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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

No. _____

APPEAL FROM
SC Court of Appeals, No. 2009147487
and the SC Workers' Compensation Commission WCC No. 0813616

Ramon Zepeda Cepeda.....Petitioner

v.

Priority Landscaping and Lawn Care, LLC.....Employer/Respondent

and

Accident Fund Insurance Company of America.....Carrier/Respondent

APPENDIX I

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ramone Zepeda-Cepeda, Appellant,

v.

Priority Landscaping and Lawn
Care, LLC, Employer, and
Accident Fund Insurance
Company of America, Carrier, Respondents.

Appeal From the South Carolina Workers' Compensation Commission
Appellate Panel

Unpublished Opinion No. 2011-UP-229
Submitted April 1, 2011 – Filed May 18, 2011

AFFIRMED

Don C. Gibson, of North Charleston, for Appellant.

Mikell H. Wyman, of Charleston, for Respondents.

PER CURIAM: In this workers' compensation case, Appellant Ramone Zepeda-Cepeda (Claimant) seeks review of a decision of the South Carolina Workers' Compensation Commission (Commission) denying his request for temporary total disability benefits and payment of medical expenses for an injury to his right leg. Claimant challenges the Appellate Panel's finding that his injury did not arise out of and in the course of his employment because he was engaging in horseplay when the injury occurred. We affirm.¹

FACTS/PROCEDURAL HISTORY

In March 2007, Claimant began working for Priority Landscaping and Lawn Care, LLC (Employer), located in Folly Beach. Among other equipment, Employer provided Claimant and his co-workers with a pole saw and extension ladders for trimming tree branches. If a branch was so high that it could not be reached while using an extension ladder and a pole saw, Employer would subcontract out that particular work to Budget Tree Service (Budget).

On September 4, 2008, Employer assigned Claimant to a crew of four to perform work on the grounds at Fort Johnson Baptist Church. The other three workers were Leonardo Solano (Leonardo), Frank Shoppel (Frank), and Cesar Rodriguez (Cesar). Frank supervised the crew, and Cesar interpreted Frank's English into Spanish for Claimant and Leonardo. The crew arrived at the location at approximately 12:45 p.m. and ate lunch before beginning work.

According to Claimant, as he began work at the location, Cesar told him that Frank wanted him to climb a large oak tree to trim one of its branches. Claimant climbed up to a large branch approximately twenty feet off the ground. He began walking along the branch and was expecting one of

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

his co-workers to hand him a tool once he was near the branch to be trimmed. However, he lost his balance and fell to the ground.

The hearing testimony of Frank and Cesar provided a different version of the events leading up to Claimant's injury. They both testified that Employer never assigned branch trimming for those branches that could not be reached with the pole saw and extension ladder. They further testified that on the day of the injury, Frank never asked Cesar to tell Claimant to trim any branches on the tree in question. Rather, they testified that Cesar offered Claimant a twenty-dollar bet that he would not jump out of the oak tree from a limb hovering twenty feet off the ground. Claimant quickly accepted the bet, climbed up the tree, and began walking out on the limb. He then "cradled" the limb, turned over, hung off the branch, and deliberately dropped to the ground.

It is undisputed that Claimant landed on his feet and limped over to the truck in which the crew rode to the location. He then began to feel pain in his right leg. Frank called Employer's owner, William Hampton (Owner), to determine how to respond to Claimant's injury. Frank also asked Cesar to advise Claimant that he should tell others he stepped in a hole. Employer's secretary drove Claimant to Doctor's Care and later took him to a local hospital for further treatment. The next day, Frank gave a written statement to Owner's wife. In the statement, Frank alleged that Claimant had climbed the tree without being instructed to do so and that the tree in question was not the type of tree that Employer would maintain. Frank also stated "It appears that [Claimant] climbed the tree for fun. He was injured when he jumped or fell out of the tree."

Claimant sought temporary total disability benefits as well as payment of all medical expenses related to his leg injury. Employer and its insurer, Accident Fund Insurance Company of America (Carrier), contested the claim on the ground that Claimant had been engaging in horseplay when he injured his right leg. The Single Commissioner found that Claimant was not engaging in horseplay and awarded Claimant the requested benefits. The

Appellate Panel reversed the award, finding that Claimant was in fact engaging in horseplay, and, therefore, his injury did not arise out of and in the course of his employment. This appeal followed.

ISSUE ON APPEAL

Was the Appellate Panel's finding that Claimant's injury did not arise out of and in the course of his employment supported by substantial evidence when the testimony on which the Appellate Panel relied was purportedly not credible?²

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the

² A claimant's injury must arise out of his employment and occur in the course of his employment. Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 331, 200 S.E.2d 83, 85 (1973).

The two elements must co-exist. They must be concurrent and simultaneous. One without the other will not sustain an award; yet the two are so entwined that they are usually considered together in the reported cases; and a discussion of one of them involves the other.

As is generally held, the words "arising out of" refer to the origin of the cause of the accident, while the words "in the course of employment," have reference to the time, place and circumstances under which the accident occurs.

Douglas v. Spartan Mills, 245 S.C. 265, 268-69, 140 S.E.2d 173, 174-75 (1965) (internal citation and quotation marks omitted).

Workers' Compensation Commission. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Specifically, section 1-23-380 of the South Carolina Code (Supp. 2010) provides that this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law.³ See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 600-01 (Ct. App. 1999), modified on other grounds, 339 S.C. 68, 528 S.E.2d 667 (2000) (interpreting section 1-23-380). Section 1-23-380 allows reversal of a factual finding of the Appellate Panel only if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

In workers' compensation cases, the Commission is the ultimate factfinder. This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. Substantial

³ The pertinent language of section 1-23-380 is as follows:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The 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: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) (internal citations and quotations marks omitted).

LAW/ANALYSIS

Claimant contests the Appellate Panel's finding that his injury did not arise out of and in the course of his employment. He argues that this finding is not supported by substantial evidence because his supervisor, Frank, and his interpreter, Cesar, who both testified that Claimant jumped out of a tree on a bet, had no credibility. Claimant asserts that Cesar and Frank admitted in the hearing before the Single Commissioner that they did not initially tell the truth about how Claimant injured himself. Therefore, Claimant argues, their hearing testimony could not be believed. We disagree.

"In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. "It is not the task of this Court to weigh the evidence as found by the Full Commission." Id.

Further, the trier of fact has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony. See Holcombe v. Dan River Mills, 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) ("The Commission in workers' compensation cases sits as a jury does. It is elementary that a jury may believe part or all of a witness's testimony[.]"). Therefore, Claimant's argument that the testimony of Frank and Cesar cannot constitute substantial evidence because they admitted to previous misrepresentations is

unconvincing. The Appellate Panel could have believed the testimony of Cesar and Frank that they were afraid they would lose their jobs if Employer learned that Claimant climbed the tree on a bet from Cesar and that Frank allowed this to happen.

Additionally, Owner's testimony supported the Appellate Panel's finding that Claimant's injury did not arise out of and in the course of his employment. Owner stated that the only time that his workers would attempt to trim a large oak tree was when it could be done with an extension pole saw and a stepladder and when the limb was not too big. Owner also testified that his standard practice was to subcontract out to Budget the trimming of any out-of-reach branches; and, that he had in fact used Budget for the very property on which Claimant and his co-workers were located on the day of the injury.

Claimant also argues that the Appellate Panel made no credibility findings, and, as a result, the Single Commissioner's finding that the testimony of Frank and Cesar was not credible was left undisturbed. Hence, Claimant asserts, this court should give deference to the Single Commissioner's credibility determination. We disagree. In the fifth finding of fact of the Appellate Panel's decision, it relied on the testimony of Frank and Cesar. Therefore, there is no question that the Appellate Panel found this testimony to be credible. As stated earlier, this court is required to give deference to the Appellate Panel's credibility determination. See Shealy, 341 S.C. at 455, 535 S.E.2d at 442 ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.").

Based on the foregoing, the evidence in the record would allow reasonable minds to reach the conclusion the Appellate Panel reached—that Claimant was engaging in horseplay, and, thus, his injury was not compensable. See Jones v. Hampton Pontiac, 304 S.C. 440, 441-42, 405 S.E.2d 395, 395-96 (1991) (holding that an employee's demonstration of a karate kick, while on break, did not give rise to his injury as a natural incident

of the work, and, therefore, his injury was not compensable). Hence, the Appellate Panel's finding that Claimant's injury did not arise out of and in the course of his employment was supported by substantial evidence. See Pierre, 386 S.C. at 540, 689 S.E.2d at 618 ("Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.") (internal citations and quotation marks omitted) (emphasis added).

CONCLUSION

Accordingly, the Appellate Panel's decision is

AFFIRMED.

WILLIAMS, GEATHERS, and LOCKEMY, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

No. 2009147487

Appeal from the South Carolina Workers' Compensation Commission

W.C.C. File No. 0813616

Ramone Zepeda-Cepeda, Employee/Appellant

v.

Priority Landscaping and Lawn Care, LLC, Employer/Respondent

AND

Accident Fund Insurance Company of America, Carrier/Respondent

PETITION FOR REHEARING

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SC Court of Appeals

INTRODUCTION

The Court filed its opinion in this case, *Zepeda-Cepeda v. Priority Landscaping and Lawn Care, LLC*, Unpublished Opinion No. 2011-UP-229, on May 18, 2011. In that Opinion the Court affirmed the findings of the South Carolina Workers' Compensation Commission Appellate Panel. Ramone Zepeda-Cepeda, the appellant in this action ("Mr. Zepeda-Cepeda"), contends that the Court was in error in its disposition of this appeal. As he will explain below, Mr. Zepeda-Cepeda believes that the Court "overlooked and misapprehended," Rule 221(a), SCACR, the arguments he made in his Brief of Appellant. Above all, the Court "overlooked and misapprehended" the facts of this case. As a result, Mr. Zepeda-Cepeda respectfully asks the Court pursuant to Rules 221(a), 240, SCACR, for a rehearing of the appeal for the following particular reasons.

The Court upheld the Appellate Panel on two major points. Although the Court did elaborate on these points later in the opinion, Mr. Zepeda-Cepeda believes that the gist of the holding can be found in the following statement:

"In workers' compensation cases, the Full Commission is the ultimate fact finder." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." *Id.* "It is not the task of this Court to weigh the evidence as found by the Full Commission." *Id.*

(Slip Op. at 2). Mr. Zepeda-Cepeda respectfully contends that the Court erred in both of these points. It overlooked the proper weight to be given the Appellate Panel's findings of fact; it also misapprehended the nature of the credibility issues in the case. On account of the fact that, in Mr. Zepeda-Cepeda view, the Court "overlooked or misapprehended" these two points. Pursuant to Rule 221(a), SCACR, the appellant respectfully asks the Court to revisit, rehear, reconsider and then to reverse the Appellate Panel's findings.

ARGUMENT

I. THE COURT OVERLOOKED THE PROPER WEIGHT TO BE GIVEN THE COMMISSION'S FINDINGS IN THIS CASE.

The Supreme Court has set out the standard of review governing appeals from the Commission, as follows:

This Court must affirm the findings of fact made by the full commission *if they are supported by substantial evidence*. See S.C. Code Ann. § 1-23-380(A)(5) (2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). This Court may reverse a decision of the full commission that is affected by an error of law. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333, 335 (2008)(court of appeals decision denying benefits to claimant reversed)(emphasis supplied). In viewing the Commission as the “ultimate fact finder” (Slip. op. at 2), the Court overlooked the requirement that these findings, to be upheld on appeal, must be supported by substantial evidence. It follows that the Appellate Panel’s decision is vulnerable if it “is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” *Hieronymus v. Hamrick*, 385 S.C. 1, 682 S.E.2d 512, 514 (Ct.App. 2009). Here, the evidence relied upon by the Appellate Panel simply fails to constitute “substantial evidence” in any meaningful sense. Indeed, when one weighs that evidence and considers its origins in the testimony of the admitted liars who spun this tale, it becomes clear that the result reached below is actually clearly erroneous. In fact, it is worse than that; it is a travesty. As a result, the findings should have been disapproved. S.C. Code Ann. § 1-23-380(A)(5). See *Doe v. South Carolina Department of Disabilities and Special Needs*, 377 S.C. 346, 660 S.E.2d 260, 263 (2008)(“We find no substantial

evidence in the record to support the Commission's denial of benefits [so] we remand for the Commission to award benefits based on Claimant's disability").

By unduly focusing on the undoubted deference to be given to the Commission's fact-finding, the Court overlooked the complementary principle that the Appellate Panel's factual findings will be set aside "if unsupported by substantial evidence." *Anderson v. Baptist Medical Center*, 343 S.C. 487, 541 S.E.2d 526, 528 (2001). Here, as Mr. Zepeda-Cepeda has repeatedly demonstrated, the result reached by the Appellate Panel resoundingly flunks the substantial evidence test. The physical and testimonial evidence before the Court did not come close to supporting the notion that Mr. Zepeda-Cepeda jumped out of the tree on a bet. When one draws back and applies logic and common sense to that proposition, the conclusions drawn by the Appellate Panel dissolve into absurdity. In its unyielding adherence to the notion that the Appellate Panel's finding of fact constitute ultimate truths (Slip op. at 2), the Court has reached a result that finds no support in the facts, in logic or especially in the law.

As the standard commentary on workers' compensation law points out, South Carolina is a jurisdiction in which "findings of fact may be reversed if they are 'clearly erroneous.'" 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, 130.05[6][c] at 130-47 (2008). The case law indeed supports that observation. *See, e.g., Thompson v. Cisson Construction Co.*, 377 S.C. 137, 659 S.E.2d 171, 178 (Ct.App. 2008); *Grayson v. Carter Rhoad Furniture*, 312 S.C. 250, 439 S.E.2d 859, 861 (Ct.App. 1993); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76, 83 (Ct.App. 1995); *McGuffin v. Schjlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162, 164 (1992);

Mitchem v. Fiske-Carter Construction Co., 278 S.C. 180, 293 S.E.2d 701, 703 (1982)
Houston v. Deloach v. Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct.App. 2008).

The results reached both by the Appellate Panel and in this Court are simply not supported by anything remotely approaching substantial evidence. Instead, these findings could not more obviously be clearly erroneous. As a result, Mr. Zepeda-Cepeda's Petition for Rehearing should be granted.

II. THE COURT MISAPPHREHENDED THE PROPER CREDIBILITY RULES TO BE APPLIED IN THIS CASE.

For all the deference the Court gives to the Appellate Panel findings, the irony is that the Panel actually made no credibility findings at all. On the other hand, the Single Commissioner did make very specific credibility findings; he found those witnesses who supported the jump out of the tree on a bet scenario to lack any meaningful credibility whatever.

Certainly, the Appellate Panel makes "[t]he ultimate determination of witness credibility[.]" *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

But what if, as here, that Panel failed to make any such determinations at all? Certainly, it would make sense to drop back to the administrative credibility determinations that do exist, namely, those entered by the Single Commissioner.

Instead, the Court relied upon what is at best an implied or constructive credibility determination. Because the Appellate Panel's fifth finding of fact cited testimony by Frank and Cesar, the Court deems that to be a credibility finding. *See* Slip. Op. at 7. This, Mr. Zepeda-Cepeda contends, is not only insufficient and unconvincing but contrary to the underlying philosophy that supports the entire workers' compensation system:

The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." *Id.* at 350, 656 S.E.2d at 759 ... "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." *Id.* (citation omitted).

Pierre v. Seaside Farms, Inc., 306 S.C. at 534, 689 S.E.2d 615, 618-19 (2010). The decisional process, in other words, should favor compensability. Here, quite obviously, it did not.

The Appellate Panel frankly ignored the Single Commissioner's credibility findings in their entirety. It is critical to note, however, that the Appellate Panel did not then substitute its own credibility findings but simply made none of its own at all. The undeniable fact that the word "credibility" appears nowhere in the Appellate Panel's Decision and Order—not even once—is very telling. Given this studied avoidance of credibility issues, the Court's conclusion that the Panel made some hidden or sub silentio credibility findings is simply insupportable. An injured claimant like Mr. Zepeda-Cepeda deserves better from our system of justice than to be denied compensation on the basis of what is at best a faintly implied inference of credibility that could not bear even a moment of scrutiny. The truth is that the Appellate Panel impermissibly failed to make the necessary credibility findings. For that reason, the Court should either have made findings of its own and ordered that benefits be paid to Mr. Zepeda-Cepeda or instead remanded the case to the Full Commission so that body could remedy its failings in its disposition of the case.

III. THE RESULT IN THIS CASE IS A MISCARRIAGE OF JUSTICE.

When all the legal doctrines and rules of law that have been applied to this case are put to one side, one stark fact remains – the finding that Mr. Zepeda-Cepeda jumped out of the tree on a bet is a travesty of justice. It could hardly be clearer that, against his employer's express orders, Mr. Zepeda-Cepeda's supervisor ordered the appellant up into the tree to trim a branch in order to avoid the delay involved in calling in a tree service. When Mr. Zepeda-Cepeda fell out of the tree, the other workers thought only about their own hides. They lied to save their jobs. That in the process they sold Mr. Zepeda-Cepeda down the river seems not to have bothered them a bit.

In today's job climate, one can perhaps understand—just barely—how fellow employees desperate to keep their jobs could act in this way. What is harder to understand is how the Appellate Panel and then this Court could not see this shocking wrong for what it was but instead to facilitate this nefarious plot. Mr. Zepeda-Cepeda deserves better. Accordingly, he respectfully asks that his Petition for Rehearing be granted.

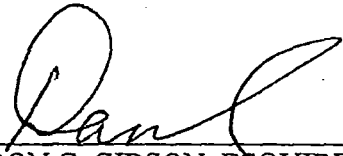
CONCLUSION

For the reasons set out above, Appellant Ramone Ramos Zepeda-Cepeda respectfully asks the Court to grant his Petition for Rehearing.

Respectfully submitted,

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June 1, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

No. 2009147487

Appeal from the South Carolina Workers' Compensation Commission

W.C.C. File No. 0813616

Ramon Zepeda-Cepeda, Employee/Appellant

v.

Priority Landscaping and Lawn Care, LLC, Employer/Respondent

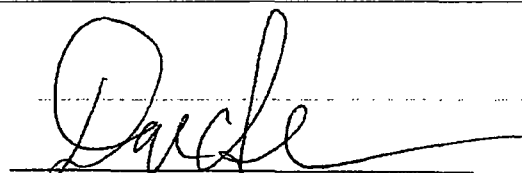
AND

Accident Fund Insurance Company of America, Carrier/Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rehearing was served on all parties
by mailing true and correct copies of the same via first class mail, proper postage affixed,
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The South Carolina Court of Appeals

Ramone Zepeda-Cepeda,

Appellant,

v.

Priority Landscaping and Lawn
Care, LLC, Employer, and
Accident Fund Insurance
Company of America, Carrier,

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Appeal From the South Carolina Workers' Compensation Commission
Appellate Panel

ORDER

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

H B W J. Williams

John O. Geathers J. Geathers

James E. Lockemy J. Lockemy

FILED
June 23, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

COPY

No. 2009147487

Appeal from the South Carolina Workers' Compensation Commission

W.C.C. File No. 0813616

Ramone Zepeda-Cepeda, Employee/Appellant

v.

