THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1707458

Appellate Case No. 2018-002005

Scotty Steele, Claimant, Appellant,

v.

Canal Wood, LLC, Wallace Logging, and Hartford Insurance Company,
Employers and Carrier, Respondents,

and

The South Carolina Workers' Compensation Uninsured Employers' Fund,
Respondent.

INITIAL BRIEF OF RESPONDENT, UEF

Timothy B. Killen, Esq., Bar No. 0072501
Holder Padgett Littlejohn + Prickett, LLC
349 West Coleman Blvd, Suite 300
Mt. Pleasant, South Carolina 29464
Office: (843) 277-0826
Fax: (843) 589-9000
tkillen@hplplaw.com
Attorneys for UEF

Other Counsel of Record:
Stephen R. Suggs, Esq.
Stewart Law Offices, LLC
10 Calendar Court, Suite 100
Columbia, South Carolina 29206
Office: (803) 743-4200

Erica E. Loudin, Esq.
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
Office: (803) 227-2894

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STATEMENT OF FACTS

Timothy Scott Steele was employed by Wallace Logging Company. ROA _; Hearing Tx. p. 9 ll. 3-5. On June 3, 2017, Claimant sustained an injury to his right middle finger, resulting in partial amputation of his right middle finger tip, as well as a laceration to the ring finger. ROA _; Claimant's APA p. 9. He initially treated for this injury at the emergency department at Carolinas HealthCare System. ROA _; Claimant's APA p. 9. Claimant underwent laceration repair for the fourth (4^{th}) finger and was given a digital block for the second finger, as well as wound dressing. ROA _; Claimant's APA p. 10.

On June 9, 2017, Claimant underwent evaluation by an orthopedic surgeon Dr. Jeffrey Daily. Dr. Daily noted that there was a small laceration of the finger tip on the right third (3^{rd}) finger and loss of the fingertip with some irregularity of the skin edges on the second (2^{nd}) finger. ROA _; Claimant's APA p. 53. Dr. Daily also noted that the right arm showed good elbow and shoulder range of motion. ROA _; Claimant's APA p. 53. After examination, Dr. Jeffrey opined that Claimant would continue with dressing changes and he may require further debridement. ROA _; Claimant's APA 53. Claimant was provided with a work excuse in which Dr. Dailey noted that he anticipated Claimant's length of time out of work to be approximately six (6) to eight (8) weeks. ROA _; Claimant's APA p. 59.

Claimant filed for a hearing on June 9, 2017, against Wallace Logging and the South Carolina Uninsured Employers' Fund. The hearing was held on December 19, 2017. ROA _; Form 50; Single Commissioner Order p. 1. At the hearing, Claimant testified that the only

treatment he sought for the finger was the initial emergency room visit plus a doctor visit the week before the hearing. ROA _; Hearing Tx. p. 16 ll. 4-7. Claimant failed to provide any medical records to show that he needed further medical care and treatment.

Regarding his employment with Wallace Logging, Claimant testified that he voluntarily quit working in June of 2017. ROA _; Hearing Tx. p. 9 ll. 6-8. Specifically, Claimant was asked if he ever worked for Wallace Logging, to which he replied that he had. ROA _; Hearing Tx. p. 8 l. 25; Hearing Tx. p. 9 11. 1-2. When asked when he stopped working for Wallace Logging, Claimant replied, "[i]n June. In June I *quit* working for him." ROA _; Hearing Tx. p. 9 ll. 6-10 (emphasis added). He further testified that he had not worked since his accident on June 3, 2017, and that he has tried to find work, but other employers would not hire him. ROA _; Hearing Tx. p. 17 ll. 20-23; Hearing Tx. p. 18 ll. 4-14.

The Single Commissioner found that Claimant suffered a compensable injury, that Wallace Logging was an employer subject to the Act, and that Dr. Jeffrey's work excuse was not dispositive of a full release to duty. ROA _; Single Commissioner Order pp. 6-7. The Single Commissioner ordered Wallace Logging to pay Claimant temporary total disability (TTD) benefits from the date of the injury to present and continuing. ROA _; Single Commissioner Order p. 8. Liability was imputed against the South Carolina Uninsured Employers' Fund. ROA _; Single Commissioner Order p. 8. The South Carolina Uninsured Employers' Fund appealed the order, and the Full Commission panel reversed in relevant part, finding *as a fact* that Claimant was entitled to only eight weeks of temporary total disability. The Appellate Panel found this was "supported by the treating physician's report dated June 9, 2017 in which he stated that the 'anticipated time out of work [approximately] 6 weeks'. Further the Claimant did not return to the doctor for further treatment after this date." ROA _; Appellate Panel Order p. 6.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa Corp.*, 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004).

