

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SOUTH CAROLINA  
Worker's Compensation Commission

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Op. No. 2018-UP-085 (S.C. Ct. App. filed February 14, 2018)

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Danny B. Cane,

Petitioner,

v.

Raber's Discount Tire Rack, Employer, and  
South Carolina Uninsured Employers Fund, Carrier,

Respondent.

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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JUN. 22 2018

**S.C. SUPREME COURT**

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**S.C. SUPREME COURT**

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## QUESTIONS PRESENTED

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. This appeal from the Court of Appeals order affirming in part and reversing in part the Workers' Compensation Commission's Appellate Panel's findings of fact fails to present any of the special and important reasons typically warranting review by the Supreme Court. This appeal does not contain novel questions of law. The Court of Appeals decision was unanimous and is not in conflict with prior decisions of the Supreme Court. There are no constitutional issues, nor federal questions involved.

Appellant Crane's Petition for a Writ of Certiorari is based solely on his disagreement with the Workers' Compensation Single Commissioner's findings of fact, and the Appellant Panel's unanimous affirmation of those findings. The Court of Appeals unanimously affirmed four of five findings because the findings were supported by substantial evidence in the record. The Court of Appeals reversed on the single issue of temporary disability compensation finding a doctor's work excuse note in the record, as well as, some evidence Petitioner returned to work after the accident. That single issue was remanded for determination if Petitioner was out of work due to the incident and whether he was entitled to total temporary disability. The appeal before this Court followed prior to any determination by the Appellate Panel on remand of this issue. In fact, Appellant's position seems to entirely rest on contesting factual findings of the Appellate Panel which should not be overruled unless there is no substantial evidence.

The questions presented to this Court are as follows:

- I. Did the Court of Appeals correctly affirm the Workers' Compensation Commission's Appellate Panel's unanimous findings of fact that appellant reached maximum medical improvement on March 31, 2014, when the finding was corroborated by medical records from multiple distinct providers and appellant's own appearance during the Single Commissioner's hearing?
- II. Did the Court of Appeals correctly affirm the Workers' Compensation Commission's Appellate Panel's unanimous findings of fact that appellant was not entitled to additional medical care when the finding was corroborated by medical records from multiple distinct providers and appellant's own appearance during the Single Commissioner's hearing?
- III. Did the Court of Appeals correctly affirm the Workers' Compensation Commission's Appellate Panel's unanimous findings of fact that appellant was not a credible witness when appellant's ability to hear normal volume voices, evasiveness, and contradictory testimony was directly observed by the Single Commissioner during the hearing?
- IV. Did the Court of Appeals correctly affirm the Workers' Compensation Commission's Appellate Panel's unanimous findings of fact that appellant sustained no permanent disability when the finding was corroborated by medical records from multiple distinct providers and appellant's own appearance during the Single Commissioner's hearing?
- V. Did the Court of Appeals correctly reverse the Workers' Compensation Commission's Appellate Panel's finding that appellant was not entitled to total temporary disability compensation after March 31, 2014 where there is a doctor's work excuse note in the record and evidence Petitioner returned to work after the accident.<sup>1</sup>

### **STATEMENT OF THE CASE**

This appeal is taken from the decision of the Court of Appeals affirming the Workers' Compensation Commission's Appellate Panel's findings regarding: (1) maximum medical improvement, (2) future medical care, (3) petitioner's credibility, and

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<sup>1</sup> This sole issue reversed by the Court of Appeals was remanded to the Appellate Panel "to determine whether Crane was out of work as a result of the accident and whether he was entitled to TTD." [R. p. 3]. The Appellate Panel has not rendered a decision on remand of this issue and therefore it is not ripe to be heard by this Court.

(4) permanency; and reversing the Appellate Panel's findings on denial of temporary permanent disability filed February 14, 2018. [R. pp. 1-3].

At the hearing before the Single Commissioner held on June 26, 2014, Petitioner was untruthful, evasive, inconsistent, and lacked credibility which is crucial to evaluating the other evidence presented. [R. pp. 20-59]. Petitioner's testimony was inconsistent with medical records received. Id. Petitioner was observed during the hearing able to hear questions asked in a normal volume even when Petitioner had his back to the questioner. Id. Petitioner claimed memory loss, but was able to remember exact details helpful to his case, while unable to remember details that may have been unhelpful to his case. Id.