Priority Landscaping and Lawn Care, LLC, Employer/Respondent

AND

Accident Fund Insurance Company of America, Carrier/Respondent

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STATEMENT OF THE ISSUES ON APPEAL

1. The Appellate Panel of the South Carolina Workers' Compensation (hereinafter "the Appellate Panel"), erred in its Full Commission Decision and Order ("Decision and Order"), filed on October 29, 2009, in holding that Ramon Zepeda-Cepeda, the claimant below and the appellant herein ("Mr. Zepeda"), failed to carry his burden to prove by the greater weight of the evidence that his injuries occurred in the course and scope of his employment.
2. The Appellate Panel erred in its Decision and Order in holding that the evidence submitted by Mr. Zepeda failed to provide a basis for a reasonable belief that he was furthering his employer's business when he climbed the subject tree.
3. The Appellate Panel erred in its Decision and Order in holding as a fact that Mr. Zepeda climbed the subject tree after accepting a bet from a co-worker to as to constitute an act of "horseplay."
4. The Appellate Panel erred in its Decision and Order in holding that Mr. Zepeda's claims was not compensable and that he was not entitled to any benefits under the South Carolina Workers' Compensation Act ("the Act").

STATEMENT OF THE CASE

The proceeding under review resulted from an appeal to the Appellate Panel by Priority Landscaping & Lawn Care, LLC, the employer/respondent ("Priority Landscape"), and Accident Fund Insurance Company of America, the carrier/respondent ("Accident Fund"), of a Decision/Order served on April 21, 2009 by Hearing Commissioner G. Bryan Lyndon ("Commissioner Lyndon," the "Hearing Commissioner" or the "Single Commissioner")(Record on Appeal ["R."] p. 008). The Decision/Order

followed a hearing that was held on January 22, 2009 in North Charleston, South Carolina.

This case arose when Mr. Zepeda was injured while at work on September 4, 2008 (South Carolina Workers' Compensation Hearing)[R. p. 297, l. 7-9]; Decision/Order, Finding of Fact No. 1 [R. 019]; Conclusions of Law No. 2 [R. p. 020]; Order/Award No. 1 [R. 021]). The parties had stipulated that Mr. Zepeda's Average Weekly Wage was \$436.32, which resulted in a Compensation Rate of \$308.89 (Decision/Order p. 3, Stipulation No. 4) [R. p. 010].

Commissioner Lyndon awarded temporary total benefits in the amount of \$308.89 per week from the date of the injury to January 22, 2009, the date of the hearing (Decision/Order, Order/Award No. 2) [R. p. 021]. The Hearing Commissioner ordered that this sum of \$308.89 also be paid from the date of the hearing until further order or operation of statute (Decision/Order, Order/Award No. 3)[R. p. 021]. In addition, Commissioner Lyndon awarded Mr. Zepeda "all his past casually related medical treatment" from the date of the injury to the date of the hearing (Decision/Order, Order/Award No. 4)[R. p. 021]. Finally, the Hearing Commissioner ordered the provision of additional medical care (Decision/Order, Order/Award No. 4)[R. p. 021].

Priority Landscape and Accident Fund appealed the Decision/Order to the Commission's Appellate Panel. Both parties filed briefs and a full Commission Hearing before Panel B was held on August 25, 2009. In the wake of that hearing, the Commission sent respondents a Request for Proposed Decision and Order, dated September 8, 2009 ("the Request")[R. p. 022]. It asked them to prepare a proposed order. It did not, however, offer any instructions or guidance, other than the overall holding, as

to what the findings of fact and conclusions of law should contain.¹ The Appellate Panel then issued its Full Commission Decision and Order on October 29, 2009 [R. p. 001], reversing the Decision/Order. Mr. Zepeda then timely appealed to his Court [R. p. 528]. He now files his Brief of Appellant and respectfully asks that the Decision and Order be reversed.

FACTS

A. Introduction.

The pertinent evidence in the case consisted primarily of testimony given at the hearing before Commissioner Lyndon by Mr. Zepeda, Tomas Marinez Betencourt (“Mr. Martinez”), a former fellow worker of Mr. Zepeda, Lucio Cesar Rodriguez Paredes (“Cesar”), a current Priority Landscape employee and co-supervisor, Frank William Shoppel (“Frank”), a current Priority Landscape employee and supervisor, and William Robert Hampton (“Mr. Hampton”), the owner of Priority Landscape. The Commissioner also considered deposition testimony taken of Mr. Zepeda, along with pertinent filings as to medical records and the like, which were additionally made part of the record by the parties. There was no dispute about Mr. Zepeda’s status as a Priority Landscape employee; he was unquestionably a Priority Landscape employee at the time of the injury. Nor were questions raised about the medical evidence in this case. *See Decision/Order, Evidence of the Case, II, Medical Evidence* [R. p. 018]. The only issue is whether

¹ What is striking is that respondents *ignored* the one instruction they were given, *i.e.*, to “recite the specific Findings of Fact and Rulings of Law of the Single Commissioner’s Decision and Order” (Request)[R. 022]. In fact, as discussed in greater detail below, respondents *excised* Commissioner Lyndon’s Findings of Fact nos. 3-4 and Conclusions of Law no. 3, which includes the credibility findings that were so fatal to their defense.

his injuries were suffered while Mr. Zepeda was engaged in his employer's work so as to render his injuries compensable.

B. Mr. Zepeda's Testimony.

Mr. Zepeda had some seven years of education in his native Mexico [R. p. 288, l. 3-14], although the process did involve skipping several grades [R. p. 288, l. 13-14]. Upon leaving school, Mr. Zepeda engaged exclusively in physically demanding work [R. p. 288, l. 15-22]. He went to work for Priority Landscape in March 2007 and continued to work for that entity for some two years, or until the date of his injury [R. p. 289, l. 9-25]. Mr. Zepeda testified that during his tenure with Priority Landscape he never missed a day of work, nor had he been disciplined for bad work, drinking on the job or betting [R. p. 291, l. 4-8]. Mr. Hampton, his employer, agreed with that assessment; Mr. Zepeda, he agreed, was a fine worker [R. p. 472, l. 23 to R. p. 474, l. 5].

Mr. Zepeda testified that he had attended safety meetings at work but on account of his inability to speak or understand English, he did not understand the proceedings [R. p. 291, l. 9-16]. He testified that he had never been told not to climb trees and that he had on a number of occasions climbed trees of roughly the same size at work as the one out of which he had fallen [R. p. 291, l. 17-25; R. p. 292, l. 1-13; R. p. 320, l. 15-22]. Mr. Zepeda testified in addition that, along with a coworker named Juvenal, he had climbed into large trees and done trimming with a variety of tools and pieces of equipment [R. p. 292, l. 6 to R. p. 294, l. 1-5]. When they trimmed large trees, Mr. Zepeda testified that the tools were always passed to the worker once he was in the tree, as it would be unsafe for the worker to carry the implements while climbing [R. p. 294, l. 6-15]. Mr. Zepeda

testified that on other occasions on which he had climbed a large tree to trim, the tools would be passed up to him by coworkers [R. p. 294, l. 12-18].

On the day in question, Mr. Zepeda's crew was working at Fort Johnson Baptist Church. The crew had left the company shop with landscaping equipment, including pole saws, ladders and chainsaws suitable for tree trimming. Before getting to work at the church, Frank and Cesar played cards, whether for money or not Mr. Zepeda was not certain [R. p. 300, l. 1-15].

Mr. Zepeda unloaded a tractor-riding mower and began mowing the grass [R. p. 301, l. 13-23]. Subsequently, the claimant returned to the company truck, where Frank, Cesar and Leonardo, another co-worker, were standing. Cesar (who normally translated Frank's instructions from English into Spanish given Mr. Zepeda's lack of English language skills), told the claimant that Frank want him to climb a nearby tree to trim a designated limb [R. p. 302, l. 15 to R. p. 303, l. 14; R. p. 304, l. 10-12]. To facilitate getting up in the tree, Mr. Zepeda drove the mower to the base of the tree, climbed up on the mower and then into the tree and attained the limb he had been told by Frank to trim [R. 303, l. 3-19; R. p. 304, l. 4-12]. Throughout this process, Mr. Zepeda testified, Frank and Cesar, his supervisors, watched in silence as he climbed up the tree and made his way out onto the designated limb [R. 303, l. 20 to R. p. 305, l. 1]. When the mishap occurred, Mr. Zepeda was nearly at the end of the limb [R. p. 337, l. 12-18]. Once there, but before he had begun to undertake the trimming assignment, Mr. Zepeda testified, he lost his balance, fell out of the tree and landed on the ground in a standing position [R. p. 305, l. 2-9].

In addition to spinning an initial but failed yarn that Mr. Zepeda had been hurt on account of falling into a ditch [R. p. 306, l. 12-16], Mr. Zepeda's two actual supervisors at the job site—Frank the supervisor and Cesar the co-supervisor—testified that he had gone up into the tree not on Frank and Cesar's instructions to trim a branch as Mr. Zepeda has testified but solely on a bet for a sum of money that he would never jump out of the tree [R. p. 368, l. 5-21 (testimony of Cesar); R. p. 416, l. 21 to R. p. 417, l. 23 (testimony of Frank)]. For his part, Mr. Zepeda denied that any such bet or offer of money ever took place, let alone that he ever engaged in such a foolhardy venture [R. p. 302, l. 2-5; R. p. 303, l. 10-12; R. p. 304, l. 21-23; R. p. 305, l. 17-19]. Indeed, Mr. Zepeda testified that he is a Jehovah's Witness for whom betting, gambling or drinking on the job are strictly forbidden [R. p. 302, l. 6-14]. It is submitted that it is improbable in the extreme that Mr. Zepeda would abandon his religious beliefs—let alone his common sense and desire to avoid serious injury or even death—to jump out of a tree to win a relatively paltry \$20.00 bet. Indeed, it is nearly as improbable that he would have done so if he had no religious beliefs on the matter at all.

After the fall, Mr. Zepeda limped away and sat down. Cesar told him the accident was being reported to Mr. Hampton [R. p. 305, l. 20; to R. p. 306, l. 11]. In Frank's presence, Cesar told Mr. Zepeda to report that he had been injured on account of falling in a ditch, lest the crew be fired [R. p. 306, l. 12-20; R. p. 307, l. 24 to R. p. 308, l. 1). *See also* R. p. 336, l. 19-24. Cesar also advised Mr. Zepeda not to talk to an attorney about the incident [R. p. 308, l. 12-19], "or there will be a problem" (R. p. 308, l. 17).

Mr. Hampton's secretary, Mary, took Mr. Zepeda to a walk-in medical clinic called Doctor's Care for treatment and then back to Mr. Hampton's house, which doubled

as the Priority Landscape shop [R. p. 309, l. 9-25; R. p. 311, l. 11-23; R. p. 312, l. 1-6]. Juvenal, a coworker and translator, subsequently took Mr. Zepeda to Roper Hospital. Juvenal, who was bilingual, told the doctors about Mr. Zepeda's injuries [R. p. 314, l. 11-19; R. p. 314, l. 25 to R. p. 315, l. 1-5], after which Mr. Zepeda was operated upon [R. p. 314, l. 20 to R. p. 315, l. 13]. After the surgery, Mr. Zepeda met with Mr. Hampton; that gentleman gave him \$100.00 via Cesar [R. p. 342, l. 9-20]. Mr. Zepeda also received \$120.00 from his other coworkers and another \$100.00 from Juvenal [R. p. 316, l. 6-17; R. p. 343, l. 7-12; R. p. 348, l. 2-14]. As a result of the accident, Mr. Zepeda has not worked pursuant to his doctor's orders since he was injured [R. p. 316, l. 25 to R. p. 318, l. 4).

C. *The Testimony of Tomas Martinez Betancourt.*

Mr. Martinez was a co-worker at Priority Landscape for some seven or eight months in 2007 [R. p. 351, l. 10-19]. He testified that while at work he climbed trees to cut limbs from small, medium *and* large trees [R. p. 353, l. 9-23]. In fact, Mr. Martinez testified he had cut trees on the very property where Mr. Zepeda was injured [R. p. 355, l. 1-7]. He also testified that it was normal to pass tools up to the workers when they were cutting limbs [R. p. 353, l. 10 to p. R. p. 354, l. 23]. Moreover, Mr. Martinez testified that he had never been told not to climb trees [R. p. 355, l. 8-16]. Finally, Mr. Martinez testified that Frank would gamble and play cards during break time [R. p. 355, l. 17-21].

D. *The Testimony of Cesar Rodriguez Paredes.*

Cesar had worked for Priority Landscape for two years and was a co-supervisor [R. p. 365, l. 9-10; R. p. 411, l. 20-25]. He also served as a translator for the workers who could not speak English [R. p. 390, l. 11 to R. p. 391, l. 3; R. p. 393, l. 9-13; R. p. 396, l.

13-18]. He testified that he was present when Mr. Zepeda suffered his injuries [R. p. 365, l. 19-20; R. p. 366, l. 1-8]. In fact, he was one of the two supervisors who ordered Mr. Zepeda to climb up into the tree to cut the limb [R. p. 302, l. 22 to R. p. 303, l. 7]. Cesar also testified that the crew had started betting on whether anyone would jump out of a tree, had fruitlessly offered money first to Frank and then to Leonardo, a fellow worker, to do so but that Mr. Zepeda, and only Mr. Zepeda, took the bet for \$20.00 and then proceeded to climb the tree and to jump [R. p. 369, l. 6 to R. p. 368, l. 21].

Cesar testified that he had given \$50.00 to Mr. Zepeda after the accident and in addition delivered two \$100.00 checks from Mr. Hampton to the injured claimant [R. p. 386, l. 1-16; R. p. 387, l. 9-14]. Cesar also testified that on one occasion Mr. Zepeda had offered him money if he was successful in the instant action [R. p. 380, l. 9-20]. Of course, assuming that the incident happened at all—which in light of Cesar’s demonstrated credibility issues is problematic—Mr. Zepeda could have meant no more than that if he was successful in gaining compensation he would be able to repay Cesar for his gift.²

The Single Commissioner did not find Cesar’s testimony credible (Order/ Decision p. 3; Findings of Fact No. 3)[R. p. 020], on a number of grounds. First, Cesar’s credibility was damaged because he first denied playing cards in the truck with Frank [R. p. 369, l. 3-5], but then later admitted to doing so [R. p. 397, l. 1-15]. Then, Cesar gave contradictory testimony about the staged photographs taken of the accident site. He refused to admit when they were taken [R. p. 381, l. 14 to R. p. 386, l. 5]; then he denied they had been taken within thirty days of the hearing; finally, he conceded that the

² Cesar actually answered “No” when asked if Mr. Zepeda had told him “he would pay you back if he got his money out of the case” [R. p. 387, l. 5-7].

pictures produced by opposing counsel were taken the very day before the hearing by counsel in the presence of Mr. Hampton [R. p. 381, l. 14 to R. p. 385, l. 20; R. p. 405, l. 1-15].

Cesar had even more serious, additional credibility problems, however. First he repeatedly denied speaking with anyone in Mr. Zepeda's lawyer's office [R. p. 388, l. 12-19]. Then, when pressed, he admitted that he not only spoken to the office but had actually lied to that office about how the accident had happened, omitting, for example, to relate the so-called Bet and Jump from a Tree story [R. p. 389, l. 2-14]. Later, however, Cesar admitted that he came up with the Bet and Jump from a Tree story to save his job [R. p. 389, l. 16-24; R. p. 407, l. 1-14]. In fact, Cesar admitted that he only testified at the hearing at all in order to save his job [R. p. 409, l. 16-18]. Cesar admitted that he had never told Priority Landscape workers not to climb trees [R. p. 391 l. 3-5]. He was unable to explain why he and Frank simply let Mr. Zepeda climb the tree and creep out onto the limb without seeking to stop the man from undertaking such a dangerous, foolhardy venture [R. p. 393, l. 14 to R. p. 116, l. 3; R. p. 395, l. 5-25].

E. The Testimony of Frank Shoppel.

Frank testified that he had worked for Priority Landscape since 1997 [R. p. 413, l.13-18), and served as a supervisor – that is, when he was not in prison for such offences as aggravated assault and battery, burglary, unlawful use of a telephone and violation of probation [R. p. 441, l. 16 to R. p. 445, l. 15]. Frank testified as to the supposed \$20.00 bet [R. p. 416, l. 21-24; R. p. 417, l. 13-20]. He also testified that Mr. Zepeda climbed the tree, crawled out on a limb that was some twenty feet above the ground, hung from the limb, let go and fell to the ground [R. p. 420, l. 7 to R. p. 421, l. 19] – all for a supposed

and paltry sum of \$20.00. Frank said he did not instruct Mr. Zepeda to climb the tree nor counsel him not to do so, even though he obviously knew the act was unsafe [R. p. 426, l. 15-23; R. p. 433, l. 23-25; R. p. 435, l. 12-25].

Frank did admit that he concocted the "Step in a Hole" cover story, which he now admits is a lie [R. p. 439, l. 5-12], and instructed Mr. Zepeda how to lie about it [R. p. 447, l. 1 to R. p. 448, l. 6]. Nor was that all. Frank also admitted that he dictated a Statement on September 5, 2008 to Mr. Hampton's wife (Claimant's APA 5) [R. p. 041], which he admits contains lies. Frank admitted that he omitted the Bet and Jump from a Tree story from the Statement for fear of losing his job [R. p. 424, l. 22-24], but merely asserted that Mr. Zepeda voluntarily climbed the tree and then either fell or jumped out of it. At this point, Frank may still have been sticking to his Step in a Hole explanation for Mr. Zepeda's injuries. Contrary to Frank's other testimony, the testimonial Statement denies seeing Mr. Zepeda fall or jump from the tree (Claimant's APA 5 [R. p. 041]. *See also* R. p. 438, l. 12 to R. p. 439, l. 3. In short, Frank freely admitted that the September 5, 2008 Statement contained representations that were false, *i.e.*, that the Statement was actually full of lies [R. p. 424, l. 22-24; R. p. 439, l. 5-12; R. p. 452, l. 15-19]. In other words, even after Frank had abandoned his Fall in a Hole yarn for the Bet and Jump from a Tree tale, he admittedly larded even this second tale with lies as well [R. p. 439, l. 5-17]. Given these admitted serial lies, coupled with Frank's lengthy list of felony convictions and drug addict status, Commissioner Lyndon found his testimony not to be credible (Decision/Order, Findings of Fact No. 3) [R. p. 020].

F. The Testimony of William Hampton.

Mr. Hampton testified that he owned Priority Landscape, that he was not present when the accident and injury took place but that he was aware of the incident [R. 457, l. 13-25; R. p. 459, l. 23-25]. He testified that Frank had told him the accident had happened because Mr. Zepeda had fallen into a ditch—the Fall in a Hole fable [P. p. 458, l. 6-14]. Mr. Hampton now knows that the Fall in a Hole story was a lie and in fact does not know personally and actually how the accident happened at all [R. p. 469, l. 5-7]. All his knowledge of the incident comes from second-hand, hearsay information [R. p. 471, l. 23 to R. p. 472, l. 2]. He does, however, note that Mr. Zepeda was a good worker with whom he had not had any disciplinary problems [R. p. 473, l. 6-10].

Mr. Hampton denied that his company would trim trees of the size from which Mr. Zepeda had fallen but would rather contract out the work to a tree service [R. p. 461, l. 7-22]. At the same time, he admitted the accuracy of Claimant's APA 6 [R. p. 042], which was a Priority Landscape June 2008 invoice to Fort Johnson Baptist Church—the very site of the tree from which Mr. Zepeda had fallen—for “tree work to be done each week throughout the property” [R. p. 470, l. 3-13]. Indeed, Mr. Hampton admitted in response to a question from the Single Commissioner that this company could remove a dead tree limb from any tree big or small so long as the limb was reachable with their equipment [R. p. 470, l. 5-11]. What is more, Frank had testified that the company had issued no written instructions not to go up into big trees [R. p. 433, l. 2-5; p. 463, l. 17-19]. Indeed, Mr. Hampton admitted that this supposed prohibition was not even discussed at company meetings [R. p. 463, l. 20 to R. p. 464, l. 1]. Nevertheless, Mr. Hampton expressed surprise at the testimony at the hearing that his employees would routinely and

indiscriminately climb into big trees, medium-size trees and small trees to trim limbs [R. p. 472, l. 5-12].

