

2011-196046

THE STATE OF SOUTH CAROLINA
In the Supreme Court

No. _____

Appeal from the South Carolina Workers' Compensation Commission
and the Court of Appeals

W.C.C. File No. 0813616
Court of Appeals Unpublished Opinion 2011-UP-229

Ramone Zepeda-Cepeda, Employee/Appellant/Petitioner

v.

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

Accident Fund Insurance Company of America, Carrier/Respondent

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Ramone Zepeda-Cepeda, the petitioner herein ("Mr. Zepeda-Cepeda"), certifies that a Petition for Rehearing was timely submitted and then denied by the Court of Appeals on June 23, 2011.

QUESTIONS PRESENTED

1. Did the Court of Appeals give improper weight to the Workers' Compensation Commission's findings in this case?
2. Did the Court of Appeals misapprehend the proper credibility rules to be applied in this case?
3. Did the Court of Appeals improperly fail to find that the result in this case constitutes a shocking and unconscionable miscarriage of justice?

STATEMENT OF THE CASE

I. Procedural Background.

This proceeding primarily involves 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.

The case arose when Mr. Zepeda-Cepeda 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]). 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 inter alia awarded Mr. Zepeda-Cepeda “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].

Priority Landscape and Accident Fund appealed the Decision/Order to the Commission’s Appellate Panel. All parties filed briefs and a 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 [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-Cepeda then appealed to the Court of Appeals [R. p. 528].

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. Because the Appellate Panel allowed the respondents to draft the order in such a way—and then did not correct their work even though it violated its instructions on its face—Mr. Zepeda-Cepeda was denied the most elementary protections of Due Process of Law.

On May 18, 2011, the Court of Appeals filed its opinion. *Zepeda-Cepeda v. Priority Landscaping and Lawn Care, LLC*, Unpublished Opinion No. 2011-UP-229, 2011 S.C. App. Unpub. Lexis 266 (S.C.Ct.App., filed May 18, 2011)(“*Zepeda-Cepeda*”), which affirmed the findings of the Appellate Panel. Mr. Zepeda-Cepeda contends that the Court of Appeals was wholly in error in its disposition of his appeal. As a review of the Petition will reveal, this case involves novel questions of law that were incorrectly answered by the Court of Appeals. Moreover, the opinion of the Court of Appeals below is in conflict with decisions of this Court. Substantial constitutional issues involving a deprivation of Due Process of Law are directly involved in this appeal. Finally, this case specifically involves important issues of South Carolina law in terms of the proper weight to be accorded findings made by the Workers’ Compensation Commission as well as the nature of the proper treatment of credibility issues on appeal. Mr. Zepeda-Cepeda, therefore, asks the Court to grant this Petition pursuant to Rule 242(b)(1), (3)(4), SCACR.

As he will explain below, Mr. Zepeda-Cepeda contends that the Court of Appeals “overlooked and misapprehended” the facts of this case. Rule 221(a), SCACR. In that regard, the Court of Appeals upheld the Appellate Panel on two major points. Although the Court of Appeals 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 of Appeals to weigh the evidence as found by the Full Commission." *Id.*

Zepeda-Cepeda, *supra*, 2011 S.C. App. Unpub. Lexis 266 at *7 to *8. Mr.

Zepeda-Cepeda respectfully contends that the Court of Appeals 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. Because, in Mr. *Zepeda-Cepeda* view, the Court of Appeals "overlooked or misapprehended" these two points. 221(a), SCACR, that court reached a shocking and insupportable miscarriage of justice that deserves redress in this Court.

II. The Factual Background.

A. Introduction.

The pertinent evidence in the case consisted primarily of testimony given at the hearing before Commissioner Lyndon by Mr. *Zepeda-Cepeda*, Tomas Martinez Betancourt ("Mr. Martinez"), a former fellow worker of Mr. *Zepeda-Cepeda*, 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-Cepeda*, along with pertinent filings of medical records and

the like, which were additionally made part of the record by the parties. There was no dispute about Mr. Zepeda-Cepeda's status as 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 was whether his injuries were suffered while Mr. Zepeda-Cepeda was engaged in his employer's work so as to render his injuries compensable.

B. Mr. Zepeda-Cepeda's Testimony.

Upon leaving school, Mr. Zepeda-Cepeda 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-Cepeda testified that while working for 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-Cepeda, he agreed, was a fine worker [R. p. 472, l. 23 to R. p. 474, l. 5].

