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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018—UP—280 (S.C. Ct. App. Filed June 27, 2018)

Scott Ledford, (Employee/Claimant), Petitioner

v.

Department of Public Safety (Employer), and
State Accident Fund (Carrier), Respondents

BRIEF OF RESPONDENTS

Sarah C. Sustusky, Esquire
Willson, Jones, Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803) 787-2520
scsustusky@wjlaw.net
Attorney for Respondents

J. Gabriel Coggiola, Esquire
Willson, Jones, Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803) 227-2889
jgcoggiola@wjlaw.net
Attorney for Respondents

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STATEMENT OF ISSUES ON APPEAL

- I. **WHETHER THE COURT OF APPEALS ERRED IN RULING THE PETITIONER HAD TO ATTRIBUTE PREJUDICE TO THE DECISION OF THE APPELLATE PANEL.**
- II. **WHETHER THE COURT OF APPEALS ERRED IN FAILING TO FIND EVIDENCE OF PREJUDICE IN ADDITION TO THE SHOCKINGLY INADEQUATE AWARD.**
- III. **WHETHER THE COURT OF APPEALS ERRED IN FINDING THE REVERSAL OF THE SHOCKINGLY INADEQUATE AWARD CURED THE PREJUDICE SUFFERED BY THE PETITIONER.**
- IV. **WHILE THE COURT OF APPEALS WAS BOUND BY PRECEDENT, WHETHER THIS COURT SHOULD ADOPT *DE NOVO* REVIEW BASED UPON AN OBJECTIVE STANDARD WHEN DECIDING WHETHER RECUSAL IS REQUIRED UNDER THE CODE OF JUDICIAL CONDUCT.**

STATEMENT OF THE CASE

This workers' compensation appeal arises following Petitioner's March 10, 2012 injury by accident, arising out of and in the course of his employment, wherein Petitioner sustained injuries to his right leg, cervical spine, and lumbar spine in a motorcycle accident. (Appendix, p.32) As a result of his accident, Respondents provided Petitioner authorized causally related medical treatment pursuant to S.C. Code Ann. §42-15-60. Petitioner ultimately reached MMI for his casually related injuries on October 31, 2013. (Appendix, p.92)

On January 24, 2014, Respondents filed a Form 21 Request for Hearing, seeking to stop payment of Petitioner's temporary total disability ("TTD") benefits, a determination of permanent partial disability ("PPD"), and credit, if any, for over-payment of TTD following the Petitioner's release at maximum medical improvement ("MMI"). (Appendix, pp.326-330) A Hearing was held before the Single Commissioner Susan Barden on August 15, 2014. (Appendix, pp. 203-275)

At the Hearing, Respondents argued Petitioner reached MMI on October 31, 2013, and

based on the evidence in the record, Petitioner's PPD award should be no more than the impairment ratings of Petitioner's authorized treating physicians, or in the alternative, if there was any resulting PPD, it would be *de minimis*. (Appendix, p. 208, lines 5-21) Further, Respondents argued for entitlement to credit for 75 weeks of compensation paid to Petitioner as a result of the Petitioner's previous workers' compensation claim stemming from a July 15, 2010 injury to the back while also working for Respondents. (Appendix, p.209, lines 17-21) In support of their position, Respondents argued the back is a single body part, and the law does not differentiate between the levels of the spine, and therefore, the previous PPD award of 25% to back paid to Petitioner for his July 15, 2010 claim should be credited against a PPD award to the back stemming from his March 10, 2012 accident. (Appendix, pp.209-210, lines 17-25 and 1-11) Finally, Respondents argued that Petitioner was not entitled to future medical treatment for the back, since Petitioner's authorized treating physician opined that any further treatment was needed only if the Petitioner's back condition deteriorated. (Appendix, p.210, lines 12-25)