The appellate panel is the ultimate fact finder in Workers' Compensation cases, and it is not bound by the single commissioner's findings of fact. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). The ultimate determination of a witness' credibly and the weight of such evidence is reserved to the appellate panel. *Shealy v. Aiken County*, 341 S.C. 488, 535 S.E.2d 438 (2000). The existence of inconsistent conclusions that may be drawn from the evidence does not preclude the administrative agency's findings from being based on substantial evidence. *DuRant v. South Carolina Dep't of Health & Envtl. Control*, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). When such conflicts in the evidence concerning a factual issue exist, the findings of the appellate panel are conclusive. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

ARGUMENT

THE COMMISSION'S FINDING THAT CLAIMANT IS ENTITLED TO ONLY EIGHT WEEKS OF TEMPORARY TOTAL DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Claimant bears the burden of proving entitlement to temporary disability benefits. *Lee v. Bondex, Inc.*, 406 S.C. 97, 102, 749 S.E.2d 155 (2013). Specifically, an employer must pay an injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages so long as the incapacity for work resulting from the injury is total. S.C. Code Ann. §42-9-10(A) (Supp. 2011). Further, temporary disability benefits are prompted "[w]hen an employee has been out of work due to a reported work-related injury ... for eight days." S.C. Code Ann. §42-9-260(A) (Supp. 2011).

Disability is presumed to continue until the employee either returns to work or compensation is suspended or terminated according to Section 42-9-260. S.C. Code Reg. 67-502(B)(1) (Supp. 2012). "Pursuant to section 42-9-260 and the accompanying regulations, the entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages." *Pollack v. Southern Wine & Spirits of America*, 405 S.C. 9, 15, 474 S.E.2d 430 (2013). Thus, an injured employee is entitled to TTD compensation when his incapacity is due to or because of the injury. *Id.* In order for temporary disability benefits to be issued, a Claimant must prove that his current work restrictions prevent him from performing the job he had before the injury *and* that his current employer has not offered light duty employment. *Lee*, 406 S.C. at 103. Consequently, his inability to secure employment with another employer has no bearing on the receipt of temporary disability benefits. *Id.*

When a Claimant is receiving temporary benefits and reaches maximum medical improvement (MMI), temporary benefits can be terminated, and the Claimant may be awarded permanent benefits. *Smith v. South Carolina Dep't of Mental Health,* 335, S.C. 396, 399, 517

S.E.2d 694 (1999). The term maximum medical improvement indicates that "a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment." *Curiel v. Environmental Management Services*, 375 S.C. 23, 29, 655 S.E.2d 482 (2007). Furthermore, a Claimant may be determined to have reached MMI while still requiring additional medical care or treatment. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 222, 628 S.E.2d 262 (2006). A finding of maximum medical improvement is a factual determination, which must be upheld on review unless supported by substantial evidence. *Shealy v. Aiken County*, 341 S.C. 448, 454, 535 S.E.2d 438 (2000); *Hall v. United Rentals*, 371 S.C. 69, 89, 636 S.E.2d 876 (Ct. App. 2006). The basis for ceasing temporary benefits upon a finding of maximum medical improvement is to allow entry of a permanent award. *Smith,* 355 S.C. at 399. As the Supreme Court has written,

> Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member.

Curiel, 376 S.C. at 29. Thus, even if an employee remains disabled after reaching MMI, his temporary benefits may be terminated in favor of permanent benefits as his injury is permanent. *Smith*, 335 S.C. at 399.

In his brief, Appellant argues that the Appellate Panel determined that Claimant was at MMI. Appellant's Brief. However, the Appellate Panel made no such finding. ROA _; Appellate Panel Order.

In the present case, the Appellate Panel was forced to determine Claimant's entitlement to temporary total disability benefits based on very limited evidence: three medical narratives and Claimant's own testimony. As such, the Panel weighed the evidence before it, as well as the

credibility of Claimant's testimony, and found *as a fact* that Claimant was entitled to eight (8) weeks of temporary total disability (TTD) benefits. This determination was based on the medical narrative from Dr. Daily on June 9, 2017, in which he opined that Claimant would return to work within six (6) to eight (8) weeks. Though it was his burden to do so, Claimant provided no documentary evidence of additional medical treatment, and, thus, the Panel found *as a fact* that Claimant never sought additional medical treatment.[1] While Claimant testified that he had continuing issues with his hand and now his shoulder, that alone would not support a finding that he was entitled to further TTD benefits nor, for that matter, that he was not at maximum medical improvement. Further, it is Claimant's burden to prove permanent disability and the need for further medical care and treatment.

Claimant also testified that his employment ended with Wallace Logging when he *voluntarily* quit in June of 2017:

Q. When did you stop working for Wallace Logging?

A. In June. In June I quit working for him.

Q. Of 2017?

A. Of 2017.

ROA _; Hearing Tx. p. 9, ll. 6 – 10.

