THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2018-002087

Dale Brooks, Employee, Appellant,

v.

Benore Logistics System, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

FINAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COMMISSION DECISIONS

STATUTES

STATEMENT OF ISSUE ON APPEAL

I. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE APPELLATE PANEL'S DENIAL OF APPELLANT'S CLAIM FOR A REPETITIVE TRAUMA INJURY?

STATEMENT OF THE CASE

This case involves an appeal from the South Carolina Workers' Compensation Commission. Dale Brooks (Appellant) alleged a repetitive trauma injury to his low back and right leg from "repeatedly getting in and out of his truck." (R. p. 31). Respondents denied the claim. A hearing was held on September 7, 2017, before Commissioner Gene McCaskill (the single commissioner). On December 27, 2017, the single commissioner issued an order finding Appellant met his burden of establishing a compensable repetitive trauma injury to his low back affecting his right leg. (R. pp. 28-29). The single commissioner awarded Appellant temporary total disability benefits for the period January 19, 2017 through June 28, 2017, as well as prior and future causally-related medical treatment.

Respondents appealed the single commissioner's order to the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel). The Appellate Panel reversed the single commissioner by an order dated October 26, 2018. Specifically, the Appellate Panel found Appellant failed to meet his burden of proving a repetitive trauma injury under section 42-1-172 of the South Carolina Code[1] to his low back and right leg arising out of his employment with Respondent Employer. Accordingly, it denied Appellant's claim for benefits. This appeal followed.

STATEMENT OF THE FACTS

Appellant's Testimony

Appellant was a 56-year-old male at the time of his deposition and the hearing before the single commissioner. His work experience included working as a "safety director" for WH

[1] *See* S.C. Code Ann. § 42-1-172(B) (noting a repetitive trauma injury is not compensable unless a commissioner makes a specific finding of fact by a preponderance of evidence between the repetitive job activities that occurred while the employee was engaged in the regular duties of his employment and the injury).

Trucking and as a radio dispatch for a company he owned. (R. pp. 205-06, 232). His criminal history includes two charges for "bounced checks." (R. pp. 236-37). As a safety director, he would host safety meetings where he would instruct employees on "how to control your truck in a given situation," and conduct accident investigations to determine who was at fault in a trucking accident. (R. pp. 208-210). According to Appellant, he trained drivers on Federal Motor Carrier Safety Regulations, instructed drivers about safety in their employment, and drafted safety policies. (R. pp. 211-12). In fact, Appellant testified at his deposition that while working for WH Trucking, a Benore employee reported a work-related accident to him. (R. pp. 215-17). According to Appellant, the company had a policy of reporting accidents "as soon as it occurred," which is standard for the trucking industry. (R. pp. 216-17). Appellant also described a prior work-related injury that resulted in a hernia. (R. p. 238). When asked why he reported that injury to his employer, he stated "[b]ecause it's procedure." *Id.* He further stated that he filed a workers' compensation claim as a result of the hernia. (R. pp. 238-39).

Some of Appellant's testimony before the single commissioner, however, was inconsistent with his deposition testimony regarding his prior work experience and knowledge of workers' compensation procedure. At the hearing, Appellant denied receiving accident reports in his safety position with WH Trucking. (R. p. 130). At the hearing, he also denied receiving workers' compensation injury or accident reports as part of his safety position. *Id.*

Appellant was hired by Benore on August 29, 2016 as a switcher operator (hereinafter, "Switcher"). (R. pp. 87, 217, 224-25). Prior to that, he worked as a "Switcher" trainer for WH Trucking for approximately one month. (R. p. 225). As a "Switcher," Appellant would "move trailers from one point to another." (R. p. 220). His duties required him to move trailers across a yard at the Bavarian Motor Works (BMW) manufacturing plant. (R. pp. 87-88). Appellant explained that in a traditional 18-wheeler, the driver might have

to "drop and hook" while winding down the landing gears; however, a "Switcher" was not required to do so often. (R. pp. 220-21). He did claim, however, that the truck used by a "Switcher" is a "rougher style truck of truck" than that of a traditional tractor-trailer. (R. p. 217). Furthermore, a "Switcher" stays within the confines of the yard and moves trailers to the trucks. (R. p. 221).