G. The Medical Evidence.

Commissioner Lyndon summarizes the Medical Evidence in his Decision/Order pp. 11-12 [R. pp. 018-019]. There was no apparent controversy regarding any of that evidence; hence, those data need not be described or treated in this brief.

ARGUMENT

THE COMMISSION IMPROPERLY FOUND AS A MATTER OF FACT AND OF LAW THAT MR. ZEPEDA DID NOT SUFFER A COMPENSIBLE INJURY BY ACCIDENT PURSUANT TO THE WORKERS' COMPENSATION ACT SUCH THAT HE IS ENTITLED TO ALL BENEFITS AFFORDED THEREUNDER.

I. INTRODUCTION.

The defining issue in this case is an essentially simple one. Mr. Zepeda asserts that he was ordered by Frank, his supervisor, to climb up into a tree and to cut down a branch. He testified that he dutifully climbed up into the tree to undertake that assigned task, but fell off the branch to the ground before he actually started working on the branch, and was severely injured as a consequence. Witnesses for Priority Landscape, on the other hand, (when not falsely claiming that the claimant had fallen into a ditch or stepped into a hole) testified that Mr. Zepeda had only climbed up into the tree on a dare, or a bet, so that his fall from the tree was the result of horseplay that was unconnected with his work duties. In the end, the matter came down to credibility—that is, who was Commissioner Lyndon to believe? The Single Commissioner found that the Priority Landscape witnesses had severe credibility problems and so on balance found their testimony unworthy of belief (Decision/Order, Findings of Fact No. 3)[R. p. 020]. On the

other hand, he found Mr. Zepeda to be credible (Decision/Order, Findings of Fact No. 1)[R. p. 019]. Accordingly, Commissioner Lyndon believed Mr. Zepeda's version of the narrative was credible (Decision/Order, Findings of Fact Nos. 1-2)[R. p. 019], and so awarded him compensation.

The most likely scenario—one which the Single Commissioner could well have believed—is that Mr. Hampton does indeed discourage his employees from trimming large trees. Yet, as Messrs. Zepeda and Rodriguez testified, the Priority Landscape crews do on occasion trim large trees—although possibly against orders. On this occasion, Frank did order Mr. Zepeda to undertake such a forbidden task. When serious injury occurred, Frank and the other employees panicked; when Mr. Hampton found out they had sent Mr. Zepeda up into a tall tree, he might fire the lot of them—particularly because serious workers' compensation exposure might be in the offing. Thus, to save their jobs, the crew concocted first the unlikely story that Mr. Zepeda had fallen into a ditch and then the even more implausible yarn that Mr. Zepeda had first climbed up and then jumped out of the tree on a dare so as to win a \$20.00 bet.

It begs credulity to assume that any adult male would agree to risk death or serious injury to jump out of a twenty-foot tree for a mere \$20.00—a sum of money Mr. Zepeda could earn on the job before his coffee break. Few rational human beings would risk their lives by jumping out of a twenty-foot-high tree for a twenty-dollar bill. Accordingly, this alternative version of the events resoundingly flunks the credibility test. The Single Commissioner properly and reasonably believed Mr. Zepeda's narrative, and the claimant respectfully asserts that the Appellate Panel should have done so as well and upheld Commissioner Lyndon's Decision/Order and Award. Under the circumstance,

then, it is up to this Court to do justice and disapprove the Decision and Order entered below.

II. STANDARD OF REVIEW.

The Supreme Court has set out the standard of review governing appeals from the Commission, as follows:

This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. *See* S.C. Code Ann. § 1-23-380(A)(5) (2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). This Court may reverse a decision of the full commission that is affected by an error of law. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333, 335 (2008)(court of appeals decision denying benefits to claimant reversed). In addition, as this Court noted:

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. *Bass v. Isochem*, 365 S.C. 454, 468, 617 S.E.2d 369, 376 (Ct. App. 2005); *Frame [v. Resort Services, Inc.]*, 357 S.C. [520] at 528, 593 S.E.2d [491] at 495 [(Ct.App. 2004)]; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 281, 519 S.E.2d 583, 591 (Ct. App. 1999). The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); *Frame*, 357 S.C. at 528, 593 S.E.2d at 495. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 393, 622 S.E.2d 546, 554 (Ct. App. 2005); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002)

Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753, 758 (Ct.App. 2007)(award of workers' compensation benefits affirmed).

Accordingly," this court'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.” *Id.*, 656 S.E.2d at 757. Or, as a recent decision framed the rule, “this court can reverse or modify the Appellate Panel's decision only if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or *is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.*” *Hieronymus v. Hamrick*, 385 S.C. 1, 682 S.E.2d 512, 514 (Ct.App. 2009) (emphasis supplied) (award of benefits affirmed).

As this Court suggested in *Hieronymus*, the traditional deference paid to the Appellate Panel disposition of the case has its limits. Where, as Mr. Zepeda will argue below, the disposition of the matter is, on the basis of the record as a whole, irrational and frankly unworthy of belief, the standard of review allows the Decision and Order to be disapproved and reversed:

The findings of the appellate panel are presumed correct and will be set aside only if unsupported by substantial evidence. *Kenco Group*, 366 S.C. at 458, 622 S.E.2d at 581; *Frame*, 357 S.C. at 528, 593 S.E.2d at 495; *Broughton*, 336 S.C. at 496, 520 S.E.2d at 637. The appellate court is prohibited from overturning findings of fact of the appellate panel *unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based.* *LibertyMut. Ins. Co. v. S.C. Second Injury Fund*, 611 S.E.2d 297, 301, 363 S.C. 612, 621 (Ct. App. 2005); *Hargrove*, 360 S.C. at 290, 599 S.E.2d at 611; *Etheredge*, 349 S.C. at 455-56, 562 S.E.2d at 681. The appellate panel's factual findings will normally be upheld; *however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.* *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *Muir*, 336 S.C. at 282, 519 S.E.2d at 591; *Sharpe v. Case Produce Co.*, 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997), *rev'd on other grounds*, 336 S.C. 154, 519 S.E.2d 102 (1999).

Houston v. Deloach v. Deloach, 378 S.C. 543, 663 S.E.2d 85, 89 (Ct.App. 2008)

(emphasis supplied) Here, as the Court will see, the Appellate Panel's decision cannot pass muster under the *Houston* and like tests.

In addition, it is a matter of black letter law that the “workers’ compensation statutes are to be liberally construed in favor of coverage.” *Hopper v. Terry Hunt Construction*, 373 S.C. 475, 646 S.E.2d 162, 166 (Ct.App. 2007). As the parties whose seek to uphold the Decision and Order below, it is, therefore, Priority Landscaping and Accident Fund’s burden to demonstrate to this Court that that the disposition by the Appellate Panel is supported by substantial evidence. Otherwise, the principles favoring coverage should prevail. It should be clear from the record as a whole that the respondents cannot possibly succeed in that venture.

Finally, it is clear that in labeling Mr. Zepeda’s injury as one that was self-inflicted and willful, respondents are invoking the terms of S.C. Code Ann. § 42-9-60 (Supp. 2008), which provides as follows:

No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another. In the event that any person claims that the provisions of this section are applicable in any case, *the burden of proof shall be upon such person.*

(Emphasis supplied). Here, respondents have plainly failed to satisfy that burden of proof. *See Youmans v. Coastal Petroleum Co.*, 333 S.C. 195, 508 S.E.2d 43 (Ct.App. 1998)(statute found inapplicable under totality of facts) Accordingly, Mr. Zepeda respectfully asks the Court to reverse that decision and to remand the matter to the Commission so that the appellant may receive the benefits to which he is entitled in fact and in law.

III. THE ISSUE OF CREDIBILITY REMAINS AN OPEN QUESTION.

As noted above, Mr. Zepeda acknowledges the rule that “[t]he final determination of witness credibility ... is reserved to the Appellate Panel.” *Hall v.*

Desert Aire, Inc., supra, 656 S.E.2d at 758. What needs to be underscored in this appeal, however, is that while Single Commissioner Lyndon made a number of credibility determinations that underlay and supported his Decision/Order, the Appellate Panel made none at all. Indeed, the words “credible” or “credibility” do not appear anywhere in the Decision and Order. On the other hand, Single Commissioner Lyndon specifically found that “the testimony of Cesar Rodriguez and Frank Shoppel is not credible for the several reasons cited by me in the evidence summary above of their own testimony in this case” (Decision/Order, Findings of Fact No. 3)(emphasis by the Single Commissioner)[R. p. 020]. Indeed, it is striking to note that in the Decision and Order, the Appellate Panel *excised* Single Commissioner Lyndon’s credibility findings. Thus, not only did the Appellate Panel make no credibility findings of its own but it actually obliterated from its Decision and Order the credibility findings placed into the record by Commissioner Lyndon. *See* Decision and Order p. 2 (Commissioner Lyndon’s Findings of Fact Nos. 3-4 excised)[R. p. 002].³

³ Mr. Zepeda recognizes that in any case in which there is conflicting testimony, it could be argued that the fact-finder is making a finding of credibility by definition when he bases his findings on the testimony of one witness rather than another. Yet where no specific credibility finding is made, the findings are not necessarily based on credibility but could be based on other, more objective factors. When a fact-finder makes a credibility determination it should (as in the case of the Single Commissioner in this case), be explicit and tied to the evidence:

“Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” *Diaz v. Sec’y of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir. 1990). However, “findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings.” *Huston [v. Bowen]*, 838 F.2d [1125,] 1133 [(10th Cir. 1988)] (footnote omitted); *see also Marbury v. Sullivan*, 957 F.2d 837, 839 (11th Cir. 1992) (ALJ “must articulate specific reasons for questioning the claimant’s credibility” ...)).

As the Court will note, it is the testimony of Frank and Cesar that essentially forms the basis for Priority Landscaping and Accident Fund's case against compensation. If that testimony is deemed not credible, then the test for substantial evidence is not present for purposes of this appeal:

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 594 S.E.2d 272 (2004); *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003). Substantial evidence is something less than the weight of the evidence. *Office of Regulatory Staff v. S.C. Pub. Serv. Comm'n*, 374 S.C. 46, 647 S.E.2d 223 (2007).

Hall v. Desert Aire, Inc., *supra*, 656 S.E.2d at 758 See also *Hieronymus v. Hamrick*, *supra*, 682 S.E.2d at 514.

This failure of the Appellate Panel to make credibility findings has a number of possible consequences. First, it is often found as a matter of general administrative law that the failure to make credibility findings vitiates the administrative holding altogether. See, e.g., *Canavan v. Workers' Compensation Appeal Board*, 769 A.2d 1250, 1252-53 (Pa. Commw. Ct. 2001). Second, the failure of the administrative fact finder to make credibility findings can rob the decision of the quantum of "substantial evidence" necessary to survive judicial review. See, e.g., *Williams v. Bowen*, 859 F.2d 255, 261 (2nd Cir. 1988) ("The failure to make credibility findings regarding the Williams' critical

Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995). For that reason, the mere fact of the holding by the Appellate Panel in this case cannot, without more, be characterized as an implied credibility finding. That is especially true where, as here, respondents improperly excised the credibility findings from the Decision and Order they prepared.

testimony fatally undermines the Secretary's argument that there is substantial evidence adequate to support his conclusion that claimant is not under a disability;" social security disability case).

Because the Appellate Panel in this case failed to make credibility findings, perhaps the most appropriate response would be to adopt, as if by default, those credibility findings entered by the Single Commissioner. They are, after all, the only credibility findings in the record. Moreover, Commissioner Lyndon's first-hand exposure to what he described as Frank and Cesar's lies surely gives his findings a particular gravity that should resonate with this Court. After all, it has long been held that "[i]t is logical for the full Commission, which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion[.]" *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318, 321 (1967). *See also Fishburne v. ATI Systems International*, 384 S.C. 76, 681 S.E.2d 595, 602 (Ct.App. 2009)(same). Here, by not making credibility findings of its own, the Appellate Panel could be said not only to have given weight to the Single Commissioner's own findings on that score but to have left them undisturbed. It is true that the Appellate Panel reached a different result from the Single Commissioner. It is clear, however, that it did not do so on credibility grounds but rather on substantial evidence grounds. Accordingly, Mr. Zepeda submits that under the circumstances a like degree of deference by this Court to the Single Commissioner's credibility findings is appropriate here.

IV. THE APPELLATE PANEL IMPROPERLY FOUND THAT MR. ZEPEDA DID NOT SUFFER AN INJURY BY ACCIDENT IN THE COURSE AND SCOPE OF HIS EMPLOYMENT

A. Introduction.

In contrast to Commissioner Lyndon (Decision/Order, Finding of Fact No. 1)[R. p. 019], the Appellate Panel improperly found that Mr. Zepeda's evidence "fails to provide a basis even for a reasonable belief that Claimant was furthering the Employer's business when he climbed into the subject tree" (Decision and Order, Conclusion of Law No. 2)[R. p. 020]. Mr. Zepeda acknowledges the rule that his injury to be compensable must have arisen out of and in the course of his employment:

To be compensable, an injury by accident must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2007). The two parts of the phrase "arising out of and in the course of employment" are not synonymous. *Osteen v. Greenville County Sch. Dist.*, 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). Also, both parts must exist simultaneously before a court will allow recovery. *Id.* "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. *Id.* at 50, 508 S.E.2d at 24.

Ardis v. Combined Insurance Co., 380 S.C.313, 669 S.E.2d 628, 632 (Ct.App. 2008)(tests satisfied; compensation awarded). Mr. Zepeda demonstrated at the hearing that his act of climbing the tree partook of precisely those two qualities; hence, he was improperly denied compensation by the Appellate Panel. *See also Grant v. Grant Textiles*, 372 S.C.196, 641 S.E.2d 869, 871 (2007)(tests satisfied; compensation awarded); *Hall v. Desert Aire, Inc.*, *supra*, 656 S.E.2d at 758-59 (same).

B. The So-Called Horseplay Narrative.

Here, the Appellate Panel found that the injury was the result of "'horseplay' as defined by the Appellate courts of this state" (Decision and Order, Conclusion of Law

No. 3)[R. p. 007]. In response, Mr. Zepeda does not simply argue that the asserted acts were not horseplay; rather, he asserts that there was no horseplay activity in this case at all because the very assertion of those acts is a false, insufficiently supported narrative crafted by Priority Landscape employees to cover up the actual cause of the accident. Moreover, there is not a shred of substantial probative evidence to support the horseplay narrative. In short, there was no bet; there was no dare; above all, Mr. Zepeda did not jump down from the tree. Rather, he was ordered up into the tree by his supervisor to undertake work that "ar[ose] out of and in the course of employment." *Ardis v. Combined Insurance Co.*, *supra*, 669 S.E.2d at 632, quoting S.C. Code Ann. § 42-1-160 (Supp. 2007). He fell from the tree while doing that work; a fortiori, his entitlement to compensation should be a matter of course. As Commissioner Lyndon rightly saw but the Appellate Panel overlooked, the issue of compensability is properly determined, in this case at least, by credibility considerations. If the persons asserting the existence of the bet and Mr. Zepeda's acceptance of that wager are themselves not credible, as Commissioner Lyndon found Decision/Order, Finding of Fact No. 3)[R. p. 020], then at the very least Commissioner Lyndon was correct when he found "that the defendants failed to prove by the greater weight of the evidence that the Claimant was engaged in 'horseplay'" (Decision/Order, Finding of Fact No. 2)[R. p. 019]. Even apart from credibility considerations, therefore, there is simply insufficient evidence to support the narrative favored by the Appellate Panel.

As the Court will see from both the Decision/Order and the transcript of the hearing itself, there are two and only two witnesses—Cesar and Frank—who tell the betting story under which Mr. Zepeda is supposed to have climbed the tree and then

jumped off from a perch twenty feet above the ground, all for a \$20.00 wager. The utter improbability of such an act has been discussed above; equally as serious is the fact that the two witnesses—the *only* two witnesses—telling this story are not only liars, are not only admitted liars, but are also admitted liars whose confessed lies relate directly to the truth or falsity of appellants' version of the alleged events in issue.⁴ Frank and Cesar's testimony is the *only* proffered evidence supporting the Bet and Jump from a Tree theory for the explanation of the injury. If, as Commissioner Lyndon reasonably and properly did, their testimony is to be rejected as not credible, then there is no evidence at all that Mr. Zepeda's fall was anything other than an accident undertaken in response to a work-related instruction from his supervisor that "ar[ose] out of and in the course of employment." *Ardis v. Combined Insurance Co.*, *supra*, 669 S.E.2d at 632. If there is no credible evidence of the "bet" as the motivating cause of the fall from the tree, then there is no reason to deny Mr. Zepeda compensation for his injuries. That is, if one were to discard the testimony of Cesar and Frank, then one would be left with the uncontroverted fact that Mr. Zepeda fell out of a tree while at work at a job site during his regular work hours. Under those facts, an award of compensation would appear to be a matter of course.

C. The Alleged Problem of the Missing Tools.

As the Court will note, the Appellate Panel focused in its Findings of Fact upon the fact that, as it found, Mr. Zepeda had no tools with him—nor did his coworkers have tools to pass him—when he climbed the tree (Decision and Order, Findings of Fact Nos.

⁴ The fact that Frank is an oft-convicted felon who shuttles back and forth between the state penitentiary and his position with Priority Landscape as his behavior and the dictates of the law permit, renders his credibility particularly subject to attack.

1-3)[R. p. 005]. The lack of tools apparently constituted substantial evidence upon which the Appellate Panel concluded that Mr. Zepeda did indeed jump off the tree on a bet. The testimony upon which the findings rest is that of Cesar (Decision and Order, Findings of Fact No. 2)[R. p. 005], and Frank (Decision and Order, Findings of Fact No. 3)[R. p. 005]. As noted above, the Single Commissioner found the two men not to be credible. Both men, in addition, admitted to first lying about what had happened to cause the fall, asserting that Mr. Zepeda had tripped and fallen in a hole. The Appellate Panel, as we have seen, did not in its deliberations specifically find these two gentlemen to be credible or not credible; hence, given their admitted lies and Frank's status as a convicted felon and drug addict, Mr. Zepeda asserts that their testimony falls far short of the quantum of substantial evidence to support the Decision and Order below.

The Appellate Panel relied as well upon Mr. Hampton's testimony that "the company trims limbs out of large trees only if they can be reached using a pole saw and a ladder" (Decision and Order, Findings of Fact No. 4)[R. p. 006]. The Appellate Panel apparently concluded that his testimony plus the equipment brought to the work site entails that Mr. Zepeda could not possibly have been twenty feet up in a tree and still be about his employer's business.

As the Court will note, Commissioner Lyndon found as a fact "that Priority Landscaping and Lawn Care, Inc., in the regular course of business did tree trimming on small, medium, and large trees when the limbs could be reached with a ladder and an extension saw" (Decision/ Order, Findings of Fact No. 1)[R. p. 019]. Even more to the point, both Mr. Zepeda [R. p. 291, l. 17 to R. p. 292, l. 1-9; R. p. 320, l. 15-22], and Mr. Martinez [R. p. 353, l. 9 to R. p. 354, l. 3], testified that they had climbed and worked on

large trees. Even if, as the Appellant Panel held, Mr. Hampton ostensibly restricted work on large trees to those reachable by ladders and extension saws, it is not improbable given this testimony as to the size of trees the crews worked on in fact, that a supervisor like Frank could order a worker like Mr. Zepeda to work on a tree that was not, strictly speaking, within Mr. Hampton's guidelines. Assuming that only a single branch was involved, given past company practice, just going ahead and getting the trimming task out of the way could have been deemed preferable to the hassle of calling in an outside tree service to do the work. In other words, Frank could reasonably have decided simply to order Mr. Zepeda up into tree just to get the job out of the way. Given the extremely long, complicated and time consuming process Mr. Hampton would have to undertake just to get an outside contractor on the job [R. p. 462, l. 12 to R. p. 462, l. 1], it is not surprising that when faced with a single limb to cut—even a limb high up in a tree—Frank and Cesar would opt for just going up into the tree and getting the job done.