In response, Petitioner asserted he is permanently and totally disabled, since he sustained injuries to multiple body parts (leg and back) in his March 10, 2012 accident. (Appendix, p. 211, lines 6-19) Petitioner argued Respondents were not entitled to credit for PPD previously paid to Petitioner as a result of his July 15, 2010 accident, since the 25% PPD award to the back was for the Petitioner's thoracic spine only. (Appendix, p. 212, lines 4-13) A hearing was held before the Single Commissioner on August 15, 2014. (Appendix, pp.203-275)

Following the August 15, 2014 hearing, the Single Commissioner reviewed the hearing testimony and complete evidence in the record. On September 16, 2014, the Single Commissioner held a telephone conference with the attorneys of records to notify them of her tentative findings and to discuss some of the inconsistencies in Petitioner's hearing testimony. (Appendix, p.163) In addition, the Single Commissioner reminded the parties of their right to enter into a settlement

agreement under S.C. Code Ann. §42-9-390, which would do away with the need for the preparation and filing of a written Decision and Order on the merits. (Appendix, p. 164)

On October 10, 2014, almost one month after the Single Commissioner's telephone conference with the attorneys of record, Petitioner filed a motion to recuse the Single Commissioner and have the claim reassigned to a new commissioner. (Appendix, pp.308-318) Petitioner's motion was the first time he ever alleged the need for the Single Commissioner to recuse herself from the case. (Appendix, pp.169-170, Findings of Fact #27 and #29) The Single Commissioner denied Petitioner's motion on November 3, 2014. (Appendix, p. 171) On November 11, 2014, Petitioner filed a Form 30 request for review of the Single Commissioner's denial of his motion to recuse. (Appendix, pp. 295-307)

On December 17, 2014, the Single Commissioner filed a Decision and Order, wherein she found the Appellant reached MMI on October 31, 2013, and Petitioner was not permanently and totally disabled as a result of the injuries sustained in his March 10, 2012 work accident. (Appendix, p.150, Finding of Fact #46, and p.153, Finding of Fact #53) The Single Commissioner awarded Petitioner 10% PPD to the right leg. (Appendix, p.158, Conclusion of Law #6) The Single Commissioner further found Petitioner sustained no additional PPD to the back beyond the 25% PPD previously paid to Petitioner as a result of his claim related to his prior July 15, 2010 work accident. (Appendix, p.158, Conclusion of Law #6) Finally, the Single Commissioner found Respondents were entitled to credit of overpayment of temporary benefits paid to Petitioner beyond his October 31, 2013 date of MMI. (Appendix, p.158, Conclusion of Law #6)

On December 29, 2014, Petitioner appealed the Single Commissioner's decision to the Full Compensation Appellate Panel ("Appellate Panel"), requesting the Appellate Panel reverse the findings of the Single Commissioner and reassign the case to another commissioner for a hearing *de novo*. (Appendix, pp.285-294) Following briefing by the parties and oral arguments held on

March 17, 2015, the Appellate Panel filed a Decision and Order on January 21, 2016. (Appendix, pp.185-208). In its Order, the Appellate Panel affirmed the Single Commissioner's denial of Petitioner's motion to recuse and reversed in part the Single Commissioner's award of 0% PPD to the back. (Appendix, p.97) The Appellate Panel awarded Petitioner 15% PPD to his back, and reduced the amount of credit for overpayment of TTD benefits to Respondents by shifting the date of credit from October 31, 2013 to January 21, 2015. (Appendix, pp.119-120) Petitioner filed a motion for rehearing, which the Appellate Panel denied on February 22, 2016. (Appendix, p.68)