He described his job duties as follows:

> You have to back up to the trailer, raise it up hydraulically from inside the cab, You have to walk onto the platform, bend over, hook up the lines, pull the trailer forward, get off the truck, walk to the back of the truck, close the doors, walk into the truck[,] go to wherever it's going to go, and reverse the entire process.
>
> What you're going to do is you're going to get off the truck, you're going to open the doors, get back in the truck, back the trailer back up, and then you're going to climb –unhook the airlines, and then you're going to pull the trailer out.

(R. p. 224).

Appellant stated this process takes approximately 15 minutes to complete. He earned $16.50 per hour while working for Benore, which he believed should have been higher. (R. pp. 228-29).

Appellant last worked at Benore on January 17, 2017. (R. p. 231). Thus, he only worked for Benore for approximately 6 months. (R. pp. 232-33). During that time, he took two weeks off in October 2016 and two weeks off during Christmas. *Id.* During the period he worked at Benore, Appellant alleged he was involved in two other work-related accidents. (R. p. 233). Specifically, he stated that while working at the Michelin plant in September 2016, a door fell from a trailer twice in the same day. *Id.* When asked if he reported those accidents, Appellant responded, "of course" and explained he reported them "immediately." (R. pp. 233-34). Appellant testified he reported the incidents to Donna, his safety supervisor, because "[t]hat was the procedure." (R. p. 234).

Therefore, Appellant knew the standard procedure for the trucking industry, namely an employee is required to report work-related accidents in a timely manner.

Regarding the incident in question, Appellant testified he began noticing pain about two weeks prior to actually reporting an accident. (R. p. 241). Claimant testified at the hearing that his injury occurred from "getting in and out of the truck so much . . . ." (R. p. 111). Specifically, he stated his job duties required him to climb steps, stoop, bend over, and twist his body. (R. pp. 93-95, 111).

According to Appellant, he reported the alleged accident to his supervisor through text messages. (R. pp. 242-44). He first stated he reported an alleged work accident to his supervisor, Joe Slattery, on January 19, 2017. (R. p. 241). Appellant then stated he reported to Slattery he was out of work for the "flu" prior to January 19, 2017. *Id.* However, he later explained that January 19, 2017 "was an approximate date." (R. p. 242). Respondents presented the text messages between Appellant and Slattery. (R. pp. 336-37).

Appellant alleged he had back pain for two weeks prior to January 19, 2017. (R. pp. 241, 245). He also described a burning sensation that had been ongoing for two weeks. (R. p. 245). He later testified that on January 17, 2017, he noticed an "extremely sharp pain in his back and [his] leg that evening." (R. p. 244). However, in his initial report to Slattery on January 18, 2017, Appellant stated, "I am sick with the flue (sic)." (R. p. 336). The next day, Appellant reported that he would not be into work on Thursday January 19, 2017, but that he hoped to work the next day. *Id.* He stated that green tea, Theraflu, and rest had helped. *Id.* Interestingly, he also reported that he realized Benore had not processed his health insurance. *Id.* Finally, in his third text message, and apparently after knowing for over two weeks of an alleged work accident, he reported:

> I need to go to Benore's doctor. Every day my back has been aching from in and out of the truck. . . . Today I barely can get out of bed. I know I have the flue (sic) but my back is much more painful to

> where it's super stiff. Advil doesn't seem to help[.] I need to at least get it checked out.
>
> Plus I f[oun]d out [B]enore never processed my health insurance.

Id.