Certainly, having worked on large trees before, it would be reasonable for Mr. Zepeda to obey his boss and to head up the tree. Clearly, this is a much more likely scenario than the farfetched Step in a Hole and/or Make a Bet and Jump rationales respondents' witnesses have variously asserted as the reason for Mr. Zepeda's injuries.

As noted above, this explanation meshes with the possibility, discussed above, that Frank had sent Mr. Zepeda up a tree in violation of the company policy upon which the Appellate Panel relied in reaching its decision. When that act led to injury, Frank was frantic [R. p.424, l. 25 to R. p. 425, l. 3], to cover up the fact that it was his violation of company policy which had directly led Mr. Zepeda's injuries and potential workers' compensation liability. This would make the Step in a Hole and/or Make a Bet and Jump

stories attractive since they could absolve Frank of responsibility for his act of mismanagement and shift the onus to Mr. Zepeda.

Counsel for respondents argued at the Full Commission Hearing that Frank made up the Step in a Hole story to save his job; he would, he feared, be fired if it were known that he countenanced as supervisor the Make a Bet and Jump scenario. *See Full Commission Hearing R. p. 264, l. 25 to R. p. 265, l. 22.* Even if Frank was trying to save his job, however, Mr. Zepeda contends that the reason for the loss of job would not have been the Make a Bet and Jump caper—whose asserted existence is frankly an insult to this Court’s intelligence—but rather the fact that he had sent Mr. Zepeda up into the tree to cut a limb when company policy was to call for an outside service to do the job. It would not have been the mere fact of sending Mr. Zepeda skyward—there was testimony discussed above that this was far from an unknown practice—but the fact that the order had led to a potentially compensable injury. That Frank realized that it was time to start spinning yarns is not surprising. What is surprising is that he actually talked the Appellate Panel into accepting the second of his tales as the truth.

The Appellate Panel found, based on the admittedly tainted testimony of Frank and Cesar that “the only reason the Claimant climbed the tree was to satisfy his obligation under a \$20.00 bet offered by Cesar Rodriguez that he would climb the tree and jump out” (Decision and Order, Findings of Fact No. 5)[R. p. 006]. This finding simply cannot, however, constitute the substantial evidence necessary for this Court to support the Decision and Order entered below. Clearly, a poor management decision by Frank intended to take care of a tree limb problem on the spot instead of calling in a tree service is a much more likely explanation for Mr. Zepeda’s journey up into the tree than

the utterly implausible notion that he “bet” someone \$20.00 that he would jump to the ground from twenty feet up in the tree. The very suggestion is utterly counterintuitive; it is contrary to the most elementary notions of human nature and motivation that a 45-year-old man with a family would risk his life for a sum of money that is less than twice what he would earn in two hours on the job.

What is more, when one closely examines the missing tools upon which the Appellate Panel based much of its factual findings, one discovers that the tools were not missing at all; they just had not yet been called into action. First, the truck on the site had a great deal of equipment on it [R. p. 357, l. 15-20], including a small chainsaw [R. p. 296, l. 11-12], which could surely have been used to cut the limb. The truck has ladders as well [R. p. 429, l. 17-25; R. p. 440, l. 17-21]. As the Court can see from the picture identified as Defendants Exhibit C-5, the truck parked next to the tree had all of the equipment necessary for that purpose [R. p. 357, l. 6-20]. The truck in the photograph is parked exactly where it was parked on the day of the injury [R. p. 416, l. 11-16]. Thus, the equipment necessary to do the job was at hand [R. p. 440, l. 22 to R. p. 441, l. 15].

As noted above, Mr. Zepeda testified that, when engaged in trimming large trees, the tools were always passed to the worker once he was in the tree, because it would be unsafe for the worker to carry the implements while climbing [R. p. 294, l. 6-15]. Mr. Zepeda testified that on other occasions on which he had climbed a large tree to trim, the tools would be passed up to him by coworkers [R. p. 294, l. 6-22]. In addition, Mr. Martinez confirmed that it was normal to pass tools up to the workers when they were up

in the tree cutting limbs [R. p. 353, l. 10 to R. p. 354, l. 23]. The tools would be passed up by ladder or sometimes by ropes [R. p. 354, l. 4-15].

Thus, the supposedly fatal lack of tools (Decision and Order, Findings of Fact Nos. 1-3)[R. p. 005], turns out upon examination not to be fatal at all. Mr. Zepeda would never have carried tools up the tree while climbing; instead, the truck had all the equipment, including ladders and ropes, necessary to pass the tools up to him in the tree. The reason why the tools were never passed up to Mr. Zepeda at all is simple – he fell *before* he got to the spot where he was to cut the limb [R. p. 305, l. 2-3], which is the first point in time when he would have needed the tools. Accordingly, it is plain that the Appellate Panel's factual findings as to the tools have absolutely no basis in the record.

It is hornbook law that "a reviewing court may reverse or modify a decision of the appellate panel if the findings, inferences, conclusions, or decisions of the panel are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Houston v. Deloach v. Deloach*, *supra*, 663 S.E.2d at 88, quoting S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006). *See also McGuffin v. Schjlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162, 164 (1992)(Supreme Court upheld circuit court decision finding that decision by Full Commission denying benefits was clearly erroneous in light of reliable probative and substantive evidence in the entire record). These principles entail that, regardless of whether credibility issues are deemed determinative or not, the Decision and Order cannot pass muster under these tests. The Decision and Order represents a clear and obvious miscarriage of justice. It accepts as true incredible, hardhearted lies by fellow workers who elevated fears for their own job security over their compatriot's entitlement to injuries he had suffered on account of his obedience to

their supervisory instructions. Accordingly, the holding should be disapproved and vacated, and the case remanded to the Commission for further proceedings in light of that holding.

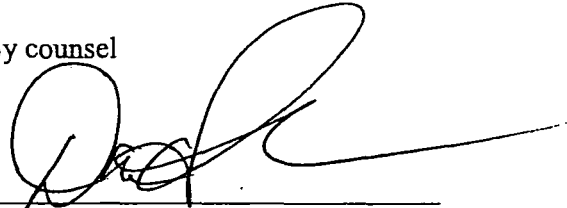
CONCLUSION

For the reasons set out above, Appellant Ramon Ramos Zepeda-Cepeda respectfully asks the Court to reverse the Decision and Order entered by the Appellate Panel in this case.

Respectfully submitted,

RAMON RAMOS ZEPEDA-CEPEDA

By counsel

A handwritten signature in black ink, appearing to read 'Don C. Gibson', is written over a horizontal line.

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May 18, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

No. 2009147487

Appeal from the South Carolina Workers' Compensation Commission

W.C.C. File No. 0813616

Ramon Zepeda-Cepeda, Employee/Appellant

v.

Priority Landscaping and Lawn Care, LLC, Employer/Respondent

AND

Accident Fund Insurance Company of America, Carrier/Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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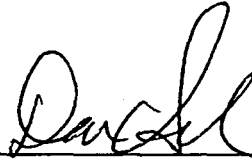
AND

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I hereby certify that the foregoing Final Brief of Appellant was served on all parties by mailing true and correct copies of the same via first class mail, proper postage affixed, to:

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Tracking No. 2009-17487

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Employer/Respondent

and

Accident Fund Insurance Company of America

Carrier/Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY FOUND AS FACT AND CONCLUDED AS A MATTER OF LAW THAT APPELLANT FAILED TO CARRY HIS BURDEN TO PROVE HIS FALL FROM A TREE LIMB AND RESULTING INJURIES AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT?**
 - A. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY CONCLUDED AS A MATTER OF LAW THAT APPELLANT'S "REASONABLE BELIEF" HE ACTED IN THE COURSE AND SCOPE OF EMPLOYMENT AT THE TIME OF HIS ACCIDENT IS INSUFFICIENT TO PROVE COMPENSABILITY UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT?**
 - B. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY FOUND AS FACT AND CONCLUDED AS A MATTER OF LAW THAT APPELLANT FAILED TO PRESENT EVIDENCE SUFFICIENT TO PROVE HE "REASONABLY BELIEVED" HE ACTED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF HIS INJURY?**
- II. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY FOUND AS FACT AND CONCLUDED AS A MATTER OF LAW THAT RESPONDENTS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE IN THE WHOLE RECORD THAT APPELLANT ENGAGED IN HORSEPLAY AT THE TIME OF HIS ACCIDENT, THUS BARRING HIM FROM RECEIPT OF WORKERS' COMPENSATION BENEFITS?**

STATEMENT OF THE CASE

This matter comes before the Court on appeal taken by Appellant Ramon Zepeda-Cepeda ("Appellant") from the Decision and Order of the South Carolina Workers' Compensation Commission ("Commission") dated October 29, 2009. Appellant alleges injury by accident in the course and scope of his employment when he fell out of a tree on September 4, 2008. Respondents denied compensability of the claim citing that Appellant's injury did not arise out of and occur in the course of Appellant's employment.

The case went to hearing before Commissioner G. Bryan Lyndon ("Hearing Commissioner") on January 22, 2009. At hearing the parties stipulated to an average weekly wage of \$436.32 with a corresponding compensation rate of \$308.09. The Hearing Commissioner issued a Decision and Order dated April 21, 2009, finding the claim compensable. He found "based on the cumulative evidence that the Appellant *reasonably believed* he was furthering the Employer's business when he climbed into [a] tree," from which Appellant fell, causing his injuries. Decision and Order, April 29, 2009, p. 12, Finding of Fact #1 (emphasis added) The Order awarded past and ongoing temporary total disability benefits, payment of all past and future causally-related medical expenses pursuant to the South Carolina Workers' Compensation Act ("Act").

Respondents timely sought review of that Decision and Order by Form 30, Request for Commission Review, dated April 29, 2009. Appellate Panel B of the Commission ("Full Commission") heard oral argument by the respective parties on August 25, 2009. By Decision and Order dated October 29, 2009, the Full Commission unanimously reversed the Hearing Commissioner's Decision and Order in full. The Full Commission ruled that a finding that

Appellant "reasonably believed" he was acting in the course and scope of his employment failed to satisfy his burden to prove compensability under the Act.

Appellant seeks appellate review of the Full Commission's decision after filing a Notice of Appeal dated November 30, 2009.

FACTS

Testimony of Ramon Zepeda

The Appellant began working for Employer/Respondent in approximately March, 2007. (R. p. 289, lines 9-13) He testified that he earned \$9.00 per hour working forty to fifty hours per week. (R. p. 290, lines 11-19)

On the day of the alleged accident, the Appellant arrived at the company's shop at 8:00 a.m. He was assigned to a crew including Cesar Rodriguez, Frank Shoppel, and a gentleman named Leonardo. (R. p. 295, lines 1-15) Shoppel worked as the supervisor of the crew and Rodriguez was the English to Spanish translator for the crew. (R. p. 297, lines 8-12)

Appellant testified that he arrived at the subject location, Fort Johnson Baptist Church, at approximately 12:45 that afternoon. He also stated that he ate lunch at 10:00 a.m. prior to arrival. (R. p. 298, lines 6-9) When the crew first arrived at the church, Shoppel drove the company vehicle around the church as was customary when arriving at a job. (R. p. 299, lines 1-4) He parked the truck under the tree shown in Defendants' Exhibit C, Picture No. 1. (R. p. 299, lines 7-20) Appellant stated that upon arrival the crew took a break "like we would – we used to." He stated that he stayed in the truck resting with Leonardo while Shoppel and Rodriguez played cards. The Appellant did not notice whether they were playing cards for money. (R. p. 300, line 12) He states that upon leaving the truck after the break he opened the doors and

removed the tractor [riding lawnmower] to begin "cutting." (R. p. 301, lines 13-23) Appellant stated he returned to the truck when he realized there was no one else working yet. He testified that the other three members of his crew were standing around the truck and when he arrived Rodriguez said that Shoppel said he "should go up the tree." (R. p. 302, line 25 – p. 25, line 4)

Appellant testified he pulled a tractor next to the tree and climbed up the tractor into the tree. (R. p. 303, lines 13-19) Appellant stated this was a customary part of his job. (R. p. 304, lines 4-5) Appellant then states he lost his balance and fell from a standing position in the tree onto the ground. He testified that he then limped to the work truck and sat down. (R. p. 305, lines 2-22) Rodriguez then informed the Appellant that he "should say [he] fell in a ditch." (R. p. 306, lines 5-16) Appellant testified Rodriguez informed him "probably we were gonna lose this job." (R. p. 306, lines 17-18)

Appellant testified that Mary, the company's secretary, arrived in her car at the location of the injury to take him to Doctor's Care. (R. p. 309, lines 9-22) Appellant was wheeled into Doctor's Care in a wheelchair and asked to sit in the waiting room. (R. p. 310, lines 1-9) The Doctor's Care secretary gave the Appellant a piece of paper but Appellant does not recall filling out the form. He simply recalls signing a piece of paper. (R. p. 310, lines 10-17) There was a Spanish speaking person in the doctor's office that attempted to communicate with the Appellant. (R. p. 311, lines 3-8) Appellant testified that Mary took him away from the Doctor's Care after being released and transported him to the company's shop at William Hampton's house. (R. p. 311, lines 13-18) Hampton is the owner of the Employer/Respondent company. Upon allegedly arriving at Hampton's home, the Appellant states he was invited in and asked to have a seat. He testified that five or ten minutes after his arrival another employee, Juvenal, along with Rodriguez, Shoppel and Leonardo arrived at the shop. (R. p. 311, line 15 – p. 312,

line 6) Appellant states Juvenal then took him to the hospital where the Appellant had surgery. (R. p. 313, line 8 - p. 315, line 13)

Appellant's counsel then turned his questions towards the topic of the normal scope of the Employer's business. Appellant testified that he and his fellow workers "trim and cut trees." (R. p. 318, lines 20-23) He testified that they "climb in big, medium and small trees." (R. p. 318, lines 24-25) He stated that part of his work with Employer/Respondent was working in residential and commercial properties during "tree work, grass work and yard work." (R. p. 319, lines 10-12) Appellant also stated that he never received any written instructions from anyone with the Employer/Respondent in English or Spanish instructing him not to climb in trees and not to cut or trim large trees. (R. p. 320, lines 19-22)

On cross-examination, Appellant admitted that he and Rodriguez lived in the same house at the time of the accident and at the time of his testimony. (R. p. 321, line 14 - p. 322, line 19) Defense counsel then showed Appellant a picture in Exhibit "C" noted as picture No. 1. Appellant acknowledged this picture that showed both the church and the limb from which he fell. (R. p. 323, lines 10-17) Appellant admitted he had no tools in his hand at the time he climbed the tree. (R. p. 324, lines 11-12) The Appellant testified that after making his way from the truck of the tree to the end of the lengthy limb shown in the pictures of Exhibit "C," he expected one of his crew members to hand him a tool. When asked what kind of tool, the Appellant testified that he wasn't sure, "some pruner or machete." (R. p. 328, lines 16-25) Appellant was unsure as to which of his fellow crew members was going to hand a tool to him, but he was certain he was in the tree to cut a limb. (R. p. 329, lines 1-7)

Appellant testified that the limb from which he fell was "maybe six meters" off ground. (R. p. 329, lines 18-19) The Hearing Commissioner took judicial notice that the limb was

"around twenty feet" from the ground. Appellant then asserted that he was standing on a limb approximately twenty feet off the ground and expected a fellow crew member to pass him a pruner or a machete. (R. p. 330, lines 9-13) He acknowledged there were no ropes involved. (R. p. 330, lines 14-15) Later the Appellant testified that no one followed him up the tree behind him on the day that he fell. (R. p. 335, lines 4-10) He acknowledged testifying previously that when he climbed other trees to work in them, Juvenal would carry a tool to him by climbing into the same tree. (R. p. 335, lines 11-18) He then acknowledged that none of the people working with him on the day of his injury climbed into the tree to pass him a tool. (R. p. 335, lines 19-21)

On redirect examination by his attorney, the Appellant testified that after speaking with Hampton several days after the accident he did not get the impression that Hampton would directly provide him with any support from his injury. (R. p. 342, lines 9-23) He did acknowledge that Hampton provided \$100.00 through Cesar. (R. p. 342, line 15) Appellant also acknowledged receiving a box of money wherein the other employees of the company contributed to help support him. (R. p. 343, lines 3-10)

Testimony of Cesar Rodriguez

Rodriguez testified that he worked for Priority Landscaping at the time of the hearing and had worked there for two years. (R. p. 365, lines 7-10) He testified that his jobs as Priority Landscaping were to mow the grass, trim bushes, use a weed-eater, and use a blower. (R. p. 365, lines 11-18)

Rodriguez testified that he was present on the day that Appellant suffered an injury at Fort Johnson Baptist Church. (R. p. 365, line 19 - p. 366, line 4) The witness examined Defendants' Exhibit C, picture No. 5, and acknowledged that the picture was of the tree from which the Appellant fell. (R. p. 367, lines 9- 13) He noted the location of the work truck on the

date of the accident and acknowledged that the crew ate lunch under the tree near the truck for approximately thirty minutes on the date of the injury. (R. p. 367, line 2 – p. 90, line 3) The witness denied playing cards with Frank on that day. (R. p. 368, lines 4-5) The witness then testified that the crew got out of the truck and started making “bets.” (R. p. 368, lines 6-14) The witness testified that his bet to the others was to “hold the tree and go down.” (R. p. 368, lines 17- 19) By way of clarification, he testified that he wanted someone to “jump out” of the tree. (R. p. 368, lines 20-21) The witness testified that he first offered the bet to Shoppel, the supervisor of the crew. (R. p. 368, lines 22-24) The offer was fifty dollars to climb the tree and jump out. Shoppel refused that bet. (R. p. 368, line 25 – p. 369, line 4) After Shoppel refused the bet, the witness offered the same bet to his other crew member, Leonardo, yet this time he offered only twenty dollars. Leonardo also refused the bet. (R. p. 369, lines 5- 14) After Leonardo refused the bet, the witness testified that he offered Appellant the bet to jump out of the tree for twenty dollars. (R. p. 369, lines 15-21)

After Rodriguez offered Appellant the bet to jump out of the tree, Leonardo drove the riding lawnmower close to the tree and the witness states the Appellant “climbed.” (R. p. 370, lines 10-13) This testimony conflicts directly with that of Appellant who stated he pulled the lawnmower up to the tree. (R. p. 303, lines 13-19) Rodriguez testified he was never asked by Shoppel to translate or tell the Appellant to climb the tree to cut a limb. (R. p. 372, lines 4-6) Rodriguez testified that he did not have a tool in his hand and did not intend to hand a tool to the Appellant to cut a branch from the tree. (R. p. 372, lines 16-21) He further confirmed that Shoppel had no tool in his hand at the time Appellant was in the tree and had no understanding that Shoppel intended to hand Appellant a tool to cut a branch from the tree. (R. p. 374, line 21 – p. 375, line 2) In looking at picture No. 4 of Defendants’ Exhibit “C,” the witness confirmed that

he could not possibly have handed Appellant a tool from the ground where he was standing while the Appellant was in the tree limb. (R. p. 375, lines 3-12) The witness clearly stated that when he offered the bet to the Appellant, the Appellant accepted:

Q. When you offered the bet to Ramone, did he say anything?

A. He looked pretty sure. He say yeah.

(R. p. 375, lines 11-13) Rodriguez testified the Appellant began to climb into the tree using the riding lawnmower after accepting the bet. (R. p. 375, lines 14-17)

Rodriguez then testified that he has never climbed into the tree from which Appellant fell, nor has he ever seen any crew member of company climb that tree (R. p. 375, line 20 - p. 376, line 1) The witness also confirmed that he has never climbed a tree as big as the tree from which the Appellant fell. (R. p. 376, lines 2-4) The witness then examined Defendants' Exhibit C, picture No. 2 and acknowledged that it showed the size tree that employees of the company would trim in the course of their business. He testified that he would trim the lower limbs of trees such as the one shown in Exhibit "C," picture No. 2. (R. p. 376, line 8 - p. 377, line 8) The witness identified Exhibit "C," picture No. 7 as a similar size tree that employees of the company would trim. (R. p. 377, line 25 - p. 378, line 23) Rodriguez also noted that he had never climbed into the tree shown on picture No. 7 of Exhibit "C," without using a ladder. (R. p. 378, line 24 - p. 379, line 1)

Most importantly, Rodriguez testified that the Appellant, who lives in the same home as Rodriguez, offered him money related to the case. The witness testified that the Appellant started the conversation about money and the witness quoted the Appellant as saying "you know, I don't get no money for - - I don't get paid these days, so if I win money, I give you some." (R. p. 379, line 24 - p. 380, line 17) The witness testified that conversation wherein the offer of

money was made occurred one month after the Appellant fell from the tree. (R. p. 380, line 25 – p. 381, line 7)

On cross-examination, Rodriguez testified that the photographs in Defendants' Exhibit "C" were taken on a Wednesday prior to the hearing. The witness acknowledged that he and Shoppel and Leonardo went to the job site with the owner of the company, Hampton, and defense counsel to procure the photographs. (R. p. 383, line 11 – p. 385, line 20) The witness acknowledged that he gave the Appellant fifty dollars when he got of the hospital. (R. p. 386, lines 5-8) He then acknowledged that the Appellant asked him to "help him, you know, give him some money" after the injury. (R. p. 386, line 24 – p. 387, line 1) Rodriguez testified that he provided the Appellant with some money but the Appellant never indicated he would pay him back. (R. p. 387, lines 2-7)

Appellant's attorney then asserted through leading questions on cross-examination that the witness spoke with someone in the Appellant's attorney's office over the telephone and informed them that the Appellant fell out of a tree. (R. p. 388, line 12 – p. 389, line 10)

The witness acknowledged not telling anyone at the Gibson Law Firm about a betting situation. (R. p. 389, lines 11-13) The witness explained the failure to mention a bet as his effort to help the Appellant and to protect his own job. (R. p. 389, lines 14-24)

Continuing in cross-examination, Rodriguez was asked whether he ever informed any co-workers, either on his own or in translation from the supervisor, that employees should not be climbing trees. (R. p. 391, lines 3-5) The witness responded that if a limb was to be cut, only he or Shoppel would perform that work. (R. p. 391, lines 8-11) Upon suggestion by counsel that only Rodriguez or Shoppel would be "the one to climb trees," the witness responded that "no, we don't climb trees. We trim the limbs." (R. p. 391, lines 3-15) Rodriguez also refuted a

suggestion from the Appellant's attorney that he himself had fallen out of a tree. (R. p. 391, line 18 – p. 392, line 6) He then refuted the suggestion that he informed the Appellant “bad things were going to happen with him if he kept up with this lawsuit,” and “that immigration was going to come and arrest him if he proceeded with it.” (R. p. 392, lines 8-17) After confirming that he considered the Appellant a friend, Rodriguez responded to a question of counsel that he bet a friend fifty dollars to climb eighteen feet into a tree and jump because, “we play.” (R. p. 392, lines 21-23) He also noted that he asked the Appellant “you sure?” before he climbed the tree to which Appellant responded “yeah.” (R. p. 393, line 21 - p. 394, line 3)

Continuing on cross-examination, Rodriguez testified that he stood on the ground and watch the Appellant climb into the tree, but did not instruct the Appellant not to climb the tree. (R. p. 395, lines 5-11) Rodriguez stated that he did not instruct the Appellant not to climb the tree because he considered the Appellant “the owner of his decision. He knows what he is doing.” (R. p. 395, lines 7-24) The witness again confirmed that it was his idea alone to offer the bet to climb the tree. (R. p. 397, lines 21-25) He stated he did not speak with Shoppel about the bet but when the Appellant accepted the bet to climb the tree, the witness informed Shoppel of the same. (R. p. 398, lines 1-7) Rodriguez stated that Shoppel questioned “You sure?” to which the witness responded to Frank, “Yeah, he want to do it.” (R. p. 398, lines 1-12) When asked why Rodriguez offered the money to jump out of the tree, he stated “You never what people’s gonna do.” (R. p. 399, line 25 – p. 400, line 1) Appellant’s attorney responded, “Well, weren’t you trying to encourage him to go up the tree?” The witness responded, “I just tell - - I offered twenty bucks, offer, you know. I say, ‘if somebody wants twenty bucks for ...’ - - and he looks pretty sure.” (R. p. 400, lines 2-6) He then stated that he asked the Appellant “You sure?”

The witness testified and the Appellant responded "Yeah, I'm going. I need the money." (R. p. 400, lines 7-9)

At no point during cross-examination did Appellant's counsel test the witness' testimony regarding the offer of money from Appellant if he prevailed in the claim.

On re-direct examination, Rodriguez confirmed that Hampton, Shoppel, Leonardo and defense counsel were present for the taking of the photographs. (R. p. 405, lines 2-15) The witness reiterated that he did not mention anything about a bet during his telephone conversation with Appellant's attorney's office because he intended to protect the Appellant and his job. (R. p. 407, lines 1-11) He acknowledged that he was scared he would lose his job because he made a bet and wanted to prevent that information from getting to the owner of the company. (R. p. 407, lines 12-19) He testified he was scared that Hampton would get upset if he found out the bet was made. (R. p. 407, lines 20-22)

Upon questioning on re-cross, the witness admitted he was testifying to protecting his job, but later on redirect informed that Hampton did not tell him he would lose his job if he did not testify at hearing. (R. p. 409, line 16 – p. 410, line 3)

Testimony of Frank William Shoppel

Shoppel testified that he is a supervisor for Employer and has been on an intermittent basis since 1997. (R. p. 413, lines 13-23) Shoppel testified that he was present on the day when Appellant fell out of the tree, causing the Appellant's injuries. (R. p. 413, line 24 – p. 414, line 4) The witness clearly stated that he did not instruct Cesar Rodriguez to translate into Spanish to tell the Appellant to climb the oak tree from which he fell to cut a limb. (R. p. 414, lines 5-8; p. 416, lines 18-20) Upon examining Defendants' Exhibit "C," picture No. 5, the witness acknowledged that it showed the picture of the tree Appellant "jumped out of." (R. p. 415, lines 16-21)

When asked why the Appellant climbed the tree, Shoppel responded "a bet." (R. p. 416, lines 21-22) The witness testified that Rodriguez made the bet which was first offered to Shoppel and then to Leonardo, both of whom rejected the bet. (R. p. 416, line 23 – p. 417, line 4) Shoppel then stated the bet was offered to the Appellant. (R. p. 417, line 4) Shoppel testified that he was offered fifty dollars to take the bet. (R. p. 417, line 5-6) After his refusal, Rodriguez offered twenty dollars to Leonardo who also refused the bet. (R. p. 417, lines 7-12) Shoppel was present when the offer was made to Appellant for twenty dollars and indicated the Appellant climbed to the tree right after the offer was made. (R. p. 417, lines 13-20)

Shoppel testified that the Appellant used the riding lawnmower to climb up into the tree after Leonardo backed it out of the work truck and positioned it close to the tree. (R. p. 417, line 21 – p. 418, line 6) He testified that the Appellant did not have a tool in his hand when he climbed the tree. (R. p. 419, lines 4-7) Shoppel also stated that he did not have a tool in his hand to pass up when Appellant climbed the tree. (R. p. 419, lines 8-10) Lastly, he confirmed that neither Cesar nor Leonardo had a tool in their hand that the Appellant would have used to cut a limb out of the tree. (R. p. 419, lines 11-17)

Shoppel testified that he witnessed the Appellant climb into the tree and onto the limb from which he fell. (R. p. 419, line 18 – p. 420, line 9) He testified the Appellant walked twenty to twenty five feet out onto the limb and that the limb was approximately twenty feet above the ground. (R. p. 420, lines 10-16) Shoppel testified that the fall happened "all quick." (R. p. 421, lines 1-2) He stated the Appellant "cradled the branch that he was standing on, turned over, and then hung and dropped." (R. p. 421, lines 3-5) The Hearing Commissioner described Shoppel's indication of the manner in which the Appellant fell as, "Well, he actually hung. He used both hands clasped around the trunk and was dangling?" The witness responded "Yes, sir." (R. p.

421, lines 11-14) Shoppel then confirmed that Appellant let go of the tree limb and landed on his feet on the ground. (R. p. 421, lines 16-19)

After the Appellant fell from the tree, Shoppel walked over and examined his legs. (R. p. 421, lines 24-25) He testified that he knew the Appellant as injured as soon as he looked at him. (R. p. 422, lines 4-6) Shoppel stated he then called Hampton, his boss. (R. p. 422, lines 13-14) Thereafter, the company secretary, Mary, arrived to transport the Appellant but Shoppel did not go with them and had no idea what happened after that point. (R. p. 422, line 19 – p. 423, line 9)

Shoppel later testified that he was worried at one time that he might lose his job if the story of the bet was made public. (R. p. 424, lines 22-24) He was worried about his job because he is the supervisor of the crew on which the bet occurred. (R. p. 424, line 25 – p. 425, line 3) Respondents' counsel showed the witness page 5 of the Appellant's APA Submissions, which the witness acknowledged was a written statement of the accident written the day after it occurred. (R. p. 425, lines 4-16) The witness testified that Hampton's wife typed the statement but that he was present and telling her his story as she typed it. (R. p. 425, lines 17-24) The witness acknowledged that this written statement said nothing of a bet on the job site. (R. p. 425, line 25 – p. 426, line 1) He responded that he had not told Hampton or Hampton's wife at this point about a bet at the time the statement was written. (R. p. 426, lines 2-4) However, he testified and the statement shows that there was mention that the Appellant climbed the tree for "fun." (R. p. 426, lines 7-10)

Shoppel testified that he never told the Appellant get out of the tree while he was in it. (R. p. 426, lines 19-21) He also never told Appellant not to climb the tree. (R. p. 426, lines 22-23) He also testified that he has never climbed the tree out of which the Appellant fell. (R. p.

426, line 24 – p. 427, line 1) Shoppel testified that the tree shown in Defendant's Exhibit C is not a tree maintained by the company. (R. p. 427, lines 2-4) He went on to state that the company does not cut limbs out of a tree as big as the one from which the Appellant fell. (R. p. 427, lines 5-7) Shoppel also examined Defendants' Exhibit "C" picture No. 2 and described a fifteen to twenty foot tall tree that was "a good example of a normal tree that Priority would trim in the course of its business," as opposed to the large oak tree from which Appellant fell. (R. p. 427, lines 8- p. 428, line 4) Shoppel stated that he would never climb into a tree shown in picture No. 2 to trim it, but would normally trim the base and lower limbs of such a tree. (R. p. 428, lines 5- 11) The witness testified that if the company needed to cut a limb in a tree about the size of that shown in picture No. 2, they would use a pole saw that extends eleven to twelve feet. (R. p. 428, lines 14-22) He described the pole saw as a small chainsaw on the end of a pole. (R. p. 428, line 25 - p. 429, line 8) After acknowledging that the company work truck had six, eight and ten foot ladders available, Shoppel testified there was no ladder pulled from the truck for Appellant to use in climbing the tree from which he fell. (R. p. 430, line 17 – p. 431, line 5)

On cross-examination, Shoppel acknowledged at Appellant's counsel's suggestion that he was the supervisor of the group and responsible for ensuring that his men were "operating and doing their job safety." (R. p. 432, lines 17-22) He also acknowledged that it would be his job in working for Hampton and the company that workers were "doing things in a safe manner." (R. p. 432, line 23 – p. 433, line 1) Shoppel acknowledged that it was not safe to climb into a twenty foot tree but did not tell the Appellant not to climb into the tree. (R. p. 433, line 16 – p. 435, line 8) The witness again described that the Appellant "cradled the tree" and dropped down. (R. p. 435, lines 22-23)

Appellant's counsel then asked the witness to read into the record his statement shown in the Appellant's APA, page 5. (R. p. 438, line 2, - p. 439, line 3) After doing so, Shoppel acknowledged that parts of that statement were "a lie." (R. p. 439, lines 5-9) He acknowledged the statement that he did not see Appellant fall out of the tree was untrue. (R. p. 439, lines 10-12) He then noted that the pole saw he previously described would be able to reach a limb in that tree with the use of a ladder. (R. p. 440, lines 5- 21)

Shoppel then acknowledged that he had previously been incarcerated for assault and battery of a high and aggravated nature. (R. p. 442, lines 1-2) He admitted through lengthy questioning and without hesitation that he had previous convictions for burglary, disorderly conduct, malicious destruction of property and violation of probation, all of which was consistent with his South Carolina Law Enforcement criminal history report marked as Appellant's Exhibit No. 4. (R. p. 442, line 4 - p. 446, line 1) Shoppel made no effort to mislead the Commissioner as to his prior convictions.

Appellant's attorney then resumed his cross-examination regarding the Employer's scope of business. The witness testified that he never instructed anyone to wear a harness while climbing a tree, because "nobody should be in a tree." (R. p. 446, lines 9-12) He confirmed that no one would be instructed to climb a tree such as the one from which the Appellant fell. (R. p. 446, lines 13-16) The witness then acknowledged that he told Cesar that the story should be told that the Appellant stepped in a hole or a ditch. (R. p. 447, lines 1-5) He confirmed discussing that matter with Cesar and instructing him to say the Appellant stepped in a hole. (R. p. 447, lines 6-25) The witness then acknowledged that the story of the Appellant stepping in a hole was an effort to cover up the bet and was the basis for him giving a false statement the day after the accident. (R. p. 448, lines 1-6)

On redirect examination by Respondents' counsel, Shoppel confirmed that he was present on the date of the accident and witnessed a bet. (R. p. 448, lines 18-21) He acknowledged fabricating the story of stepping in a hole in an effort to keep his job and the Appellant's. (R. p. 448, line 22 – p. 449, line 1) He stated that he was not threatened in any way to change his story and confirmed under oath that the account of events involving the bet that prompted the Appellant to climb into the tree was the truth. (R. p. 449, lines 2-8)

Testimony of William Hampton

Hampton testified that he has owned Priority Landscaping in its current form since 1996. (R. p. 457, lines 13-17) He described the business of Priority Landscaping and Lawn Care as "lawn maintenance and landscaping selection." (R. p. 457, lines 18-21) He testified that on the date of the injury, he was contacted by Frank and informed that "Somebody was injured on the job and that someone had fallen into a ditch." (R. p. 457, line 22 - p. 458, line 9) Hampton discovered through Shoppel's written statement that there was a fall from a tree involved in this accident. (R. p. 459, lines 5-10)

After evaluating the photographs in Defendants' Exhibit "C," Hampton testified that the oak tree from which the Appellant fell is not of the size that Priority Landscaping would cut or trim. (R. p. 461, lines 1-4) In further explanation, he stated, "There is three things our business does not do. It does not trim large oak trees. We have a subcontractor to do that. It does not provide irrigation services. We have a subcontractor for that. And we do not provide chemical treatments. We have a subcontractor for that." (R. p. 461, lines 5-12). The witness testified that Priority Landscaping contracts with Budget Tree Service, owned by an arborist, Richard Van Kirk, to perform tree services. (R. p. 461, lines 15-25). He further stated that if a client such as Fort Johnson Baptist Church called and asked him to evaluate a problem with a large oak tree, he

would inform the client that he needed to contact Budget Tree Service first. (R. p. 462, lines 12-18) He would then evaluate the tree problem with Richard Van Kirk and the property manager or owner of the client property. (R. p. 462, lines 19-21) He stated that Richard would evaluate the problem and provide a price quote to resolve the situation. (R. p. 462, lines 19-22) Hampton would then submit the quote to the client property for their decision on whether to proceed with the proposed resolution. (R. p. 462, line 19 - p. 463, line 1) In reference to the tree from which the Appellant fell, Hampton testified that his employees "never" scale trees that large. (R. p. 463, lines 10-11) He followed by saying that he has not provided any specific safety instructions regarding climbing large trees because "we don't climb large trees." (R. p. 463, lines 12-16)

Hampton then examined Defendants' Exhibit "B" and described the documents as "invoices submitted by Richard [Van Kirk] to our company for work done at various properties, specifically tree service work." (R. p. 464, line 21 - p. 465, line 10) Upon being directed to an invoice dated September 16, 2008, the witness described the work done as "remove several broken limbs and one large branch on the wire" from Ft. Johnson Baptist Church. (R. p. 465, lines 11-22) Hampton then acknowledged that this work was performed just 12 days after the date of the alleged accident. (R. p. 465, lines 23-24) He examined another invoice from work performed at "108 West Cooper" wherein the description of work was "cut back branches from building on oak tree in the back." (R. p. 466, lines 3-17). The witness described that invoice as an example of work that Budget Tree Service would be brought in to perform. (R. p. 466, lines 18-20)

Hampton went on to testify that he did not recall the Appellant visiting his home on the evening of the accident. (R. p. 467, lines 4-21) Instead, he testified that he arrived at the Doctor's Care where the Appellant was being treated at approximately 7:00 p.m. that evening.

(R. p. 467, line 22 – p. 468, line 1) Hampton clearly testified that he did not ask Frank to tell the Appellant that he should fabricate a story about stepping in a ditch or a hole. (R. p. 468, line 15 – p. 469, line 2) He testified he was informed that was the original story but later found out such was not the case. (R. p. 469, lines 3-7) He also confirmed that he never made any threats of any sort or adverse action against any employees who testified at the hearing. (R. p. 469, lines 8-12) He then confirmed his understanding that the Appellant's injuries occurred after a bet was made on his jobsite. (R. p. 469, lines 13-15)

Upon cross-examination, Appellant's counsel confronted the witness with Appellant's APA p. 6, which the witness confirmed was an invoice for Ft. Johnson Baptist Church from June 2008. (R. p. 469, line 2 – p. 470, line 4) On that invoice, the witness confirmed that a note at the bottom of the invoice that said, "Tree work will be done each week throughout the property, special attention given to trimming the base of the Crepe Myrtles paralleling the walkway to the sanctuary." (R. p. 470, lines 5-13) Hampton acknowledged that his company's invoice states the tree work would be done on the property and that the invoice does not differentiate between small or big trees. (R. p. 471, lines 10-15) Appellant's counsel then asserted through his questioning that it was clear to the witness that the invoice indicated "other tree work would be done." The witness responded, "Yes, for instance on the example given in the other photos." (R. p. 471, lines 19-22) Hampton confirmed on redirect examination that "the example given in the other photos" refers to the smaller trees previously mentioned in Defendants' Exhibit "C," pictures Nos. 2. (R. p. 474, line 19 – p. 475, line 11) The witness stated the company would trim a small oak tree to prevent limbs from hitting cars as they by. (R. p. 475, lines 15-20)

On other cross-examination by the Appellant's attorney, the witness admitted he was not present for the accident and only knows what he was told after the accident. He acknowledged

that Shoppel did not originally state exactly what actually happened. (R. p. 471, line 23 - p. 472, line 5) The witness acknowledged hearing testimony from another witness who said that employees of the company would "climb into big trees, little trees, and medium-sized trees." (R. p. 472, lines 6-10) Hampton testified that testimony surprised him because "that would not be something that we would do." (R. p. 472, lines 11-12)

On additional redirect examination by Defendants' counsel, the Hampton acknowledged that he was present for the taking of photographs of the site of the injury. (R. p. 477, lines 14-16) Hampton confirmed that he and his employees instructed defense counsel on where the particular points of importance and referenced occurred on the jobsite and that defense counsel did not "stage" any photographs as had been asserted by Appellant's counsel on his cross-examination of the witness. (R. p.477, line 14 - p. 478, line 1)

Finally, Hampton responded to questioning from the Commissioner regarding whether the company would authorize one of its employees to cut a dead limb from a large tree such as the one from which the Appellant fell. The witness testified in no uncertain terms that he would allow his employees to trim a dead limb out of a large tree if the limb could be reached with a ladder and an 11-foot extension pole saw. (R. p. 478, line 7 - p. 479, line 11) He acknowledged that he wanted the trees to look nice but stated he would only take out dead limbs if they were safely reached from the ground. (R. p. 479, lines 12-24) The Commissioner then asked if Shoppel, the crew supervisor, would have the authority to instruct an employee to attempt to cut a limb and then decide to contact Hampton if it is unreachable. The witness reiterated the company's position on the issue that a limb can be trimmed from a large tree "if it is reachable by . . . a stepladder, an extension pole saw, not physically climbing into a tree. Not physically climbing into a tree, but using a stepladder and extension pole saw. The extension pole saw will

cut a limb maybe in an oak tree about this big [referring to the tree from which Appellant fell].”