On February 19, 2014, Petitioner, Danny Crane, was involved in a work related incident arising out of and during the course and scope of his employment as a mechanic for James Raber d/b/a Raber's Discount Tire Rack (Raber's) when an air hose "popped loose" from a pneumatic powered tire changer.<sup>2</sup> [R. pp. 23, 26-28]. Security cameras recorded the incident and the events following the same during which Petitioner is recorded speaking with two other employees and continuing to work to repair the air hose minutes after the incident occurred. [R. pp. 32-33]. Petitioner's wife picked him up at work and transported him to Barnwell County Hospital for examination. [R. p. 28]. Petitioner was discharged and instructed to follow up with ear, nose, throat (ENT) doctor, John F. Ansley, M.D. [R. p. 28].

Petitioner followed up the next day with Dr. Ansley who noted Petitioner's complaint of difficulty hearing in both ears, an audiogram was performed indicating a

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<sup>2</sup> Petitioner was determined to be an employee of Raber's not an independent contractor. This finding was not appealed and is not at issue in Petitioner's appeal.

severe sensorineural hearing loss in both ears, and Petitioner was discharged with a plan to perform a CT scan of his temporal bones. [R. p. 108]. Approximately six days after the incident, on February 25, 2014, petitioner underwent a CT scan resulting in an impression of "Normal appearance of bilateral temporal bone structures on unenhanced temporal bone CT. If the patient has sensorineural hearing loss, consider further evaluation with MRI brain and internal auditory canals. Chronic Sinusitis." [R. p. 110 (emphasis added)]. That same day Petitioner was seen by his family doctor, Dr. Dean Koukos complaining of hearing loss and for the first time complained of headache and dizziness. [R. pp. 126-27]. Dr. Koukos' neurological exam indicates Petitioner was "alert and oriented X3 with no impairment of recent or remote memory, normal attention span and ability to concentrate, able to name objects and repeat phrases . . . ." [R. p. 127]. Petitioner had a follow up appointment with Dr. Ansley on March 6, 2014, underwent a second audiogram, and Dr. Ansley's report indicates petitioner "actually had a shift downward on the audiogram[.]" and petitioner was scheduled for an auditory brainstem response test at MUSC. [R. p. 111]. Importantly, Dr. Ansley made no record of headaches or dizziness. Dr. Ansley's assessment was to "rule out sensorineural hearing loss[.]" and Petitioner was scheduled for an ABR at MUSC "to obtain more objective measure of his hearing[.]" after which a follow up appointment with Dr. Ansley would be scheduled. [R. pp. 111-12 (emphasis added)]. Petitioner never underwent the ABR as recommended, never had a follow up appointment with Dr. Ansley, nor did Petitioner submit a causation opinion from Dr. Ansley, notwithstanding that Dr. Ansley was Petitioner's treating ENT physician. [R. pp. 36-37].

On March 14, 2014, a CT scan of petitioner's head was performed at Aiken Regional Medical Center in response to complaints of headaches and hearing loss which returned normal results. [R. pp. 37, 125]. On March 26, 2014, Petitioner was seen at Barnwell County Hospital Emergency Room for a rib fracture he sustained when he tripped and fell getting out of the shower. [R. pp. 37, 120-24]. Absent from the examination records are any references to present symptoms of headaches, dizziness, or balance problems as contributing to petitioner's fall, nor do the records indicate any reports of bleeding from ears or memory loss. [R. pp. 37, 120-24]. Medical records from Petitioner's follow up at Barnwell Family Medicine on March 31, 2014 similarly lack reference to present symptoms of headaches, dizziness, balance problems, or reports of bleeding from ears or memory loss. [R. pp. 37-38, 114-18]. To the contrary, examination of the ears, nose, mouth, and throat reveals, inter alia, "normal pinnae with no scars, masses or lesions, otoscopic exam reveals normal external auditory canals with tympanic membranes clear and mobile . . . ." [R. p. 115].