Appellant offered absolutely no evidence that he was refused employment by Wallace Logging after his anticipated six (6) to eight (8) weeks of being placed out of work. Records as a whole. As noted *supra*, "Pursuant to section 42-9-260 and the accompanying regulations, the

[1] Appellant does not argue that he is entitled to continuing medical care and treatment. Proof of the need for continuing medical care and treatment would be necessary to show that he is entitled to ongoing TTD benefits. It should be noted that the Single Commissioner did not find that Claimant needs further medical care and treatment, and this was not appealed by Respondent. This issue has been abandoned because Appellant did not appeal the Single Commissioner's failure to award continuing medical care and treatment ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). *State v. Addison*, 338 S.C. 277, 285, 525 S.E.2d 901, 906 (Ct. App. 1999).

entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages." *Pollack v. Southern Wine & Spirits of America*, 405 S.C. 9, 15, 474 S.E.2d 430 (2013). In this case, the only evidence is that the Claimant's alleged inability to earn wages after the eight (8) weeks was due to his failure to go to work. His unemployment was due to his decision to terminate his own employment and not from any work restrictions preventing him from employment. There is no evidence in the record that Claimant's restrictions lasted longer than eight (8) weeks, as noted by Dr. Daily's work excuse on June 9, 2017. Thus, he failed to meet his burden of proof that his purported lack of employment was the result of any incapacity due to the work-related injury. As such, the Panel's finding that he is entitled to only eight (8) weeks of temporary total benefits is based on substantial evidence.

CONCLUSION

In conclusion, factual determinations and the weight of evidence are reserved to the Appellate Panel. Claimant bears the burden to provide the panel with evidence supporting his entitlement to these benefits. The evidence presented to the panel regarding Claimant's entitlement to temporary total benefits included just three (3) medical narratives and the testimony of Claimant, who said that he voluntarily quit working. After weighing this evidence, as well as the credibility of Claimant's testimony, the Panel found *as a fact* that Claimant never returned for future medical treatment and, as such, he was entitled to only eight (8) weeks of benefits. Considering the record as a whole, reasonable minds could conclude that Claimant could have returned to work after eight weeks but for the fact that he voluntarily left his employment with Wallace Logging. Thus, the Appellate Panel's order is based on substantial evidence and should not be disturbed by this Court.

RESPECTFULLY SUBMITTED,

Timothy B. Killen, Esq., Bar No. 0072501
Holder Padgett Littlejohn + Prickett, LLC
349 West Coleman Blvd, Suite 300
Mt. Pleasant, South Carolina 29464
tkillen@hplplaw.com
843-277-0826
Attorneys for Respondent UEF

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Canal Wood, LLC, Wallace Logging, and Hartford Insurance Company,
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and

The South Carolina Workers' Compensation Uninsured Employers' Fund,
Respondent.

PROOF OF SERVICE

I hereby certify that I have served Respondent UEF's Initial Brief and Designation of Matter to be included in the Record on Appeal and Certificate of Counsel of the parties by placing them in the U.S. Mail, sufficient postage pre-paid, on March 21, 2019, addressed as follows:

Stephen R. Suggs, Esq.
Stewart Law Offices, LLC
10 Calendar Court, Suite 100
Columbia, South Carolina 29206,

Erica E. Loudin, Esq.
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204,

Jamie Wallace
Wallace Logging
1973 Kirkley Road
Jefferson, South Carolina 29178, and

Jamie Wallace
Wallace Logging
1973 Kirkley Road
Pageland, South Carolina 29728.

Michelle Adams

Michelle Adams, Paralegal
Holder Padgett Littlejohn + Prickett, LLC
349 West Coleman Blvd, Suite 300
Mt. Pleasant, South Carolina 29464
madams@hplplaw.com
Attorneys for Respondent UEF

HOLDER
PADGETT
LITTLEJOHN+
PRICKETT LLC
ATTORNEYS AT LAW

Timothy B. Killen

Reply to: *Charleston Office*
direct: **843.277.0826**
fax: **843.589.9000**
tkillen@hplplaw.com

March 21, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Appellate Case No. 2018-002005
Scotty Steele v. Wallace Logging, *et al.*
W.C.C. File No. 1707458

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of Initial Brief of Respondent UEF, Respondent UEF's Designation of Matter, Certificate of Counsel, and Proof of Service of the same in the above-captioned matter, which was filed with your office yesterday.

By copy of this letter and enclosures, we hereby serve a copy of the aforementioned documents on Respondent and Appellant by and through counsel of record.

With kindest regards,

HOLDER PADGETT LITTLEJOHN + PRICKETT

Timothy B. Killen

TBK/mma
Enclosures
cc: Stephen R. Suggs, Esq. (*via* U.S. Mail)
Erica E. Loudin, Esq. (*via* U.S. Mail)
Jamie Wallace, Wallace Logging (*via* U.S. Mail)

HOLDER PADGETT LITTLEJOHN + PRICKETT
349 W Coleman Blvd, Suite 300
Mount Pleasant, SC 29464
Attn: maa

FIRST-CLASS

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The Honorable Jenny Abbott Kitchings
SC Court of Appeals
1220 Senate St
Columbia, SC 29201