(R. p. 480, lines 9-20).

ARGUMENT

STANDARD OF REVIEW

The standard of review set forth in the Administrative Procedures Act ("APA") applies to workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Thus, the findings of the workers' compensation commission are presumed correct and will be set aside only if unsupported by substantial evidence. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E.2d 357 (1996). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 594 S.E.2d 272 (2004). Substantial evidence is something less than the weight of the evidence. *Office of Regulatory Staff v. S.C. Pub. Serv. Comm'n*, 374 S.C. 46, 647 S.E.2d 223 (2007). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the commission are conclusive. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 541 S.E.2d 526 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Lee v. Harborside Cafe*, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct.App. 2002).

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY FOUND AS FACT AND CONCLUDED AS A MATTER OF LAW THAT APPELLANT FAILED TO CARRY HIS BURDEN TO PROVE HIS FALL FROM A TREE LIMB AND RESULTING INJURIES OCCURRED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

Appellant submits the Appellate Panel of the South Carolina Workers' Compensation Commission ("Full Commission") erred in finding that Appellant failed to carry his burden to

prove his injury occurred in the course and scope of his employment. Commissioner G. Bryan Lyndon's ("Hearing Commissioner") concluded that the claim was compensable under the South Carolina Workers' Compensation Act ("Act") based upon Appellant's "reasonable belief" he was acting in the course and scope of his employment when he climbed a large oak tree on the employer's jobsite.

A. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY CONCLUDED AS A MATTER OF LAW THAT APPELLANT'S "REASONABLE BELIEF" HE ACTED IN THE COURSE AND SCOPE OF EMPLOYMENT AT THE TIME OF HIS ACCIDENT IS INSUFFICIENT TO PROVE COMPENSABILITY UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT.

The Full Commission held that Appellant's "reasonable belief" we was acting in furtherance of his employer's business at the time of his injury is insufficient under the law to award workers' compensation benefits. Respondents submit the Full Commission properly interpreted the law and reversed the Hearing Commissioner's decision, thus denying Appellant those benefits.

The South Carolina Workers' Compensation Act dictates that a *claimant* must prove by a preponderance of the evidence that she suffered an injury by accident in the course and scope of her employment. S.C. Code Ann. §42-1-160(A) An injury arises in the course of employment when it occurs within the period of the employment, at a place where the employee reasonably may be in the performance of his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An accident arises out of the employment when it arises because of it, as when the employment is a contributing proximate cause. *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 230, 113 S.E.2d 737, 739 (1961) The phrases "arising out of" and "in the course of employment" are used conjunctively. One of these elements without the other will

not sustain an award. *Brady v. Sacony of St. Matthews*, 232 S.C. 84, 101 S.E.2d 737 (1957) The burden rests upon the claimant to show by competent testimony, not only the fact of injury, but that it occurred in connection with the employment; and to furnish evidence from which the inference can logically be drawn that the injury arose out of and in the course of the employment. *Fowler*, 236 S.C. at 235, 113 S.E.2d at 742.

The Full Commission appropriately notes in its Decision and Order that,

The panel concludes that the Hearing Commissioner's finding that Claimant 'reasonably believed' he was asking in the course and scope of his employment is insufficient to conclude as a matter of law that this claim is compensable under the Act. The panel concludes that the Claimant must prove not that he believed he was operating in the course and scope of his employment, but that he actually was operating in the course and scope of his employment at the time of his accident. Claimant failed to carry that burden.

The law establishing a workers' compensation claimant's burden to prove the elements of "arises out of" and "occurs in the course of" employment is well-settled. That law is recited above. There simply is no reference in that established corpus of law to a standard of proof that permits an award of benefits under the Act where a claimant "reasonably believes" she is acting in furtherance of her employer's business at the time of an accidental injury. Respondents submit to base an award of benefits on such a reduced standard of proof is clear, reversible error of law.

The perils of a claimant's "reasonable belief" standard of proof in workers' compensation claims are easily identified by examining the practical effect of such a standard: every workers' compensation claimant reasonably believes she is acting in the course and scope of her employment. If that claimant did not believe she was acting in furtherance of her employer's business at a place and time where, and in a circumstance under which she is expected to operate, then it would be clear without examination of any evidence that an injury by accident

would not be compensable. But if that claimant were required only to prove that she reasonably believed she acted in the course and scope of her employment, then nary a workers' compensation claim would be denied. Had the legislature so intended that standard of proof, the Act would speak clearly on the point. Yet it speaks clearly when it says "'injury and personal injury' mean only injury by accident arising out of and in the course of employment." The Courts of this state have not seen fit in their many opportunities to examine that provision to interpret it as incorporating injuries by accident that occur while an employee reasonably believes the injury arose out of and in the course of the employment.

The Full Commission identified the error in the Hearing Commissioner's Decision and Order and took affirmative steps to correct it by reversing the award of benefits. Respondents respectfully request this Court affirm that decision.

B. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY FOUND AS FACT AND CONCLUDED AS A MATTER OF LAW THAT APPELLANT FAILED TO PRESENT EVIDENCE SUFFICIENT TO PROVE HE "REASONABLY BELIEVED" HE ACTED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF HIS INJURY.

The Full Commission found as fact and concluded as a matter of law that Appellant could not prove by a preponderance of the evidence in the whole record that he even "reasonably believed" he was acting in furtherance of the Employer's business at the time of his injury. Thus, according to the Full Commission, it stands to reason that he also fails to carry his burden to prove he actually was acting in the course and scope of his employment. The Full Commission entertained and considered conflicting evidence on the issue and properly determined that Appellant was not acting in the course and scope of his employment at the time of his injury. Respondents submit the Full Commission's findings that Appellant had no tool

and no plan to receive a tool to trim a branch are, first, their interpretation and decision based on conflicting testimony of the witnesses; and second, are supported by substantial evidence in the record. Thus, those findings and the decision to deny benefits should not be disturbed on appeal.

The Full Commission specifically identified the facts upon which they based their decision to reverse the award. Those facts centered on the question of whether Appellant could reasonably believe he was furthering his employer's business when he climbed the tree without tools in his possession and without any arrangements or plan with his crew members to pass or hoist him a tool to cut a branch from the limb from which he fell. It stands to reason that if Shoppel indeed sent the Appellant into the tree to trim a limb, Appellant would need a tool on his person or the crew on the ground would need a plan to pass or hoist a tool to the Appellant.

For all of Appellant's examination of witness credibility issues among defense witnesses, there is one undisputed fact – when Appellant climbed a 20-foot oak tree allegedly to trim a branch from a large limb, he had no tool on his person. The Appellant, Shoppel and Rodriguez were the only witnesses at hearing who were present at the scene when Appellant climbed the tree. All three of those witnesses testified Appellant had no tool on his person when he climbed. (R. p. 324, lines 6-12; p. 372, lines 16-21; p. 374, line 21 – p. 375, line 2; p. 419, lines 4-17)

Appellant testified in deposition that he had no tool when he climbed the tree. (R. p. 497, line 25 – p. 498, line 1) He stated he “would wait until somebody passed [a tool] on to me.” (R. p. 498, lines 10-13) When asked what tool he intended to use, Appellant responded, “Maybe a hatchet. Maybe a saw.” (R. p. 498, lines 14-15) He couldn't specifically identify what tool he planned to use. Later at hearing, Appellant again testified he had no tool in his possession when he climbed. (R. p. 324, lines 6-12) He testified one of his co-workers intended to pass him a tool, but he couldn't specifically identify the tool or the specific crew member who would pass

him the tool. (R. p. 328, line 21 – p. 329, line 7) He further stated the only crew member holding any sort of implement when he climbed was Leonardo, who was holding a “weed eater” (presumably a string trimmer). (R. p. 324, lines 13-15) Appellant admitted Leonardo was not going to pass him a weed eater to trim a branch out of a tree. (R. p. 324, lines 16-18) If he intended to trim a branch from a tree on order of his supervisor, it stands to reason that he would have to at least consider and arrange for the proper tool to do the job. Appellant offered no evidence of any such prior consideration or plan. This testimony lends credence to that of Shoppel and Rodriguez that no one on the crew had a tool in their hands and no plan to climb, pass or hoist one up to the Appellant in the tree. (R. p. 372, lines 16-21; p. 374, line 21 – p. 375, line 2; p. 419, lines 4-17) This testimony of the defense witnesses on this point was not contradicted with other evidence or even tested on cross-examination.

Appellant’s internally inconsistent testimony on alleged previous trimming jobs in large trees calls into question not only his credibility, but his bald and unsupported assertion that someone on the ground intended to pass him a tool to trim the branch on the day in question. He testified that he previously climbed large trees to trim branches as part of his employment. (R. p. 293, lines 18-20) Appellant responded that he never carried tools into large trees because that might cause him to fall. (R. p. 294, lines 6-11) He testified that “somebody would pass [a tool] to me.” When asked how they would pass him a tool, the following exchange took place:

Q. And how would they pass it to you?

A. So the time that [a coworker] told me to come down and he went up and then I passed him the power saw.

Q. Did you just hand them up with your hands, or did you use any other method?

A. No, *I had to go up the tree to give it to him.*

(R. p. 294, lines 12-22) If Appellant at once refused to carry a tool into a tree himself for fear of falling, then there is no valid explanation for his subsequent testimony that he climbed a large tree to carry a tool to a coworker charged with trimming branches or limbs. There simply is no reasonable explanation for and consistency in Appellant's version of events pertaining to trimming a branch in the tree on the day at issue in this case.

In addition, the owner of the company, Hampton, testified the company contracted out any work trimming large trees if the crew could not reach a branch needing trimming with an extension ladder and use of a pole saw. (R. p. 479, line 5 – p. 480, line 20) Respondents put into evidence numerous invoices reflecting the company's policy to contract Budget Tree Service to perform any tree work that exceeded their minimal capacity to trim large trees with a ladder and pole saw. One of those invoices reflects contract work performed on trees at the very location of Appellant's injury just twelve days following the injury. Hampton's testimony and the invoices, in the absence of credibility concerns, are substantial evidence enough to support the Full Commission's finding that Appellant failed to prove he was performing services in the course and scope of his employment when he climbed the tree.

The Full Commission viewed all of this testimony and the record as a whole and properly found that Appellant failed to present evidence sufficient to carry his burden to prove his injuries arose out of and in the course of his employment. The panel considered conflicting testimony of the witnesses and found that "Appellant carried no tool and made no arrangements for a tool to be passed to trim the limb he alleges was his charge from supervisor Frank Shoppel." (R. p. 006, Conclusion of Law #2) Thus, Appellant having failed to answer the Commission's question of why he was in the tree, the Commission drew a conclusion from other evidence in the record that the only explanation was that a bet occurred – an issue discussed at length *infra*. The Full

Commission's findings on this point should not be disturbed on appeal as the Commission is the ultimate finder of fact in this instance. Furthermore, there is other substantial evidence taken from the record as a whole that supports the Full Commission's findings. Accordingly, Respondents respectfully requests this Court affirm the Commission's Decision and Order.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY FOUND AS FACT AND CONCLUDED AS A MATTER OF LAW THAT RESPONDENTS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE IN THE WHOLE RECORD THAT APPELLANT ENGAGED IN HORSEPLAY AT THE TIME OF HIS ACCIDENT, THUS BARRING HIM FROM RECEIPT OF WORKERS' COMPENSATION BENEFITS.

The South Carolina Supreme Court states, "The homely word "horseplay" is applied by the courts to pranks and practical jokes which are frequently indulged in by congregated workmen; and courts generally distinguish between aggressors or instigators, who are not compensated when injured, and nonparticipating victims or innocent bystanders who are compensated." *Allsep v. Daniel Constr. Co., et al*, 216 S.C. 268, 57 S.E.2d 427, 429 (1950) The Court in *Allsep* awarded compensation to the innocent victim of a prank. In doing so, Justice Stukes noted, "Our act contains a provision which in substance denies compensation when the injury results from intoxication or willful misconduct of the injured employee" *Id.* While there is no precedent establishing in this state that a bet between co-workers that involves the threat of immediate physical injury is indeed horseplay, it certainly stands to reason that such a bet constitutes the "willful misconduct" Justice Stukes references in his opinion.

A decision on this issue ultimately falls to this Court's mandated standard of review discussed in detail *supra*. Appellant would have the Court believe he was ordered up the tree by Shoppel to trim a small limb from a larger branch approximately twenty feet above the ground.

He testified that Shoppel (through the crew translator, Rodriguez) gave that direct order. (R. p. 303, lines 3-4) Shoppel's testimony directly contradicts that version of events:

Q. Were you present at Fort Johnson Baptist Church ---

A. Yes

Q. --- when [Appellant] fell out of a tree.

A. Mm-hmm. (affirmative response)

Q. Yes?

A. Yes.

Q. I need you to say yes or no. Did you instruct [Rodriguez] to translate into Spanish to tell [Appellant] to climb the oak tree to cut a limb?

A. No.

(R. p. 413, line 24 – p. 414, line 8)

Shoppel later reiterated that same testimony. (R. p. 416, lines 18-20) Rodriguez's testimony also contradicts the Appellant's version of events by confirming that he made the bet that Respondents submit is the reason Appellant climbed the tree. (R. p. 369, line 6 – p. 370, line 16; p. 397, line 21 – p. 398, line 12).

The conflicting testimony on this point between Appellant on one hand, and Shoppel and Rodriguez on the other is a clear question of fact. That question is whether there was an order from Shoppel to Appellant to climb the tree, or whether there was a bet to climb the tree. The question pits the testimony of opposing witnesses with the Full Commission charged to find the answer. The Full Commission found after careful examination of the evidence and deliberation on the issues, and in spite of the Hearing Commissioner's finding that neither Shoppel nor

Rodriguez were credible, that there was a bet to climb the tree. (R. p. 007, Conclusion of Law #3)

The law is clear: where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492-493, 541 S.E.2d 526, 528 (2001). On the issue of whether there was a bet to climb the tree, this Court must give deference to the Full Commission's exhaustive review of the facts as established by testimony and should not disturb the resulting findings. To overturn that decision would require this Court to substitute its interpretation of that conflicting testimony over that of the fact-finder – the Full Commission. Such a substitution of judgment on the facts falls well beyond the scope of review conferred on this Court.

Appellant asserts the Hearing Commissioner's finding of a lack of credibility in both Shoppel and Rodriguez creates a lack of substantial evidence to support the Full Commission's finding that a bet between co-workers brought about this accident. Appellant's reliance on the Hearing Commissioner's credibility findings is brought about by his assertion that Respondents improperly excised those findings from their proposed Decision and Order. The Full Commission carefully considered the proposed Decision and Order submitted by Respondents counsel at the Commission's request. In the Full Commission's "Request for Proposed Decision and Order," the Commission reserves the right to "modify and/or delete any or all portions of the submitted Decision and Order."

The Full Commission signed the Decision and Order without modification or deletion. That Order remained silent on the issue of credibility, but implicit in their finding that a bet occurred between co-workers is a finding that the panel believed Shoppel's and Rodriguez's

testimony over that of the Appellant. The Decision and Order clearly recites the Hearing Commissioner's findings "in pertinent part." (R. p. 002) Respondent submits the Full Commission's omission of the Hearing Commissioner's credibility findings speaks to the pertinence of those findings to the Full Commission's ultimate reversal of the Hearing Commissioner's decision. Reaching the decision to favor Shoppel's and Rodriguez's testimony on the issue of the bet required the Full Commission to lend credibility to those witnesses. It simply does not stand to reason that Shoppel and Rodriguez are not credible because the Full Commission made no specific findings on that issue. The only guidance given by the Full Commission in preparation of the Decision and Order was "Full Reversal of the order of the [Hearing] Commissioner." Full reversal of the Hearing Commissioner's Order must include the credibility findings at issue.

Accordingly, Respondents respectfully request this Court refrain from substituting their interpretation of conflicting testimony for that of the Full Commission. In doing so, the Court should affirm the Full Commission's decision that a bet occurred that removed this accident from any consideration that in occurred in the course and scope of the Appellant's employment. By affirming that decision, the Court need not reach the issue of whether a bet between co-workers constitutes "horseplay" as examined in *Jones v. Hampton Pontiac*, 304 S.C. 440, S.E.2d 427 (1991); *Allsep v. Daniel Constr. Co., et al*, 216 S.C. 268, 57 S.E.2d 427 (1950); and, *Floyd v. City of Charleston*, 287 S.C. 474, 339 S.E.2d 166 (Ct.App. 1986) (all as interpreting S.C. Code Ann. §42-1-160(A)). Appellant failed raise that argument in brief; therefore the question is not before the Court.

CONCLUSION

The Full Commission reached its findings and conclusions by thoroughly examining and considering conflicting testimony of the various opposing witnesses. The Full Commission's findings, therefore, should not be disturbed on appeal. Furthermore, there is more than ample substantial evidence to support the findings and conclusions reached by the Full Commission. For the reasons stated herein, Respondents respectfully request this Court affirm the Decision and Order of the Full Commission denying workers' compensation benefits to Appellant.

May 18, 2010



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tracking No. 2009147487

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0813616

Ramone Zepeda-Cepeda, ... Appellant,

v.

Priority Landscaping and Lawn Care, LLC, ... Employer,

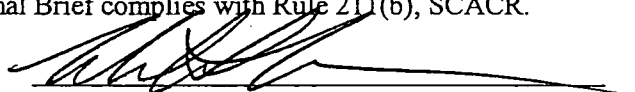
and

Accident Fund Insurance Company of America, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

May 18, 2010



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

No. 2009147487

Appeal from the South Carolina Workers' Compensation Commission

RECEIVED

MAY 19 2010

W.C.C. File No. 0813616

SC Court of Appeals

Ramone Zepeda-Cepeda, Employee/Appellant

v.

Priority Landscaping and Lawn Care, LLC, Employer/Respondent

AND

Accident Fund Insurance Company of America, Carrier/Respondent

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ARGUMENT

I. RESPONDENTS' CHARACTERIZATION OF THE FULL COMMISSION'S FINDING AS TO THE INSUFFICIENCY OF MR. ZEPEDA'S "REASONABLE BELIEF" THAT HE ACTED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT FAILS TO ENGAGE THE ACTUAL ISSUES IN THIS CASE.