Petitioner received no further medical treatment until he was referred by his attorney to David S. Rogers, M.D. for an independent medical examination (IME) performed on May 19, 2014 at Oaktree Medical Centre Department of Neurology – three months after the incident. [R. pp. 19, 134-40]. For the first time, Petitioner asserts he has had other falls caused by lack of balance, in addition to the fall resulting in his rib injury, and he has experienced bleeding from his ears. [R. pp. 38, 135]. Petitioner reported "a lot" of dizziness causing him to feel off balance. [R. pp. 38, 135]. For the first time, Petitioner also reports difficulties with concentration, memory, thinking, and planning. [R. pp. 39, 135]. Dr. Roger's IME report does not even mention petitioner's

February 25th exam by Dr. Koukos indicating “no impairment of recent or remote memory, normal attention span and ability to concentrate, able to name objects and repeat phrases . . . .” [R. pp. 127, 134-40]. Nor does Dr. Roger’s IME report mention petitioner’s March 31st exam also lacking reference to present symptoms of headaches, dizziness, balance problems, reports of bleeding from ears or memory loss. [R. pp. 114-18, 134-40]. Without any objective testing, such as the ABR recommended by Dr. Ansley, Dr. Rogers assigned Petitioner permanent impairments including a “closed head injury with resultant post-concussive syndrome.” [R. p. 138].

This case was tried before a Single Commissioner Susan Barden (Single Commissioner) on June 26, 2014 and, subsequent to the trial, claimant was permitted to submit additional evidence. [R. pp. 20, 42-43]. Petitioner submitted a third audiogram test performed on August 19, 2014, after the hearing, and an affidavit indicating he has applied for Social Security Disability. [R. pp. 42-43, 185]. The Single Commissioner found statements in the audiogram to be Petitioner’s own self-serving statements that were not further investigated by the examining doctor. [R. pp. 42]. Additionally, correspondence on September 15, 2014 from audiologist Ronald Lunn notes Petitioner “was seen on several previous occasions for purposes of audiological assessment with findings demonstrating inter-, and intra-test inconsistencies, with recommendations made for auditory brainstem response studies, as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing.” [R. pp. 42-42, 183].

The Single Commissioner rendered a Decision and Order filed on April 30, 2015 finding, inter alia: claimant failed to prove any ongoing medical problems that would

entitle him to medical treatment beyond March 31, 2014; claimant failed to prove any permanent disability; and claimant is untruthful, evasive, and inconsistent. [R. pp. 20, 37, 58-59]. Petitioner appealed the Single Commissioner's decision to the Workers' Compensation Commission's Appellate Panel (Appellate Panel), a hearing was held on July 21, 2015, and the Appellate Panel unanimously "determined all of the Hearing Commissioner's finding of fact and conclusions of law are correctly stated[.]" and affirmed the Single Commissioner's order in its entirety. [R. p. 62]. Petitioner appealed to the Court of Appeals which unanimously affirmed the Appellate Panel's findings on four of five issues because the findings were supported by substantial evidence in the record. [R. pp. 1-3]. The Court of Appeals reversed the Appellate Panel's denial of total temporary disability and remanded the same, finding a doctor's work excuse note in the record, as well as, some evidence Petitioner returned to work after the accident. [R. pp. 1-3]. Petitioner filed a motion for rehearing which the Court of Appeals denied finding it was "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." [R. p. 15]. Petitioner's appeal to this Court followed.

### **STANDARD OF REVIEW**

The South Carolina Administrative Procedures Act governs the standard of judicial review in workers' compensation cases and provides an appellate court authority to reverse a decision by the Appellate Panel if it is affected by an error of law or is clearly erroneous in view of the substantial evidence. S.C. Code Ann. § 1-23-380(5)(d)-(e). "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 that [the Appellate Panel] reached or must have reached” to support its order. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland Cty. Sch. Dist. No. 1, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)).

“The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact.” Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007). Where “there are conflicts in the evidence over a factual issue[,]” the finding of the Appellate Panel are conclusive. Id. “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.” Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). An appellate court “may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-380(5). When reviewing an appeal from the Appellate Panel, “this [c]ourt 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 where the decision is affected by an error of law.” Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). See S.C. Code Ann. § 1-23-380(5).