On March 21, 2016, Petitioner filed a Notice of Appeal with the Court of Appeals. On March 27, 2018, Petitioner also filed a motion to argue against precedent for *de novo* review based on an objective standard whether a judicial officer's conduct violated the Code of Judicial Conduct. Following briefing by the parties, oral arguments were held before the Court of Appeals on May 16, 2018. (Appendix, pp.185-202) At the call of the case, the Court of Appeals quickly denied Petitioner's motion to argue against precedent. On June 27, 2018, the Court of Appeals issued an unpublished opinion, wherein they ruled (1) the Single Commissioner was not required to recuse herself from the case and Petitioner had not attributed prejudice to the decision of the Appellate Panel as required by law; (2) the Appellate Panel's reversal of the Single Commissioner's findings on PPD and credit owed to Respondents was supported by the substantial evidence in the record; and (3) the substantial evidence in the record supported the Appellate Panel's findings that Petitioner was not credible and his landscaping business remained lucrative following his March 10, 2012 work accident. (Appendix, p.10) Petitioner filed a motion for rehearing (Appendix, pp. 2-8), which was denied by the Court of Appeals on August 8, 2016. (Appendix, p.1)

On September 17, 2018, Petitioner filed a Petitioner for Writ of Certiorari, which this Court granted on December 13, 2018. This appeal follows.

STATEMENT OF FACTS

Petitioner graduated high school and attended college for two years where he studied criminal justice. (Appendix, p.221, lines 21-23) At the time of Petitioner's March 10, 2012 accident, Petitioner worked as a Lance Corporal and ACE team member with the South Carolina Highway Patrol. (Appendix, p.223, lines 4-9)

Prior to his March 10, 2012 work accident, Petitioner sustained a prior workers compensation claim for an injury on July 25, 2010 that he described as "a t-spine injury only." (Appendix, p.268, lines 12-18). Petitioner denied that he received an impairment rating to his cervical spine as a result of his 2010 workers' compensation claim. (Appendix, p.252, lines 24-25) At the August 14, 2015 hearing before the Single Commissioner, Petitioner testified that as a result of his 2010 workers compensation claim, he only received treatment to his thoracic spine and that he did not complain of neck pain. (Appendix, p.270, lines 16-20) Despite this testimony, and after being confronted by a medical evidence from his 2010 workers' compensation claim on cross-examination, Petitioner acknowledged he received a 5% impairment rating to his cervical spine as a result of his 2010 workers' compensation claim. (Appendix, p. 270, lines 1-4) As a result of his 2010 injury to the spine, Petitioner was paid 25% PPD to the back on a Form 16A settlement. (Appendix, p.321)

With regards to his current claim, Petitioner was injured in a motorcycle accident on March 10, 2012. As a result of his accident, Petitioner sustained compensable injuries to his right leg, neck, and back. Petitioner underwent right ankle surgery with Dr. Taylor on January 30, 2013, and Dr. Taylor ultimately released Petitioner at MMI on May 23, 2013 and assigned 7% permanent impairment to the right leg, along with permanent work restrictions of no running, cutting, and pivoting. (Appendix, p. 396) Further, Dr. Taylor opined that Petitioner required no future medical to tend to lessen his period of disability. (Appendix, p.396)

As it related to his back, Petitioner initially treated with Dr. William Mills at Coastal Orthopaedic Associates for his neck and back pain after the 2012 accident. Dr. Mills diagnosed Petitioner with C5-6 spondylosis with right cervical radiculopathy and L5-S1 spondylosis. (Appendix, p.428) Dr. Mills previously treated Appellant for his 2010 injuries. At his August 23, 2012 deposition, Dr. Mills testified Petitioner's thoracic area was the most symptomatic as a result of his prior 2010 work accident, but Petitioner also had symptoms in his neck, upper back, and lower back. (Appendix, p.591, lines 7-21)

In addition to his treatment with Dr. Mills, Petitioner underwent an evaluation of his back with Dr. William Edwards of Pee Dee Orthopaedic. Noting that Petitioner was not interested in pursuing aggressive treatment to his cervical spine, Dr. Edwards found Petitioner reached MMI for the back on October 31, 2013. (Appendix, p.524) Dr. Edwards assigned 15% impairment to the back based on cervical disc protrusions. (Appendix, p. 524). Dr. Edwards further opined that it was more likely than not that Petitioner would require cervical fusion surgery and lumbar disc surgery in the future, *if the Petitioner's condition deteriorated in the future. (emphasis added,* Appendix, p.524)