Mr. Zepeda-Cepeda 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 when he suffered the injuries for which he seeks

compensation [R. p. 291, l. 17-25; R. p. 292, l. 1-13; R. p. 320, l. 15-22]. Mr. Zepeda-Cepeda 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-Cepeda testified, 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-Cepeda 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-Cepeda'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, although whether for money or not Mr. Zepeda-Cepeda was not certain [R. p. 300, l. 1-15].

Mr. Zepeda-Cepeda 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-Cepeda'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-Cepeda drove the mower to the base of the tree, climbed up on the mower, then into the tree and finally 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-Cepeda 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-Cepeda 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-Cepeda 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-Cepeda had been hurt on account of falling into a ditch [R. p. 306, l. 12-16], Mr. Zepeda-Cepeda's two actual supervisors at the job site—Frank and Cesar—testified that the claimant had gone up into the tree not on Frank and Cesar's instructions to trim a branch as Mr. Zepeda-Cepeda 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-Cepeda 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-Cepeda testified that he is a

Jehovah's Witness for whom betting, gambling or drinking are strictly forbidden [R. p. 302, l. 6-14). It is submitted that it is improbable in the extreme that Mr. Zepeda-Cepeda 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-Cepeda 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-Cepeda to report that he had been injured on account of falling in a ditch, lest the crew be fired for violating a no-tree-trimming instruction from Mr. Hampton [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-Cepeda 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-Cepeda 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-Cepeda to Roper Hospital. Juvenal, who was bilingual, told the doctors about Mr. Zepeda-Cepeda's injuries [R. p. 314, l. 11-19; R. p. 314, l. 25 to R. p. 315, l. 1-5], after

which Mr. Zepeda-Cepeda was operated upon [R. p. 314, l. 20 to R. p. 315, l. 13]. After the surgery, Mr. Zepeda-Cepeda met with Mr. Hampton; that gentleman gave him \$100.00 via Cesar [R. p. 342, l. 9-20]. Mr. Zepeda-Cepeda 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-Cepeda 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-Cepeda 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-Cepeda 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 allegedly ordered Mr. Zepeda-Cepeda 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 accept the wager but that Mr. Zepeda-Cepeda, and only Mr. Zepeda-Cepeda, took the bet for \$20.00 and then proceeded to climb the tree and to jump to the ground from it [R. p. 369, l. 6 to R. p. 368, l. 21].

Cesar testified he had given \$50.00 to Mr. Zepeda-Cepeda after the accident and in addition 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-Cepeda 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 in the extreme—Mr. Zepeda-Cepeda could well 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 found Cesar’s testimony not worthy of belief (Order/Decision p. 3; Findings of Fact No. 3)[R. p. 020], on a

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].

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 pictures produced by opposing counsel were taken the day before the hearing by counsel in the presence of Mr. Hampton in a staged rehearsal for the hearing before the Single Commissioner [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-Cepeda's lawyer's office [R. p. 388, l. 12-19]. Then, when pressed, he admitted that he had 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 yarn [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 keep from getting fired [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, assuming *arguendo* only the truth of his so-called "bet and jump" scenario, he and Frank simply let Mr. Zepeda-

Cepeda 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 committing 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-Cepeda 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 relatively trivial sum of \$20.00, an amount of money that the claimant could have earned before taking his morning coffee break. Frank said he did not instruct Mr. Zepeda-Cepeda to climb the tree nor did he 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 was a lie [R. p. 439, l. 5-12], and instructed Mr. Zepeda-Cepeda how to lie about it [R. p. 447, l. 1 to R. p. 448, l. 6]. 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-Cepeda 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-Cepeda's injuries. Contrary to Frank's other testimony, the testimonial Statement denied seeing Mr. Zepeda-Cepeda 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 fabrication for the Bet and Jump from a Tree tale, he admittedly larded even this second tale with lies [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-Cepeda had fallen into a ditch—the Fall in a Hole fable [R. 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-Cepeda 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-Cepeda 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-Cepeda 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 its 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].

ARGUMENT

II. THE COURT OF APPEALS MISAPPREHENDED THE PROPER WEIGHT TO BE GIVEN THE APPELLATE PANEL'S FINDINGS.

This 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,” *Zepeda-Cepeda*, *supra*, 2011 S.C. App. Unpub. Lexis 266 at *7, quoting *Pierre v. Seaside Farms, Inc.*, 306 S.C. 534, 689 S.E.2d 615, 618 (2010), the Court of Appeals overlooked the requirement that these findings must, to be upheld on appeal, 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”). Plainly, a similar result should have been ordered here. *See Murphy v. Owens Corning*, ___ S.C. ___, 710 S.E.2d 454 (Ct.App. 2011).