### **ARGUMENT**

The Single Commissioner's findings that Petitioner was untruthful, evasive, inconsistent, and therefore lacked credibility, which was affirmed by the Appellate Panel, is crucial to any discussion regarding other findings of fact Petitioner now

challenges and must be addressed first.<sup>3</sup> Petitioner's challenge to the findings of fact regarding maximum medical improvement, additional medical treatment, and permanent disability, rest on similar factual findings, objective medical records, Petitioner's lack of credibility, and as such will be addressed together.<sup>4</sup>

**I. The Workers' Compensation Commission's Appellate Panel's findings of fact that Petitioner is not credible is based upon inconsistencies between the Petitioner's testimony, objective medical records, and the Single Commissioner's observation of Petitioner during the June 26, 2014 hearing.**

At an IME with Dr. Rogers on May 19, 2014, approximately three months after the incident, Petitioner complains of, inter alia, balance problems caused by the incident and several falls resulting from lack of balance; bleeding from his ear; "cognitive impairment with decreased concentration, alteration in recent memory, thinking, and planning;" resulting from a work related injury in which an air hose exploded and he was struck in the head by a hose clamp. [R. pp. 134-35, 63]. Petitioner's medical records contradict his statements to Dr. Rogers. The emergency room records note petitioner's head was "atraumatic," lack mention of any bruising to the head, balance problems, memory loss, cognitive issues, bleeding, or headaches. [R. pp. 63-64]. Similarly, medical records from Petitioner's visit to Dr. Ansley (ENT) on February 20, 2014, the day after the accident, and on March 6, 2014, lack mention of headache, head injury, balance problems, memory loss, cognitive difficulty, or bleeding from the ears. [R. pp. 67, 108, 111]. Petitioner did have a visit to his family doctor between visits with Dr. Ansley in which he reported headaches and dizziness, however, the neurological

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<sup>3</sup> Credibility of Petitioner is Petitioner's third Question Presented, but necessarily needs to be discussed first.

<sup>4</sup> These factual determinations are raised in Petitioner's first, second, and fourth Questions Presented. As noted in footnote 1, the issue of total temporary disability was reversed by the Court of Appeals and remanded to the Appellate Panel "to determine whether Crane was out of work as a result of the accident and whether he was entitled to TTD." [R. p. 3]. The Appellate Panel has not rendered a decision on remand of this issue and therefore it is not ripe to be heard by this Court.

examination indicates “alert and oriented X3 with no impairment of recent or remote memory, normal attention span and ability to concentrate, able to name objects and repeat phrases . . . .” [R. pp. 68, 127].

Additionally, the Single Commissioner found petitioner’s actions at trial and his testimony to be inconsistent or contradictory with the other evidence. [R. p. 64]. Prior to the hearing, Petitioner informed the Single Commissioner she would need to raise her voice so the Petitioner could hear her. [R. p. 64]. However, Petitioner was able to hear and answer the questions of his attorney who spoke at a normal volume, and did not ask his attorney to raise his voice. [R. p. 64]. Additionally, while watching a video of the incident during the hearing, with his back turned to his attorney, Petitioner was able to hear and answer questions from his attorney spoken at a normal volume. [R. p. 64]. The Single Commissioner also found the video of the incident showing Petitioner working to repair the air hose immediately after the incident and speaking with co-workers telling them to get him things for the repair inconsistent with an inability to hear. [R. p. 64].

The Single Commissioner found Petitioner to be evasive in answering questions and untruthful. Petitioner has claimed memory loss due to the incident including an inability to remember the events immediately following the incident, but his testimony contradicts his own assertion. [R. p. 64]. Petitioner was able to remember “exactly what he texted his wife after the incident (“come get me”), he remembers finding a metal hose clamp by his hat shortly after the accident, he remembers telling everyone he worked with that he could not hear; however Claimant alleges he does not remember that he continued to work on the tire changer after the accident occurred.” [R. pp. 64-

65]. Additionally, Petitioner remembered the events involved in the incident sufficiently to explain to his IME doctor exactly how the accident occurred. [R. pp. 65]. Petitioner denied at the hearing pre-existing conditions that he had admitted to Dr. Rogers one month prior, and reported to Dr. Rogers he just sits at home now, while testifying at the hearing he is still a volunteer fireman, but stays in the truck during calls. [R. pp. 68-70]. Other inconsistent testimony included Petitioner testifying "he cannot work because it is too loud and causes him to develop headaches and that he cannot hear his children talking in the back seat when he is driving; by contract (sic), Claimant admitted to going on fire calls and listening to the radio so loudly in his car with his kids tha (sic) this (sic) mother-in-law complained and his ears bled." [R. p.70].