A. *Introduction.*

As Ramone Zepeda-Cepeda ("Mr. Zepeda"), pointed out in his Brief of Appellant, the decision by the Full Commission is fatally flawed in at least two respects. First, the findings of fact and conclusions of law in the Full Commission Decision and Order ("the Decision and Order"), are not supported by substantial evidence, while on the other hand Mr. Zepeda's quest for benefits is amply supported by such a quantum of evidence. Second, the failure of the Full Commission to deal with the fundamental credibility issues in this case also renders the Decision and Order insupportable on appeal.

The Decision and Order is founded almost entirely by the testimony of two admitted liars, Cesar Rodriguez ("Mr. Rodriguez"), and Frank Shoppel ("Mr. Shoppel"), the latter of whom is a felon to boot. They were both supervisors who according to their boss were told not to send employees up into trees to trim tree limbs. The evidence in this case suggests that Messrs. Rodriguez and Shoppel sent Mr. Zepeda up into the tree notwithstanding. Before he could be handed a cutting tool, however, Mr. Zepeda fell from the tree and was seriously injured. At that moment Messrs. Rodriguez and Shoppel panicked; they were afraid of losing their jobs for violating their boss's orders. Accordingly, they concocted a story that Mr. Zepeda had been injured by stepping into a hole. When Mr. Zepeda's injuries proved too serious to make that story believable, the

two men spun a second and even more improbable yarn, namely, that Mr. Zepeda had climbed up the tree and jumped off on a \$20.00 bet. The Single Commissioner found that Messrs. Rodriguez and Shoppel had lied on a number of occasions and were not credible; thus benefits were awarded to Mr. Zepeda. Unaccountably, the Full Commission bought Messrs. Rodriguez and Shoppel's story (the second one, that is, not the first), and denied compensation to Mr. Zepeda. This result is wholly unsupported by substantial evidence—it is, in fact, a miscarriage of justice—and so Mr. Zepeda urges the Court to right this unconscionable wrong by reversing the Decision and Order.

Nothing in the response filed by employer Priority Landscaping and Lawn Care, LLC ("Priority"), and carrier Accident Fund Insurance Company of America ("Accident Fund"), the respondents herein ("the respondents"), succeeds in rebutting Mr. Zepeda's argument. Still less do respondents offer any cogent reasons why the Decision and Order should be approved in this forum. Accordingly, Mr. Zepeda respectfully asks the Court to reverse the Decision and Order and to remand the matter to the Full Commission so that the benefits to which Mr. Zepeda is entitled can be provided to him.

B. The "Reasonable Belief" Concept is not Determinative of the Issues in this Case.

The Single Commissioner found that Mr. Zepeda "reasonably believed he was furthering the Employer's business when he climbed into the subject tree" (Decision/Order, Findings of Fact No. 1)[R. p. 019]. Of course, the Single Commissioner's assumption as to reasonable belief was based on the finding that Mr. Zepeda had climbed the tree "during the course of employment under the instructions, direction of, and in the presence of his supervisor Frank Shoppel and interpreter Cesar

Rodriguez" (*id.*). On review, the Full Commission determined that this finding by the Single Commissioner of "reasonable belief" was insufficient to establish compensability (Decision and Order, Conclusions of Law No. 1)[R. p. 006]. As the Full Commission stated, "the Claimant must prove not that he believed he was operating in the course and scope of his employment, but that he actually was operating in the course and scope of his employment at the time of his accident" (*id.*)(emphasis in the original). The Full Commission then concluded that Mr. Zepeda had "failed to carry that burden" (*id.*).

The respondents attempt to develop that theme by presenting a black letter synopsis of the law of the course and scope of employment in the "reasonable belief" context (Initial Brief of Appellant [sic] pp. 25-26).¹ The discussion is based essentially upon hornbook law with which no one, least of all Mr. Zepeda, could possibly object. Indeed, that concept of course of employment was recently defined by the Supreme Court in a way that is directly applicable to the appeal at hand:

A claimant may recover workers' compensation benefits if he sustains an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2009). "Arising out of" refers to the origin and cause of the accident; the phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753,

¹ Priority and Accident Fund are, of course, the respondents in this appeal. They are not the "appellants," let alone jointly the "appellant," as they label themselves in their Brief of Appellant [sic]. In addition, one notes that that in the referenced discussion, respondents refer to Mr. Zepeda as the "Appellant[]", as "we," and then later on succeeding pages as "she" and "her" (Brief of Appellants [sic] pp. 25-27). This mislabeling of the brief and the inaccurate use of personal pronouns suggests that this discussion has been copied from some other, earlier workers' compensation brief, with minimal if any editing or proofreading. This misidentification of parties may also help to explain the irrelevancy of some of the argument contained in that document to the case at hand.

758 (Ct. App. 2007). *An accident arises out of the employment when the accident happens because of the employment, as when the employment is a contributing proximate cause. Sola v. Sunny Slope Farms*, 244 S.C. 6, 135 S.E.2d 321 (1964).

Pierre v. Seaside Farms, Inc., ___ S.C. ___, ___ S.E.2d ___, 2010 S.C. Lexis 28 at *8 to *9 (S.C., filed February 16, 2010)(emphasis supplied).

Thus, respondents and Mr. Zepeda all agree on the meaning of the phrase, "injury by accident arising out of and in the course of employment." *Id.* at *8. The purpose for which respondents proceed to put that concept to use in their Brief of Appellant [sic] is another matter altogether, however. In the wake of their legal discussion, respondents attempt to explain why the notions of course and scope of employment cannot be defined by reference to an employee's reasonable belief (Brief of Appellant [sic] pp. 26-27). Respondents then conclude by arguing that "if that Claimant were required only to prove that she [sic] reasonably believed she [sic] acted in the course of scope of her [sic] employment, then nary a workers' compensation claim would be denied" (Initial Brief of Appellant [sic] p. 27).

Mr. Zepeda is hard pressed to understand the relevancy of this particular argument. It is true that the Single Commissioner did find that Mr. Zepeda "reasonably believed that he was furthering the Employer's business when he climbed into the subject tree" (Decision/Order, Findings of Fact No. 1)[R. p. 019]. At the same time, this finding was made in the context of a determination that Mr. Zepeda was ordered by his supervisors to go up in the tree to cut a tree limb. In other words, Mr. Zepeda "reasonably believed" he was about his employer's business simply because, as the Single Commissioner found as a fact, his supervisors had ordered him up into the tree to

cut a tree limb (*Id.* Nos. 1-2; Conclusions of Law No. 2)[R. p. 020]. The “reasonable belief” paradigm is, therefore, nothing more than shorthand for the finding that Mr. Zepeda climbed up the tree at his supervisor’s direction for the purpose of undertaking an employment-related task.

Respondents, however, focus less on what Mr. Zepeda did than on what he believed. This is, as we have seen, contrary to the approach taken in the Decision and Order itself (Decision and Order, Conclusions of Law No. 1)[R. p. 006]. Respondents’ view seems to be that when Mr. Zepeda allegedly climbed up the tree to jump off on a bet, he somehow “reasonably believed” that he was acting in the course and scope of his employment while so doing. This is illogical, needless to say. This appeal does not turn upon what Mr. Zepeda *believed* when he was up in the tree. The appellant (that is, the *real* appellant herein), would be the first to admit that if he had purposefully climbed the tree and intentionally jumped off on a bet, he would not have been about his employer’s business. The truth, however, is that he did no such thing, and there is plainly insufficient evidence in the record to establish that he did.

The relevant inquiry, therefore, is not into Mr. Zepeda’s subjective state of mind when he climbed the tree but the objective reason why he did so, which objective reason then led in turn to the appellant’s reasonable belief that he had been ordered up into the tree to trim a tree limb. Indeed, the Full Commission itself adopted that approach when it stated, as noted above, that “the Claimant must prove not that he believed he was operating in the course and scope of his employment, but that he actually was operating

in the course and scope of his employment at the time of his accident" (Decision and Order, Conclusions of Law No. 1)[R. p. 006](emphasis supplied).²

Respondents interpret that language to mean that, assuming that the Full Commission found that Mr. Zepeda "could not prove ... that he even 'reasonably believed' he was acting in furtherance of the Employer's business at the time of the injury ... it stands to reason that he also fails to carry his burden to prove he actually was acting in the course and scope of his employment" (Brief of Appellant [sic] p. 27)(emphasis in the original). As Mr. Zepeda has emphasized throughout this appeal, however, the important inquiry is not what he *believed* but what he *did*. If he climbed the tree to trim a limb in response to an order by his supervisor, then he obviously and reasonably "believed" he was furthering his employer's business. If on the other hand he climbed the tree to jump off in order to win a tree-jumping bet, it then would have been impossible by any reasonable standard for him to have "believed" he was acting in the course and scope of his employment. The "reasonable belief" requirement is therefore a red herring to which the Court need pay no attention in its adjudication of this appeal. The Full Commission did not base its decision on any "reasonable belief" finding; nor does Mr. Zepeda assert that it should have done so. Respondents are the only ones pressing the "reasonable belief" argument, and for that reason the Court can lay it to rest.

² Respondents acknowledge they drafted the Decision and Order signed by the Full Commission. They also acknowledge that "[t]he Full Commission signed the Decision and Order without modification or deletion" (Brief of Appellant [sic] p. 33). The form and content of the Decision and Order is that drafted and written by the respondents, therefore.

Again, the question at hand is not what Mr. Zepeda *believed* so much as what he actually *did*. The answer to that question turns on whether there is substantial evidence in the record to support the finding by the Full Commission that Mr. Zepeda did accept the bet and did make the jump, as opposed to suffering an accidental fall while attempting to trim a tree limb in response to a direct order from his supervisors. Mr. Zepeda contends that the evidence in this case, testimonial and otherwise, simply does not support the conclusion that he accepted the bet and made the jump. In summary, the larger point for this particular discussion point is that the notion of "reasonable belief" has little relevance to the issues before the Court in this appeal.

C. To the Extent the Notion of "Reasonable Belief" Is Relevant to this Appeal, the Evidence Shows That Mr. Zepeda Did Reasonably Believe He was Acting in the Course and Scope of His Employment.

Respondents may be arguing that Mr. Zepeda could not have had a reasonable belief that he should go up in the tree to cut a limb because company policy forbade such actions. Respondents argue, for example, that Mr. Hampton, the owner of Priority, had a policy of not allowing his employees to go up into trees if they could not be reached from the ground with an extension ladder and pole saw (Brief of Appellant [sic] p. 30).

Respondents naturally argue that Mr. "Hampton's testimony and the invoices, in the absence of credibility concerns, are substantial evidence enough conclusively to support the Full Commission's finding that Appellant failed to prove he was performing services in the course and scope of his employment when he climbed the tree" (Brief of Appellant [sic] p. 30). This proposition proves nothing of the kind, however. The most the allegation proves is that (a) Mr. Hampton had announced a policy that his employees

were not to go up into trees to cut limbs; and (b) he did on at least some occasions hire an outside service to perform those services. By no means does it establish that the employees always followed that policy—in fact, the evidence shows they did not—or that all tree trimming undertaken by the company was done by this outside service. Again, the evidence shows that Priority employees did go up in trees and trim tree limbs on a not infrequent basis.

The problem with respondents' company policy argument is that while this may, *arguendo* only, have been Mr. Hampton's policy back in the office, the evidence shows that his employees out in the field did not always follow that policy. Mr. Zepeda testified that he had on a number of occasions climbed trees of roughly the same size at work as the one out of which he had fallen [R. p. 291, l. 21 to R. p. 292, l. 13], and, along with a coworker named Juvenal, had climbed into large trees and done trimming with a variety of tools and pieces of equipment [R. 292, l. 6 to R. p. 294, l. 5]. In addition, Mr. Zepeda testified that he had never been told not to climb trees orally or in writing [R. p. 291, l. 17-20; R. p. 320, l. 19-22]. Moreover, fellow worker Tomas Martinez Betancourt, who had no demonstrated reason to lie, testified that while at work he climbed trees to cut limbs from small, medium *and* large trees [R. p. 353, l. 9-23], and had, in fact, never been told not to climb trees for that purpose [R. p. 355, l. 8-16]. Finally, even Mr. Rodriguez, one of Mr. Zepeda's supervisors, admitted that he had never told Priority Landscape workers not to climb trees [R. p. 113, l. 3-5].³

³ In addition to supporting the view that Mr. Zepeda had a reasonable belief that climbing the tree was undertaken in the course and scope of his employment, the corroboration by

Thus, Mr. Zepeda's belief that it was proper to climb up in the tree at his supervisors' command to undertake his employer's work was reasonable indeed. In the wake of supervisory instructions from Messrs. Shoppel and Rodriguez to climb the tree and to trim the branch, Mr. Zepeda's belief that he was bound to go up into the tree was highly and inescapably reasonable indeed.

In short, the reasonable nature of this belief was not vitiated by the ostensible official company policy forbidding such actions—even if Mr. Zepeda had been told of the policy, which both he and even Mr. Rodriguez testified had never happened. The record shows that trips up into the trees by many employees were commonplace notwithstanding that policy. That fact, coupled with the fact that Mr. Zepeda was specifically ordered to go up into the tree to trim a limb by his supervisors, makes his belief that he was about his employer's business reasonable by definition.

The case law supports this view. In *Lomax v. City of Greenville*, 225 S.C. 289, 82 S.E.2d 191 (1954), for example, a janitor in the city jail was injured while taking a message across town to the family of an inmate. Mr. Lomax had administratively been awarded compensation but the circuit court reversed that decision on the ground that his injury had not taken place in the course and scope of his employment. That is, the delivery of messages from prisoners to their families was deemed not to be part of his official duties; hence, he was not injured in the course and scope of his employment.

other witnesses of his testimony that he had never been told not to climb trees supports his credibility against the two witnesses who, after making up one story about how his accident took place, came up with a second one involving a bet to jump from a tree that, notwithstanding the first lie, the Full Commission seemingly accepted as gospel.

The Supreme Court reversed, however, on the ground that whatever the official rules stated, Mr. Lomax had been assigned such duties as a practical matter:

It appears from the uncontradicted testimony that the City of Greenville, acting through its Police Department, has considered it a matter of public concern that a person imprisoned in the city jail for a misdemeanor should be permitted to communicate with his relatives or friends, to the end that bail might be promptly arranged, and that for many years the appellant and other janitors in the Police Department had been under general orders to act as messengers for that purpose where telephone communication was not available.

Id., 82 S.E.2d at 195. When Mr. Lomax then carried out those duties and was injured in the process, he was found to have been injured in the course and scope of his employment.

The parallels presented by *Lomax* when applied to the present case are compelling. Here, as in *Lomax*, there was no official policy ordering employees to climb trees and to trim limbs. In fact, here, the official policy, according to Mr. Hampton at least, discouraged such activity. Yet in practice the employees did so anyway—and their supervisors ordered them to do so. Because of that practice, and against this factual background, Mr. Zepeda clearly had a “reasonable belief” that he was about his employer’s business when he was ordered up into the tree.

Likewise, in *Compton v. Town of Iva*, 256 S.C. 35, 180 S.E.2d 645 (1971), a town policeman was killed while assisting in a neighboring jurisdiction in the wake of a motor vehicle accident. The Town argued that Mr. Compton was not killed in the course and scope of his employment because he had no business being at work beyond the town’s corporate limits. The court disagreed:

Appellants challenge the legality of the custom whereby an Iva town policeman gave assistance to other law enforcement officers beyond the town limits. The Town of Iva, having acquiesced in the custom and received benefits from the custom, is in no position to complain. We do not have before us the question of what authority, if any, the Iva town police could exercise outside the town limits. It is common knowledge that in the realm of law enforcement it has become increasingly more desirable for a police officer to answer calls accompanied by another policeman. Under the circumstances we cannot say that the actions of Compton were illegal, nor can we say as a matter of law that his activities preclude his beneficiaries from claiming compensation.

Id., 180 S.E.2d at 647-48. As in *Lomax*, so long as the deviation from strictly assigned duties was a regular practice, injuries suffered in allegedly irregular activities were compensable nonetheless—and reasonably to be believed as such. Where, as here, the alleged deviation was not only ordered by Mr. Zepeda's supervisors but followed long-standing practice, this conclusion is compelling. By the same logic, Mr. Zepeda was injured while in the course and scope of his employment.

II. THE FULL COMMISSION'S DECISION AND ORDER FAILS THE SUBSTANTIAL EVIDENCE TEST.

Notwithstanding its total irrelevance to the adjudication of this appeal, respondents continue to press the "reasonable belief" issue in this section of their brief as well (Brief of Appellant [sic] pp. 27-31). Respondents' continued reliance upon this issue is, one suspects, a way of avoiding the real issues in this case, namely, credibility and the lack of substantial evidence in the record supporting the Full Commission's Decision and Order. Respondents may understandably assume there is more profit to be had in discussing a non-issue in this case than with grappling with those matters that are actually in issue and, in the end, determinative. Nonetheless, the signal fact is that the Single Commissioner made extensive credibility findings to the end that the *only* two

witnesses who testified that Mr. Zepeda jumped out of the tree on a bet, namely Messrs. Rodriguez and Shoppel, had no credibility whatever (Decision/Order, Findings of Fact No. 3)[R. p. 020]. This finding was based in turn on the fact that Mr. Rodriguez lied about when the photographs of the scene had been taken (Decision/Order, Evidence of the Case pp. 8-9)[R. pp. 015-016]. More seriously still, the Single Commissioner noted that Mr. Rodriguez "had blatantly lied to Mr. Gibson's office about how the accident had happened, omitting anything about a 'bet' surrounding the Claimant's fall" [R. p. 016]. Indeed, Mr. Rodriguez admitted that he came up with the Bet and Jump from a Tree story to save his job [R. p. 389, l. 16-24; R. p. 407, l. 1-22]. As respondents themselves note, "[Mr.] Rodriguez then informed [Mr. Zepeda] that he 'should say [he] fell in a ditch'" (Brief of Appellant [sic] p. 7, citing [R. p. 306, l. 5-16], failing which "[Mr.] Rodriguez informed him 'probably we were gonna lose this job'" (Brief of Appellant [sic] p. 7, citing R. p. 306, l. 17-18).

The Single Commissioner also found that Frank Shoppel, one of Mr. Zepeda's supervisors ("Mr. Shoppel"), a convicted felon [R. p. 442, l. 1 R. p. 446, l. 1 & Appellant's Exhibit No. 4), and the other person—the *only* other person—to tell the bet-and-jump story, was also unworthy of belief. As the Single Commissioner found, "Mr. Shoppel ... concocted a cover story at the scene of the accident, and instructed the Claimant ... to lie about how the accident had occurred to say that he had stepped in a hole rather than tell the actual facts" [R. p. 017]. Furthermore, Mr. Shoppel "dictated a 'Statement' ... which contained lies [and that] the representations ... were in fact lies" (*id.*). In fact, Mr. Shoppel admitted telling a number of lies [R. p. 439, l. 5-12].

As a result, the whole source of the "jump out of the tree on a bet" story was related to the Full Commission by two admitted liars who had earlier concocted an entirely different but utterly and equally untruthful story as to what happened to cause Mr. Zepeda's injuries. The Single Commissioner made those lies and the resultant lack of credibility the cornerstone of his award to Mr. Zepeda of compensation. Yet the Full Commission in the Decision and Order drafted for it by respondents inexplicably failed to mention any of these credibility problems, let alone to factor them into the Decision and Order.