By unduly focusing on the undoubted deference to be given to the Commission’s fact-finding, the Court of Appeals 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 of Appeals 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 findings of fact constitute ultimate truths, *Zepeda-Cepeda, supra*, 2011 S.C. App. Unpub. Lexis 266 at *7 to *8, the Court of Appeals reached a result that finds no support in the facts, in logic or especially in the law.

The leading commentary on workers' compensation law emphasizes that 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). Case law supports that observation, As a very recent case stated:

Under the APA, this Court can reverse or modify the decision of the Commission where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is *clearly erroneous* in view of the reliable, probative, and substantial evidence considering the record as a whole.

Pikaart v. A & A Taxi, Inc., ___ S.C. ___, ___ S.E.2d ___, 2011 S.C. Lexis 219 at *5 (S.C., filed July 11, 2011)(emphasis supplied).

Mr. Zepeda-Cepeda submits that the case at hand is a poster child for the application of that doctrine. *See also Thompson v. Cisson Construction Co.*, 377 S.C. 137, 659 S.E.2d 171, 178 (Ct.App. 2008); *Mullin ax 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); *Grayson v. Carter Rhoda Furniture*, 312 S.C. 250, 439 S.E.2d 859, 860 (Ct.App. 1993)(emphasis supplied), *off's as modified*; 317 S.C. 306, 454 S.E.2d 320 (1995).

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

III. THE COURT OF APPEALS MISAPPHREHENDED THE PROPER CREDIBILITY RULES TO BE APPLIED IN THIS CASE.

The point to be underscored in this case is that the testimony of the witnesses upon whose testimony the findings of the Appellate Panel and the Court of Appeals was utterly incredible by any reasonable standard. These findings are founded almost entirely upon the testimony of two admitted liars, Cesar and Frank, the latter of whom is a convicted 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 strongly entails that Cesar and Frank sent Mr. Zepeda-Cepeda up into the tree notwithstanding those instructions. Before he could be handed a cutting tool, however, Mr. Zepeda-Cepeda fell from the tree and was seriously injured. At that moment Cesar and Frank panicked; they were afraid of losing their jobs for violating their boss's orders. Accordingly, they concocted a story that Mr. Zepeda-Cepeda had been injured by stepping into a hole. When Mr. Zepeda-Cepeda'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-Cepeda had climbed up the tree and jumped off on a \$20.00 bet. The Single Commissioner found that Cesar and Frank had lied on a number of occasions and were not credible; thus benefits were awarded to Mr. Zepeda-Cepeda. Unaccountably, the Appellate Panel bought Cesar and Frank's story (the second one, that is, not the first), and denied compensation to Mr. Zepeda-Cepeda. Even more unaccountably, the Court of Appeals did the same. For purposes of this portion of the analysis, however, the point to be underscored is that the testimony of these two men entirely lacks credibility. Without their testimony, the entire basis for the findings below crumbles. It follows in turn that this result is wholly unsupported by substantial evidence—it is, in fact, a miscarriage of justice—and so Mr. Zepeda-Cepeda urges this Court to right this unconscionable wrong by granting his Petition for Certiorari..

For all the deference the Court of Appeals gave 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. Certainly, the usual rule is that 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). This is because the Appellate Panel

is “in a superior position to evaluate witness credibility.” *Paschal v. Price*, 392 S.C. 128, 708 S.E.2d 771, 773 (2011). But what if, on account of respondents’ mode of drafting the proposed order, the Appellate Panel fails to make any such determinations at all? Certainly, it would make sense in that event to drop back to the administrative credibility determinations that do exist, namely, those entered by the Single Commissioner.

Instead, the Court of Appeals 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 of Appeals deemed it a credibility finding. *See Zepeda-Cepeda, supra*, 2011 S.C.App. Unpub. Lexis 266 at *9. This, Mr. Zepeda-Cepeda contends, is not only insufficient and unconvincing but also 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., supra, 689 S.E.2d at 618-19 (2010). The decisional process, in other words, should favor compensability. Here, quite obviously, it did not.