At the direction of his attorney, Petitioner sought further evaluation from Dr. Stephen Poletti at Southeastern Spine Institute. Dr. Poletti first evaluated Petitioner on May 7, 2012, at which time Dr. Poletti noted that Petitioner had "remained with neck pain" since the 2010 injury. (Appendix, p.528). Dr. Poletti's subsequent note dated March 5, 2014 indicated Petitioner did not have neck pain prior to his 2012 motorcycle accident. (Appendix, p.533) Dr. Poletti placed Petitioner at MMI effective March 5, 2014 and assigned a 23% permanent impairment to the back based on cervical and lumbar radiculopathy. (Appendix, p.533). With regards to Petitioner's need for surgery, Dr. Poletti indicated that Petitioner "potentially" needed surgery. (Appendix, p.338).

At the August 15, 2014 hearing, Petitioner admitted he has neither looked for nor applied for any jobs since getting hurt at work on March 10, 2012. (Appendix, p.265, lines 1-5) Petitioner further testified that he continued to own and operate a landscaping and lawn company called ProCutters. (Appendix, p.265, lines 6-13). Petitioner denied knowing how much income he earned from ProCutters, but Petitioner agreed that his tax returns for the year after his accident reflected gross receipts and sales of \$334,906. (Appendix, pp. 265-266, lines 18-25 and lines 1-4). In fact, ProCutters' gross receipts admitted into evidence demonstrated that his gross receipts increased from \$243,658 in 2012 to \$334,906 in 2013. (Appendix, pp.660 and 696)

In response to questioning from his attorney, Petitioner testified that he is "somewhat of a hustler" and that he "work[s] a lot." (Appendix, p.227, lines 7-9). Petitioner then tried to clarify that he tries "from time to time to get involved" with the landscaping business. (Appendix, p.248, line 24 – p.249, lines 1-2). Petitioner testified that he tries to abide by his work restrictions, but his pain intensifies when he does not. (Appendix, p. 252, lines 13-15) Petitioner further testified that his landscaping business supplements his income, and that he must continue operating the business because he "do[es] not have a choice." (Appendix, pp. 231-232, lines 23-25 and lines 1-3).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

The Court shall not substitute its judgment for that of the agency as to the weight of the

evidence on questions of fact. The Court may affirm the decision of the administrative 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:

- (d) affected by other error of law; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (S.C. 1981).

The test is whether the decision of the Commission is supported by substantial evidence. 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 administrative agency reached in order to justify its action. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may

not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENTS

I. The Workers' Compensation Commission correctly found the Single Commissioner was not required to recuse herself from Petitioner's case.

In workers' compensation cases, Commissioners are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. S.C. Code Ann. §42-3-250. Not only does the Code of Judicial Conduct require that a Commissioner disqualify himself or herself in a proceeding in which the Commissioner's conduct might *reasonably* be questioned, but it also requires that a Commissioner shall hear and decide matters assigned to the Commissioner except those in which disqualification is required. (*see* Canon 3(E) and 3(B)(1) Code of Judicial Conduct, Rule 501 SCACR). Canon 3(E) provides that recusal may be necessary when: (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) the judge served as a lawyer in the matter in controversy; (3) the judge or his family member has more than a *de minimis* interest that could be affected by the proceeding; or (4) the judge or someone within the third degree in relationship to her is a party to the proceeding or acting as a lawyer in the proceeding. (Canon 3(E)(1)(a)-(d), Rule 501, SCACR).

In this case, Petitioner admits that the alleged basis for the Single Commissioner's recusal never involved any claim Commissioner Barden or member of her family had any personal prejudice against Petitioner, any relationship with the State Fund, any knowledge of the facts of case, or any financial interest in the outcome of the case. Further, Petitioner to date has never specifically alleged any source of the alleged bias. Instead, Petitioner simply accuses the Single

Commissioner of bias merely because she made findings, which the Single Commissioner based on the Petitioner's testimony and the evidence in the record that Petitioner was not credible as it related to his complaints about his pre-March 10, 2012 cervical complaints and his testimony involving post-accident money he earned through his landscaping business, ProCutters.