In their Brief of Appellant [sic], respondents ignore the beam in their own eye to fixate on what they take to be the mote in Mr. Zepeda's eye. To that end, they made the astonishing claim that it was only Mr. Zepeda's lack of credibility that had been established (Brief of Appellant [sic] p. 28). And what established this alleged lack of credibility? The fact that when Mr. Zepeda climbed the tree, "he had no tools on his person" (Brief of Appellant [sic] p. 28). Yet this fact—one which is denied by no one—provides no reasonable means by which to attack Mr. Zepeda's credibility at all. After all, Mr. Zepeda testified that, when engaged in trimming large trees, the tools were *always* passed to the worker once he was in the tree, because it would be dangerous for the worker to carry the implements while climbing [R. p. 294, l. 6-15]. Mr. Zepeda testified that on other occasions on which he had climbed a large tree to trim, the tools would be passed up to him by coworkers [R. p. 294, l. 12-15].

Respondents' mote-picking and beam-ignoring goes into high gear at this point. Mr. Zepeda was faulted because he could not tell who precisely would pass him up the

tools (Brief of Appellant [sic] pp. 28-29). Mr. Zepeda was deemed a liar because he could not specify which particular tool was going to be passed up to him (Brief of Appellant [sic] pp. 28-29). Mr. Zepeda's credibility was attacked because he was supposedly unable to say exactly how the tool would be passed up to him (Brief of Appellant [sic] pp. 29-30).

What respondents deem to be Mr. Zepeda's "internally inconsistent testimony" (Brief of Appellant [sic] p. 29), can be seen upon examination to be nothing of the kind. The matters upon which respondents lay such stress are collateral details as to which any witness who had suffered such a serious injury would, months after the event, reasonably be unable to recount with perfect recall. Thus, while respondents focus on matters like how close to the tree the lawnmower was before Mr. Zepeda used it to climb into the tree (Brief of Appellant [sic] p. 29), they ignore the fact that their primary witnesses' testimony does not founder upon such imperfectly recalled minor details but instead upon the fact that they initially invented out of whole cloth a fictitious version of how the accident happened and then, when caught in the act, came up with another, allegedly even less believable, version of the events. Respondents do not even bother to suggest to the Court why these admitted liars, having admittedly spun a entirely false and self-serving yarn, should be believed when they come up with a different version when, account of the severity of Mr. Zepeda's injuries, story number one failed to retain upon scrutiny a shred of believability. Respondents instead stress contradictions or gaps relating to minor matters of collateral detail in the claimant's testimony while failing to engage the fact that their overall narrative—that Mr. Zepeda climbed up the tree and

jumped off on a bet—is supported by nothing more than the self-serving, retooled testimony of admitted liars.

Respondents attempt to justify the Order and Decision by arguing that Mr. Zepeda “failed to answer the Commission’s question of why he was in the tree;” hence, “the Commission drew a conclusion ... that the only explanation was that a bet occurred” (Brief of Appellant [sic] p. 30). The truth is that Mr. Zepeda’s version of the injury is supported by credible testimony, even if a very few of the minor details remain cloudy. Respondents’ version is supported only by the testimony of admitted liars; their version represents their second stab at the truth, and it is the overall truthfulness of their entire narrative, not merely its collateral details alone, that remain in doubt.

Perhaps most important of all, Mr. Zepeda’s version is believable, makes sense, and is consistent with received notions of human nature, standards of conduct and common sense. Respondents’ version is totally contrary to human experience, is illogical, and given its origins in the testimony of Messrs. Rodriguez and Shoppel, simply lacks even the slightest ring of truth. Their testimony is nothing more than a dishonest attempt by two supervisors who against company policy sent a worker up in a tree but who, when he was injured, sold that worker down the river so in order to sacrifice that worker’s compensation for their own job security. A shoddier, more heartless business is hard to imagine.

As the Court is aware, “this court’s review is limited to deciding whether the Full Commission’s decision is unsupported by substantial evidence [.]” *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753, 757 (Ct.App. 2007). Likewise, the decision is

vulnerable if it "is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Hieronymus v. Hamrick*, 385 S.C. 1, 682 S.E.2d 512, 514 (Ct.App. 2009). Here, the evidence relied upon by the Full Commission simply fails to constitute "substantial evidence." Indeed, when one weighs that evidence and considers its origins in the testimony of admitted liars, it becomes clear that the result reached below is actually clearly erroneous. As respondents argue, the Full Commission is indeed "the ultimate finder of fact in this instance" (Brief of Appellant [sic] p. 31). Yet to have its findings of fact approved on appeal, they need to be supported "by substantial evidence." *Hall v. Desert Aire, Inc.*, *supra*, 656 S.E.2d at 757. When they are not, they should be disapproved. S.C. Code Ann. § 1-23-380(A)(5). In this case the findings of fact are not so supported; accordingly, the Decision and Order should be disapproved in this forum. *See Doe v. South Carolina Department of Disabilities and Special Needs*, 377 S.C. 346, 660 S.E.2d 260, 263 (2008) ("We find no substantial evidence in the record to support the Commission's denial of benefits [so] we remand for the Commission to award benefits based on Claimant's disability").

Notwithstanding, respondents would have the Court believe that it is powerless to disapprove the result below. To that end, respondents assert that "where there is a conflict in the evidence ... the findings of fact are conclusive" (Brief of Appellant [sic] p. 33). Certainly, this is the general rule; however, as respondents' own case on this point states, the Full Commission's findings will be set aside "if unsupported by substantial evidence." *Anderson v. Baptist Medical Center*, 343 S.C. 487, 541 S.E.2d 526, 528 (2001). Surely, an administrative finding based on conflicting evidence is not insulated

from reversal if the resolution of the dispute chosen by the Full Commission is itself "unsupported by substantial evidence." *Id.*

A leading commentator explains the application of these rules in the judicial review context. The deference given to findings by the commission assumes in the first instance that "the particular finding is supported by credible evidence[.]" 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 130.05[2] at 130-35 (2008)(hereinafter "*Larson*"). Here, the findings as to the jump from the tree are based almost entirely on the tainted testimony of Messrs. Rodriguez and Shoppel, both of whom are admitted liars; hence, as Mr. Zepeda has demonstrated both above and below, the Decision and Order is marked by a lack of "credible evidence." *Id.*

As noted above, respondents contend with respect to the Decision and Order that "the findings of fact are conclusive" (Brief of Appellant [sic] p. 33). The truth, however, is that in this State there are important exceptions to this usual rule of conclusiveness. As *Larson* points out, South Carolina is a jurisdiction in which "findings of fact may be reversed if they are 'clearly erroneous.'" *Larson, supra*, 130.05[6][c] at 130-47 (2008). Indeed, South Carolina case law so holds:

The appellate court is prohibited from overturning findings of fact of the Appellate Panel *unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based.* *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund*, 611 S.E.2d 297, 301, 363 S.C. 612, 621 (Ct. App. 2005) *cert. denied* July 2007; *Hargrove*, 360 S.C. at 290, 599 S.E.2d at 611; *Etheredge*, 349 S.C. at 455-56, 562 S.E.2d at 681. *The Appellate Panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.* *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *Muir*, 336 S.C. at 282, 519 S.E.2d at 591; *Sharpe v. Case Produce*

Co., 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997) *rev'd on other grounds*.

Thompson v. Cisson Construction Co., 377 S.C. 137, 659 S.E.2d 171, 178 (Ct.App. 2008) (emphasis supplied). Thus, the Full Commission's findings will not be upheld when "the commission's decision rested on a clearly erroneous view of the evidence before it."

Grayson v. Carter Rhoad Furniture, 312 S.C. 250, 439 S.E.2d 859, 861 (Ct.App. 1993).

As this Court said in another case:

[T]he Commissioner's finding that Mullinax's bladder condition was not linked to her injury is wholly unsupported by the evidence. As stated in *Edwards v. Pettit Construction Co.*, 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979) (cited in *Glover v. Rhett Jackson Co.*), "while a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it."

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76, 83 (Ct.App. 1995) (emphasis supplied). See also *McGuffin v. Schjlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162, 164 (1992) (Supreme Court upheld circuit court decision finding that decision by Full Commission denying benefits was clearly erroneous in light of reliable probative and substantive evidence in the entire record); *Mitchem v. Fiske-Carter Construction Co.*, 278 S.C. 180, 293 S.E.2d 701, 703 (1982) (court examines Commission's findings to determine if they are or are not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"); *Houston v. Deloach v. Deloach*, 378 S.C. 543, 663 S.E.2d 85 (Ct.App. 2008) ("a reviewing court may reverse or modify a decision of the appellate panel if the findings, inferences, conclusions, or decisions of the panel are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'").

This is a matter of statute law, as well. Thus, even though in the usual case, "[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact," it is still that case that:

The 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: ...

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record

S.C. Code Ann. § 1-23-380(A)(5)(e). Mr. Zepeda submits that it is difficult to imagine a case in which these exceptions to the conclusiveness rule are more applicable than the one at bar. When the record as a whole is examined, it is clear that (a) there is no substantial evidence to support the findings below; and (b) those findings are clearly erroneous in addition. A reversal of the Decision and Order is therefore mandated.

III. THE FULL COMMISSION'S DECISION AND ORDER FAILS THE CREDIBILITY TEST.

Whether the credibility of the witnesses produced the required degree of substantial evidence is an important aspect of this case. When one discusses these issues, it is useful to consider the general rules governing compensability as recently restated by the Supreme Court:

"In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances." *Hall*, 376 S.C. at 349, 656 S.E.2d at 759. "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." *Id.* at 350, 656 S.E.2d at 759.

"Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the

course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." *Pelfrey v. Oconee County*, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945). "These words are construed broadly and should continue to be so construed." *Id.* (citation omitted). "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." *Id.* (citation omitted).

Pierre v. Seaside Farms, Inc., supra, ___ S.C. at ___, ___ S.E.2d at ___, 2010 S.C. Lexis 28 at *9 to *10. The decisional process, in other words, should favor compensability. That rule of construction obviously did not inform the Decision and Order in this case.

Respondents see this case as one involving nothing more than "horseplay" (Brief of Appellant [sic] pp. 31-34). Respondents seek to buttress this characterization by quoting Messrs. Rodriguez and Shoppel (Brief of Appellant [sic] pp. 31-32), both of whom, as we have seen, swore that they did not order Mr. Zepeda to climb the tree to cut a limb. Instead both testified that the claimant climbed the tree to jump off to the ground on a bet.

Messrs. Rodriguez and Shoppel did so testify (Brief of Appellant [sic] pp. 31-32). Yet both men are admitted liars for whom this version of the story was their second—not even their first—stab at the truth. They had earlier but falsely averred with apparently the same level of certitude that Mr. Zepeda had suffered his injuries by falling into a hole. Why the Commission would believe them—especially on this second go-around with the truth—is a mystery to Mr. Zepeda. Given that their first version was acknowledged even by them to be a tissue of lies, one would think that the act of accepting a second version of the incident from these same two gentlemen would fit the old adage of, "Fool me once, shame on you; fool me twice, shame on me."

Neither the Full Commission nor respondents deal with issues of "credibility," except in passing. Instead, respondents argue that "[t]he conflicting testimony ... between Appellant on the one hand, and [Messrs.] Shoppel and Rodriguez on the other is a clear question of fact" (Brief of Appellant [sic] p. 32). Respondents' apparent strategy is to transform any underlying issues of credibility into issues of fact. Because, according to respondents, the Full Commission found as a fact "that the Claimant climbed the tree after accepting a bet from his co-worker [sic], Cesar Rodriguez" (Decision and Order, Conclusions of Law No. 3), respondents attempt to convince this Court that the resolution of this case lies not in findings of credibility but instead by way of deference to the Full Commission's findings of fact.

This attempted sleight of hand so as to engineer an end run around the credibility issue cannot succeed. Mr. Zepeda has pointed out below that even when characterized as findings of fact, the findings based on the testimony of Messrs. Rodriguez and Shoppel are subject to disapproval as clearly erroneous. Even in terms of respondents' own argument, however, a cursory reading of the record of this case reveals that this case should turn primarily on findings of credibility. When respondents drafted a Decision and Order that specifically excised all credibility concerns, however, the Full Commission, when it signed off on that document, issued a fatally flawed disposition of the appeal.

No South Carolina workers' compensation cases dealing with these omitted and/or deleted credibility issues were found. Other courts, however, have treated the point in analogous administrative review contexts. As a federal court found upon examining a Social Security Administration holding that a claimant was not under a

disability but where the ALJ had not made credibility findings as part of his determination, "the failure to make credibility findings regarding this testimony undermines the government's argument that there was substantial evidence to support a conclusion that Mahoney was not under disability." *Mahoney v. Chater*, 1998 U.S. Dist. Lexis 1639 at *8 (E.D.N.Y., filed January 23, 1998). Thus, an absence of credibility findings entails a parallel absence of substantial evidence to support the result reached in the administrative forum.

Precisely the same result is mandated here. Credibility was plainly a critical issue in this case; indeed, it was arguably the primary basis for the Single Commissioner's holding in favor of compensation. The Full Commission's failure even to address the issue renders its Decision and Order plainly erroneous and thus subject to reversal in this Court. As the court stated in *Smith v. Heckler*, 735 F.2d 312, 317 (8th Cir. 1984), an SSI case, "[w]e have held that a failure to make credibility determinations concerning such evidence requires a reversal and a remand." See also *Strom v. Astrue*, 2008 U.S. Dist. Lexis 112308 at *80 n. 21 (D.Minn., filed January 28, 2008) (same)(SSI case).

A case arising in an immigration context also underscored the importance of making credibility determinations where such findings are both proper and indicated:

This type of confusion ... warrants a remand to untangle the basis for the immigration judge's decision. See *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004) ("A remand is required because the immigration judge's analysis of their application is unreasoned. She 'determined that the respondent is basically credible; however, his testimony is not inherently persuasive.' We do not understand what this means."); *Muhur v. Ashcroft*, 355 F.3d 958, 961 (7th Cir. 2004) (failure to make a credibility determination regarding whether petitioner was or was not a Jehovah's

Witness requires remand); *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (immigration judge's failure to make a credibility determination left a "yawning void" in the decision); *see also Krastev v. INS*, 292 F.3d 1266, 1279 (10th Cir. 2002) ("we caution the BIA that its practice of simply assuming, without deciding, credibility is not favored"); *Cordon-Garcia v. INS*, 204 F.3d 985, 993 (9th Cir. 2000) (statements such as "even were we to assume that the respondent was a credible witness" do not allow the reviewing court to "undertake a meaningful analysis of Petitioner's credibility and its effect on her application for asylum").

Diallo v. Ashcroft, 381 F.3d 687, 699 (7th Cir. 2004). Simply put, as another case found, "the absence of findings as to credibility or past persecution prevented us from resolving the case on either of those grounds." *Barsoum v. Gonzales*, 422 F.3d 22, 31 (1st Cir. 2005). The problem with the case at hand was well-illustrated by Judge Posner when he faulted an immigration judge for focusing on the burden of proof instead of credibility:

When an immigration judge says not that he believes the asylum seeker or he disbelieves her but instead that she hasn't carried her burden of proof, the reviewing court is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason.

Iao v. Gonzales, 400 F.3d 530, 534 (7th Cir. 2005). Precisely the same flaw infects the Decision and Order in this case.

Notwithstanding Mr. Zepeda's criticism of the Decision and Order for omitting specific credibility findings, respondents argue that such findings are nonetheless present sub silentio:

That [Decision and] Order remained silent on the issue of credibility, but implicit in their [sic] finding that a bet occurred between co-workers is a finding that the panel believed Shoppel's and Rodriguez's testimony over that of the Appellant.

(Brief of Appellant [sic] p. 34). Respondents' argument fails on several levels, however. First, their argument paints with too broad a brush, for under their view any decision in a

case that involves witnesses would necessarily include a credibility determination. The problem is that if this were so, the numerous cases discussed above that faulted administrative orders following hearings for omitting credibility findings, would make no sense. Under that view, every administrative determination based on witness testimony would be so based. As we have seen above, that simply is not the case. The Decision and Order's disregard of credibility concerns leaves the reader in the dark as to whether Mr. Zepeda "failed to carry [his] burden of proof because [his] testimony was not credible, or for some other reason." *Iao v. Gonzales, supra*, 400 F.3d at 534. The failure to deal with the issue of the respective credibility of Messrs. Zepeda, Rodriquez and Shoppel thus makes it difficult upon review "to untangle the basis for the [Full Commission's] decision." *Diallo v. Ashcroft, supra*, 381 F.3d at 699. In other words, the mere fact of a Decision and Order does not, standing alone, necessarily constitute a credibility finding.

Second, the Full Commission took purposeful, positive steps to *avoid* any credibility findings. It did not explicitly disapprove the credibility findings made by the Single Commissioner; in fact, it did not even just ignore them. Instead, the Full Commission took volitional steps through the means of respondents' draftsmanship to remove any mention of credibility from the Single Commissioner's Decision/Order and hence its own Decision and Order. For example, the Full Commission reproduced the Single Commissioner's Decision/Order at the front of its disposition—but only in part. In its reproduction of the Single Commissioner's Finding of Fact No. 1, the Full Commission excised all mention of Messrs. Rodriquez and Shoppel's reaction to Mr. Zepeda's act of climbing the tree. More seriously, the Full Commission excised in its

entirety Single Commissioner's Finding of Fact No. 3, which explicitly found Messrs. Rodriguez and Shoppel's testimony to be "not credible" (*id.*)(emphasis in the original).

Having excised the Single Commissioner's credibility findings in their entirety, the Full Commission did not then substitute its own credibility findings. Instead, it made none but so thoroughly ignored the issue that the word "credibility" appears nowhere in the Decision and Order—not even once. Given this studied avoidance of credibility issues, respondents' assertion that "[f]ull reversal of the Hearing Commissioner's Order must include the credibility findings at issue" (Appellant's Brief [sic] p. 34), finds no support in the record of this case.⁴ The truth is that the Full Commission impermissibly failed to make necessary credibility findings.⁵ On that account alone, the Court should either make findings of its own and order that benefits be paid to Mr. Zepeda or instead remand the case to the Full Commission so that body can remedy the failings in its disposition of the case.

CONCLUSION

For the reasons set out above, Appellant Ramon Ramos Zepeda-Cepeda respectfully asks the Court to reverse the Decision and Order entered by the Full

⁴ This failing is underscored by respondents' "request [that] this Court refrain from substituting their [sic] interpretation of conflicting testimony for that of the Full Commission" (Brief of Appellant [sic] p. 34). That is the problem, of course; there *is* no "interpretation of conflicting testimony [by] the Full Commission" (Brief of Appellant [sic] p. 34), anywhere in the Decision and Order.

⁵ Of course, to the extent the Court does find that there are credibility findings somehow present in the Decision and Order, Mr. Zepeda argues that, like the findings of fact themselves, those credibility findings have no substantial evidentiary basis in the record and are clearly erroneous. Such a finding provides an additional ground for reversing the Decision and Order. *See Thompson v. Cisson Construction Co.*, *supra*, 659 S.E.2d at 178; S.C. Code Ann. § 1-23-380(A)(5)(e).

Commission, and to order that body to grant Mr. Zepeda the full compensation for this injuries to which he is entitled. Alternatively, Mr. Zepeda respectfully asks the Court to remand the matter, with instructions, to the Full Commission for a proper resolution of this case.

Respectfully submitted,

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May 18, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

No. 2009147487

Appeal from the South Carolina Workers' Compensation Commission

W.C.C. File No. 0813616

Ramon Zepeda-Cepeda, Employee/Appellant

v.

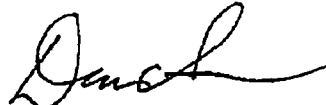
Priority Landscaping and Lawn Care, LLC, Employer/Respondent

AND

Accident Fund Insurance Company of America, Carrier/Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Final Reply Brief of Appellant was served on all parties by mailing true and correct copies of the same via first class mail, proper postage affixed, to:

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