The Appellate Panel reviewed the Single Commissioner's findings of fact pertaining to Petitioner's credibility and affirmed the same finding the entire claim questionable and Petitioner "untruthful, evasive, and inconsistent, which behavior inevitably leads to doubt." [R. p. 74]. The Appellate Panel's findings of fact as to Petitioner's credibility are corroborated by medical records from multiple distinct providers, Petitioner's own appearance and testimony at the hearing, and are not clearly erroneous in view of this substantial evidence in the record. The Court of Appeals' unanimous opinion correctly affirmed the Appellate Panel's unanimous affirmation of the Single Commissioner's findings of fact as to Petitioner's lack of credibility. Therefore, this petition for a writ of certiorari should be denied.

**II. The Workers' Compensation Commission's Appellate Panel's findings of fact that Petitioner reached maximum medical improvement on March 31, 2014; does not require additional treatment; and did not sustain permanent disability are corroborated by medical records and Petitioner's lack of credibility.**

The Appellate Panel unanimously affirmed the findings of fact that Petitioner reached maximum medical improvement on March 31, 2014, does not require additional medical treatment, did not sustain permanent disability based, and is not entitled to temporary disability compensation<sup>5</sup> after March 31, 2014 is based upon the medical records and petitioner's lack of credibility.

Medical records from Dr. Dean Koukos, Petitioner's family doctor who treated petitioner approximately six days after the incident, indicate Petitioner has "normal hearing," and Petitioner was "alert and oriented X3 with no impairment of recent or remote memory, normal attention span and ability to concentrate, able to name objects and repeat phrases . . . ." [R. pp. 75, 127]. The Appellate Panel also found Petitioner's visit to the emergency room on March 26, 2014 and the follow up with his family doctor on March 31, 2014 illustrative of a lack of ongoing problems. [R. pp.65-66]. These two examinations were in connection with a fractured rib Petitioner sustained after the incident at issue when Petitioner tripped and fell in his bathroom. [R. pp. 65-67]. Petitioner maintains this fall and several other falls are due to balance problems resulting from the incident. [R. p. 135]. However, the records from these two visits lack any mention of head injury, hearing loss, or balance problems allegedly caused by the incident that occurred one month prior and allegedly responsible for the fall resulting in

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<sup>5</sup> As noted in footnote 1, the issue of total temporary disability was reversed by the Court of Appeals and remanded to the Appellate Panel "to determine whether Crane was out of work as a result of the accident and whether he was entitled to TTD." [R. p. 3]. The Appellate Panel has not rendered a decision on remand of this issue and therefore it is not ripe to be heard by this Court.

his fractured rib. [R. pp. 65-66]. The Appellate Panel's order also indicates Petitioner's own IME doctor, Dr. Rogers, found Petitioner had reached maximum medical improvement [R. p. 75]. In addition to these medical records is the evidence of Petitioner's lack of credibility, as discussed in Part I, supra, finding Petitioner's actions and testimony during the hearing to be inconsistent, contradictory, evasive, and untruthful.

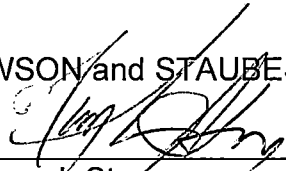
The Appellate Panel's findings of fact as to the issues of maximum medical improvement, additional medical treatment, and permanent disability are corroborated by medical records from multiple distinct providers, Petitioner's own appearance and testimony at the hearing, and are not clearly erroneous in view of this substantial evidence in the record. The Court of Appeals' unanimous opinion correctly affirmed the Appellate Panel's unanimous affirmation of the Single Commissioner's findings of fact. Therefore, this petition for a writ of certiorari should be denied.

### **CONCLUSION**

Petitioner's appeal fails to raise any of the special and important reasons typically warranting review by the Supreme Court and is based solely on his disagreement with the Single Commissioner's findings of fact unanimously affirmed by the Appellate Panel and the Court of Appeals. Therefore, this court should affirm the decision of the lower court.

[Signature on Following Page]

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**PROOF OF SERVICE**

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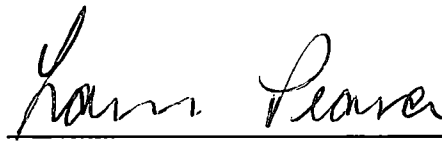
I, Rhonda Huckabee, am a paralegal to Matthew J. Story and I have caused the S.C. Uninsured Employers Fund's **Return to Petition for Writ of Certiorari** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on June 20, 2018, addressed as follows:

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Lauren Pearce

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