Respondents first note that Petitioner's arguments seems to suggest that Petitioner is somehow entitled to more credit as being credible due to Petitioner's chosen profession of law enforcement. While Respondents commend Petitioner on his honorable choice of profession, Respondents respectfully submit that a law enforcement officer is not entitled to any more protection under the law than a teacher, a construction worker, or any other injured worker. Instead, the issue of Petitioner's credibility boils down to the basic fact that his testimony contradicted the evidence in the record, including Petitioner's medical records and tax returns, which demonstrated his substantial earnings through his separate side businesses.

a. The Court of Appeals correctly affirmed the Workers' Compensation Commission's decision that the Petitioner failed to attribute prejudice to the decision of the Appellate Panel as required by law.

In applying Canon 3(E)(1), the South Carolina Court of Appeals has stated that movant or petitioner must show some evidence of bias or prejudice of the judge. Lyvers v. Lyvers, 280 S.C. 361, 367, 312 S.E.2nd 590, 594 (Ct. App. 1984). "Allegations of facts that are merely frivolous or fanciful will not support a motion to disqualify on the grounds of prejudice, nor will conclusory statements, conjecture, or innuendo be sufficient to support a motion for disqualification." 46 Am. Jur. 2nd *Judges* §208 (1994). "Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case." Mallet v. Mallet, 323 S.C. 141, 145, 473 S.E.2nd 804, 807 (Ct. App. 1996). Moreover, "[t]he fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings."

(Id. at 147). In this case, Petitioner has not introduced any cogent evidence of bias or prejudice by the Single Commissioner.

Undeterred by the lack of bias evidence, Petitioner's counsel attempts to draw this Court's attention to the post-hearing telephone conference held by the Single Commissioner with the attorneys of record. As the Single Commissioner stated in her Order denying Petitioner's motion for recusal, the Single Commissioner conducted the telephone conference with the attorneys of record to notify them of her tentative findings and to discuss some of the inconsistencies in Petitioner's testimony. In his brief, Petitioner incorrectly asserts the Single Commissioner "attacked the character of Petitioner's counsel who she called an unethical liar." To the contrary, the Single Commissioner went as far as to compliment Petitioner's counsel on his representation of his client and assured Petitioner's counsel that her findings were in no way a reflection upon him or his abilities. (Appendix, p. 164) Further, Petitioner incorrectly argues in his brief that the Single Commissioner "attacked the Petitioner's character by referring to him as a 'hustler' in the derogatory sense of him being a cheat." Not only is this statement outright false, but in fact it was Petitioner's counsel who characterized his client as a "hustler" during his direct examination at the August 15, 2014 hearing. (Appendix, p.227, lines 7-9).

Despite the lack of evidence in support of his argument, Petitioner's counsel alleges that during this phone conference, the Single Commissioner "threatened criminal proceedings" against Petitioner in an effort to coerce him into an unfavorable settlement. Petitioner fails to identify the source of the Single Commissioner's bias that would motivate her to make such an alleged threat. In fact, the Single Commissioner made no such threat, either expressly or impliedly. Instead, the Single Commissioner merely referenced her statutorily imposed duty to report "suspected" false statements or misrepresentations by a Claimant to the Insurance Fraud Office of the Attorney General for investigation and prosecution as required by S.C. Code Ann.

§42-9-440. Specifically, S.C. Code Ann. §42-9-440 states that the Commission “shall” report all cases of suspected false statement or misrepresentation.

The Legislature’s use of the word “shall” demonstrates the obligation of a Commissioner in such a case and eliminates the Commissioner’s ability to decide which cases of suspected false statements or misrepresentations should be reported and which should not. A Commissioner has an all-encompassing statutory obligation to report such suspected false statements or misrepresentations every time. Further, a Commissioner is not charged with the obligation to investigate or prosecute the suspected false statements or misrepresentations, as that duty falls to the Attorney General’s office. Therefore, the Single Commissioner lacked the ability to “threaten criminal proceedings” because such action could only be taken by the Attorney General’s office.