The Appellate Panel’s order 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 of Appeals’ conclusion that the Appellate Panel made some hidden or sub silentio credibility findings is patently 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 withstand even a moment’s scrutiny. The truth is that the Appellate Panel impermissibly failed to make the necessary credibility findings. For that reason, the Court of Appeals should either have made findings of its own, 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 that regard.

Even if, arguendo only, the Appellate Panel could be said to have made an implied credibility finding, *Zepeda-Cepeda, supra*, 2011 S.C. App. Unpub. Lexis 266 at *9, that finding was at most an implied one that was, moreover, made solely on a cold record. As a North Carolina case noted, in such cases it is more appropriate to give weight to the actual hearing officer who saw the live witnesses and observed their demeanor:

We have repeatedly stressed the need of the Full Commission to acknowledge the deputy commissioner's superior position to make findings regarding credibility when the Full Commission is reviewing these findings with

only a cold record before it. *See Holcomb v. Pepsi Cola Co.*, 128 N.C. App. 323, 325, 494 S.E.2d 609, 610 (1998); *Taylor v. Caldwell Systems, Inc.*, 127 N.C. App. 542, 545, 491 S.E.2d 686, 689 (1997); *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 639-41, 478 S.E.2d 223, 225-26 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997).

Hollingsworth v. Cardinal Container Service, 131 N.C.App. 400, 507 S.E.2d 571, 573 (1998). Because “South Carolina Courts frequently look to North Carolina's rulings since our workers' compensation code is very similar,” *Pierre v. Seaside Farms, Inc.*, *supra*, 689 S.E.2d at 619, it is appropriate to give greater weight in this case to the Single Commissioner’s robust, explicit credibility findings as opposed to what is at best a tepid, implied, cold-record finding by the Appellate Panel.

Finally, the Court of Appeals rested its finding in part on the principle that “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.” *Zepeda-Cepeda*, *supra*, 2011 S.C. App. Unpub. Lexis 266 at *8. The problem is that when one disregards that portion of Cesar and Frank’s testimony which was either admittedly a lie or unworthy of belief on other grounds, there is frankly very little left upon which one could make a reasoned finding.

The Court of Appeals, however, argues that Mr. Zepeda-Cepeda’s “argument that the testimony of Frank and Cesar cannot constitute substantial evidence because they admitted to previous misrepresentations is unconvincing.” *Id.* With all due respect, it is that very justification that

“is unconvincing.” *Id.* When one moves beyond these admitted misrepresentations by Cesar and Frank and then confronts the sheer implausibility of what remains, there is simply a lack of substantial evidence upon which to credit these two gentleman’s testimony—which is, after all, the basis for the Court of Appeals’ findings—and on that basis to rule against Mr. Zepeda-Cepeda. Taken in context, Cesar and Frank’s testimony is so flimsy and unworthy of belief that even the possibility of its being taken seriously by a reviewing body brings to mind the Duke of Wellington's reaction to being greeted on the street by a passerby as "Mr. Smith": “If you can believe that, sir, you'll believe anything.” The same, it must be said, is true of both the Appellate Panel and the Court of Appeals findings made and conclusions reached in this case.

IV. THE RESULT IN THIS CASE CONSTITUTES A SHOCKING MISCARRIAGE OF JUSTICE.

When the legal doctrines and rules of law applied to this case are put to one side, one stark fact remains—the finding by the Court of Appeals that Mr. Zepeda-Cepeda jumped out of the tree on a bet is a miscarriage of justice. It could hardly be clearer that, against their employer’s express orders, Mr. Zepeda-Cepeda’s supervisors ordered him up into a tree to trim a branch in order to avoid the hassle and delay of calling in a tree service. When Mr. Zepeda-Cepeda fell out of the tree, Cesar and Frank 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. Nor did it trigger determinative concerns in the Appellate Panel or the Court of Appeals. This Court should do better.

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

CONCLUSION

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

Respectfully submitted,

RAMONE ZEPEDA-CEPEDA

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July 25, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

No. _____

Appeal from the South Carolina Workers' Compensation Commission
and the Court of Appeals

WCC File No. 0813616
Court of Appeals Unpublished Opinion 2011-UP-229

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 a copy of the foregoing Petition for Writ of Certiorari was served on
all parties by mailing true and correct copies of the same via first class mail, proper

Postage affixed, to :

SC Court of Appeals
Tanya Gee, Clerk of Court
P.O. Box 11629
Columbia, SC 29211
(803) 734-1890
(copy of Petition)

SC Workers' Compensation Commission
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