of his pre-existing psychological condition) and as a result of this he has been out of work since approx. June 17, 2019, he needs additional medical treatment, he is not at MMI and needs his weekly workers compensation checks to commence again; which the initial evidentiary hearing Commissioner correctly Ordered in this. The Appellate Panel's findings of fact and conclusions of law to the contrary, "float on air, unsupported by any visible explanation or evidence." *Clark*, 433 S.C. at 195, S.E.2d at 387.

CONCLUSION

For the foregoing reasons, this Court should reverse the Appellate Panel's decision and reinstate the decision of the Single Commissioner, or alternatively, remand this case for consideration under the proper legal standards.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA

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IN THE COURT OF APPEALS

W.C.C. FILE NO.: 19-08703
Appellate Case No.: 2022-000067

KYLE R. BAGLEY, Employee-Claimant, Appellant,

v.

JN FIBERS INC D/B/A SUN FIBER, LLC, Employer-Defendant, Respondent,

AND

GREAT AMERICAN INSURANCE COMPANY, Defendant-Carrier, Respondent(s).

PROOF OF SERVICE

I certify that I have served the "Final Brief" by emailing a copy of same, on the below date, to:

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