Petitioner repeatedly argues that he has supplied the only evidence in the record of what was said on the phone call, referencing a self-serving affidavit filed by Petitioner’s counsel. Appellant apparently overlooks the Single Commissioner’s nine (9) page Order denying Petitioner’s motion to recuse, setting forth in meticulous detail the extensive list of evidence she relied on in denying his motion to recuse, including her staunch denial that she ever threatened criminal proceedings. (Appendix...) Petitioner further seems to ignore the sixty-seven (67) findings of fact issued by the Single Commissioner in her December 17, 2014 Decision and Order supporting her position that Petitioner is not credible, a finding affirmed by the Appellate Panel.

In her order denying Petitioner’s motion for recusal, the Single Commissioner astutely points out that Petitioner did not even allege a bias existed until after she revealed her ruling would be unfavorable to Petitioner. (Appendix, p.170) As stated above, the Single Commissioner is the sole judge of credibility and sole decider of weight given to each piece of evidence

presented during the hearing. The Single Commissioner held no bias or prejudice while listening to Petitioner's testimony, and her actions did not prevent Petitioner from fully litigating his claim. The Single Commissioner merely judged Petitioner's testimony, weighed it against the evidence in the record, and determined Petitioner's credibility accordingly.

Furthermore, if a party disagrees with a Commissioner's finding, that party's remedy is to appeal to the Full Commission for consideration of the Appellate Panel. S.C. Code Ann. § 42-17-50. The Appellate Panel has the power to "reconsider the evidence, receive further evidence, rehear the parties . . . and amended the award." (Id.) The Appellate Panel may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the Single Commissioner. Lowe v. Am-Can Transp. Serv. Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). In this case, the Appellate Panel affirmed the Single Commissioner's findings supporting her conclusion that Petitioner was not credible.

In this case, it is unclear on what grounds Petitioner alleges his rights have been affected and how the Single Commissioner's alleged bias was also transmuted to the Appellate Panel. This point is especially true in light of the fact that the Appellate Panel actually increased the Single Commissioner's award as it related to Petitioner's PPD. The purpose of the Judicial Canons are not to allow Petitioner to utilize a recusal mechanism to change the outcome of his case (i.e., to obtain a "second bite at the apple") solely because he is dissatisfied with the result. Petitioner's remedy is to appeal. It would be highly prejudicial to Respondents to allow Petitioner to have another commissioner determine Petitioner's credibility and permanency. The Single Commissioner appropriately denied Petitioner's motion for recusal, and the Appellate Panel correctly affirmed her decision. Respondents respectfully request this Court do the same.

b. The Court of Appeals properly allowed the Appellate Panel's review of whether the Single Commissioner should have been recused in Petitioner's case.

For the first time since the beginning of the case, Petitioner now argues this Court should now "adopt a rule permitting cursory administrative review to shield judicial misconduct."

Specifically, Petitioner goes on to make the unsupported argument that the enforcement of the Code of Judicial Conduct is too important to be delegated to administrative agencies.

Respondents respectfully submit that Petitioner's argument completely lacks merit and ignores the appellate procedure set forth by the South Carolina Legislature. Pursuant to S.C. Code Ann. §42-17-50, if an application for review of a Single Commissioner's decision is made to the Full Commission Appellate Panel, the Appellate Panel shall review the award and, if good grounds be shown therefore, reconsider the evidence, rehear the parties or their representatives and, if proper amend the award. S.C. Code Ann. §1-23-380(a) states that the parties are required to exhaust their administrative remedy by appeal to the Appellate Panel before they are entitled to appeal the issue to the higher appellate courts. The statute is clear that a party is not entitled to appeal any issues in his case until they have exhausted their administrative remedy by appeal to the Appellate Panel, and Petitioner cites no statute or case law supporting his unfounded statement that judicial misconduct is a matter "too important" to be delegated to the Full Commission. Respondents respectfully submit the Appellate Panel Commission is completely capable of hearing an issue as important as judicial misconduct, and if a party arguing judicial misconduct still disagrees with the Appellate Panel's decision, that party is still entitled to the full ongoing appellate process to the Court of Appeals and Supreme Court under the law.

Second, Petitioner asserts that the Appellate Panel's review of the judicial misconduct issue was "cursory." Again, Petitioner cites no authority in support of this argument; however, Petitioner argues the only evidence on the issue is the affidavit of Petitioner's attorney.

Respondents again respectfully submit that not only was the affidavit of Petitioner's attorney self-serving evidence, but Petitioner also ignores sixty-seven (67) findings of fact made by the Single Commissioner in coming to her conclusion that Petitioner was not credible. As such, Petitioners respectfully request this Court affirm the decision of the Appellate Panel.

II. The Court of Appeals correctly affirmed that the findings of the Workers' Compensation Commission were supported by the substantial evidence in the record.

The Single Commissioner made sixty-seven (67) findings of fact, each one of which contains a citation to evidence in the record. Petitioner conveniently narrows in on one finding of fact to conclude that the Hearing Commissioner's ruling is based on pure speculation. It is clear Petitioner is merely grasping at straws to find indices of bias and relies on his misplaced argument that due to the Single Commissioner's bias, there is not substantial evidence to support the findings and rulings of the Full Commission.

Petitioner argues that the Appellate Panel's adoption of finding of fact insinuating that Petitioner is a liar who should be prosecuted for fraud is unsupported by the substantial evidence. However, such argument is improper as there is no such finding of fact. The Appellate Panel does conclude that Petitioner was untruthful and evasive when testifying, a conclusion supported by the substantial evidence. Petitioner denied that he had any neck injury or neck pain prior to his 2012 accident. (Appendix, p.270, lines 22-24). Petitioner was specifically asked whether he complained of any neck pain after his 2010 accident, to which he testified "no." (Appendix, p.270, lines 22-24) Therefore, the findings related to Petitioner's lack of credibility and untruthfulness are supported by the substantial evidence in the record.

Despite Petitioner's denial of neck injury or pain before his 2012 accident, a prior Order of the Commission proves that not only did Petitioner allege an injury to his neck and complain

of neck pain after his 2010 accident, he actually sought a change of condition for the worse based on neck pain. (Appendix, pp.173-184) The Appellate Panel specifically found as a fact that Appellant received treatment for his neck as result of his 2010 accident. (Appendix, p.182)

The August 15, 2014 hearing in this matter was held to determine whether Petitioner had reached MMI and whether he was entitled to any permanency benefits. The parties stipulated that Petitioner had reached MMI. (Appendix, p.207, lines 22-24) Petitioner sought a finding of permanent and total disability; however, the Appellate Panel properly weighed the evidence in this case and determined Petitioner was not permanently and total disabled. (Appendix, p.89)

Again, such finding is supported by the substantial evidence in the record. Petitioner has run his own successful business for 18 years and continued to do so after his 2012 work accident. (Appendix, p. 265, lines 6-13) In fact, Petitioner's ProCutters income increased after his 2012 accident. (Appendix, pp. 660 and 696)

Appellant is well educated as he graduated high school and attended 2 years of college. (Appendix, p.221, lines 21-23) A vocational report submitted into evidence identified multiple jobs Petitioner is qualified to perform and that are within his restrictions. (Appendix, pp. 492-507). Petitioner admitted he has not applied for or looked for any employment. (Appendix, p.265, lines 1-5). To support an award of permanent and total disability, Petitioner has the burden to prove he has made reasonable efforts to obtain employment and failed to do so due to an injury produced limitation. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2nd 646 (S.C. 1967). Petitioner failed to meet this burden based on his own testimony that he has neither applied for nor looked for any employment, and therefore, the Appellate Panel correctly determined Petitioner was not permanently and total disabled.

Petitioner accuses the Single Commissioner of never giving the Petitioner or his CPA an opportunity to explain basic accounting to her. It is the obligation of Petitioner to present

evidence for the Commission's consideration. Petitioner could have testified in greater detail regarding his income tax return, his CPA could have testified, or he could have refuted the evidence in some other way. Petitioner had notice Respondents intended to submit Petitioner's tax returns into the record, as such documents were properly listed on Respondents' Pre-Hearing Brief. (Appendix, pp.422-423) Petitioner neither objected to the submission of his tax returns nor presented any contrary evidence. Instead, Petitioner argues that the Commission's consideration of such properly submitted evidence indicates bias.

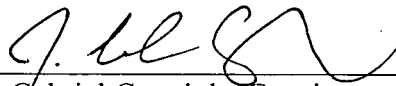
Regardless of any attempted explanation by Petitioner, it does not take an accountant to question why a small landscaping business needs a boat, spends over \$6,000.00 for uniforms, over \$11,000 in utilities, and nearly \$3,000 in telephone expenses. (appendix, pp.672 and 675) The Single Commissioner admitted she did not have the expertise to question the legality of Petitioner's deductions and did not make any rulings as to the same. The Single Commissioner merely pointed out the excessive deductions on Petitioner's tax returns that mask his true income. It is the Commission's duty and obligation to weigh the evidence presented and make rulings. Petitioner failed to sufficiently explain or justify the seemingly egregious deductions listed on his tax returns. The fact that the Single Commissioner's findings involving Petitioner's lack of credibility involving his earnings and his tax returns does not make her biased, it simply demonstrates Petitioner did not meet his burden of proof establishing wage loss or permanent and total disability.

The Commission weighed the substantial evidence in the record and properly ruled that, based on the facts of the claim, Petitioner neither suffered wage loss nor permanent and total disability. Instead, the Commission properly awarded Petitioner disability compensation under S.C. Code Ann. §42-9-30 for his right leg and back injuries, and such findings and rulings are supported by the substantial evidence.

CONCLUSION

Based upon the foregoing arguments, Respondents respectfully request that this Court (1) affirm the Appellate Panel's finding that the Single Commissioner was not required to recuse herself; (2) affirm the Court of Appeals decision that Petitioner failed to attribute prejudice to the decision of the Appellate Panel as required by law; (3) affirm the Court of Appeals decision that the Appellate Panel's findings were supported by the substantial evidence in the record; and (4) affirm the Court of Appeals denial of Petitioner's argument that this Court should adopt a *de novo* review based upon an objective standard when deciding whether recusal is required under the Code of Judicial Conduct.

RESPECTFULLY SUBMITTED,



J. Gabriel Coggiola, Esquire
Sarah C. Sutusky, Esquire
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, SC 29204
(803) 227-2889
Attorneys for Respondents

February 11, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018—UP—280 (S.C. Ct. App. Filed June 27, 2018)

Scott Ledford, (Employee/Claimant),.....Petitioner,

v.

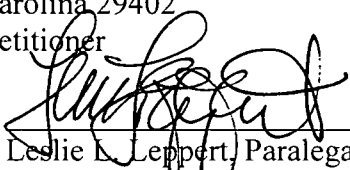
Department of Public Safety (Employer), and
State Accident Fund (Carrier),.....Respondents.

PROOF OF SERVICE

The undersigned certifies that on the date indicated below, she served counsel for Petitioner with a copy of **Respondents' Brief** by mailing copies of the same by United States Mail postage prepaid on February 11, 2019 to the following addresses:

E. Hood Temple, Esquire
Hatfield Temple, L.L.P.
Post Office Box 1170
Florence, South Carolina 29503-1770
Attorney for Petitioner

J. Kevin Holmes, Esquire
The Steinberg Law Firm, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
Attorney for Petitioner



Leslie L. Leppert, Paralegal
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803)227-2890

February 11, 2019
Columbia, South Carolina