Later that day, Appellant again indicated what he was experiencing "may be the flue (sic)." (R. p. 337). Appellant testified he initially did not think his condition was work-related. (R. p. 245). He explained that he first noticed it was work-related on January 17, 2017, when he stepped onto a platform and felt a burning sensation. (R. pp. 246-47). Although he stated the pain had been ongoing for two weeks, and caused a sharp pain on January 17, 2017, Appellant not only did not report an alleged injury at that time, he also did not mention a work-related injury in his first few texts. (R. p. 247). Appellant never reported a work-related injury to Slattery aside from the text messages. (R. pp. 250-51).

Appellant testified he met with human resources representative Bill Beamer and completed an affidavit. (R. pp. 252-53). He stated he also talked with Beamer regarding light duty work, but he was informed Benore did not offer light duty positions. (R. pp. 254-56).

At the time of the hearing before the single commissioner, Appellant was working at Edwards Printing as a driver and previously worked in shipping and receiving. (R. pp. 118-120). Appellant testified that sitting, standing, driving, and trying to do anything increased his pain; however, he admitted he is required to do all of these activities at his current job. (R. p. 125).

Ergonomics Expert Glen Adams

Respondents hired erogonomics expert Glen Adams to review Appellant's job and to issue an ergonomics report. (R. p. 339). Adams reviewed Appellant's deposition, his medical records, and visited the job site where Appellant worked as a "Switcher." (R. pp. 339-345). Adams found that, contrary to Appellant's testimony, he would be able to enter and exit the cab

of the truck without having to bend over. (R. pp. 147-48, 344). He further found that the job tasks of a "Switcher" do not require lifting that exceeds any recommended safe lifting limit. (R. p. 345). Finally, Adams concluded the job involved two activities with forward bending (connecting the harness and entering and exiting the cab); however, neither of those tasks involved elevated risks for the development of lumbar musculoskeletal disorders. (R. pp. 344-45).

Appellant's Physician Dr. Eric Loudermilk

Appellant was referred to Dr. Eric Loudermilk of Piedmont Comprehensive Pain Management Group, LLC by his attorney. (R. p. 306). Dr. Loudermilk evaluated Appellant on May 1, 2017. (R. p. 306). At that time, Appellant reported pain in his back and leg that began around January 3, 2017. *Id.* Later, in response to a questionnaire from Appellant's attorney dated August 11, 2017, Dr. Loudermilk checked, "yes" to the question, "Did the repetitive activities of [Appellant]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping and climbing ladders, most probably cause low back pain with the right leg radiculopathy?" (R. p. 315). He also responded affirmatively to the question, "Did the repeated work activities above cause an L4-L5 disc protrusion shown on Dale's MRI of 6.27.17?" *Id.* Finally, Dr. Loudermilk opined "No" to the question: "Does the attached ergonomics report change your opinion in anyway?" (R. p. 316). However, it is unclear whether the ergonomics report from Glen Adams was included as an attachment to the questionnaire because the Adams report was not included in Appellant's attorney's submissions to the single commissioner. Moreover, neither the questionnaire from Appellant's attorney nor any other evidence indicate Dr. Loudermilk reviewed an actual job description of Appellant's job activities as a "Switcher." (R. pp. 315-16).

STANDARD OF REVIEW

"In workers' compensation cases, the Appellate Panel is the ultimate finder of fact." *Thomas v. 5 Star Transp.*, 412 S.C. 1, 9, 770 S.E.2d 183, 187 (Ct. App. 2015). "[W]hen evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive." *Dozier v. Am. Red Cross*, 411 S.C. 274, 289, 768 S.E.2d 222, 229-30 (Ct. App. 2014). "Courts will not overturn the factual findings of the [Appellate Panel] unless they are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000). "Pursuant to S.C. Code Ann. § 42-17-50 (Supp. 2010), the [Appellate Panel] shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner." *Pack v. State Dep't of Transp.*, 381 S.C. 526, 535, 673 S.E.2d 461, 466 (Ct. App. 2009).

Judicial review of a Worker's Compensation Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5). A reviewing court should affirm the decision of the Appellate Panel unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The reviewing court may not substitute its own judgment for that of the Appellate Panel as to the weight of the evidence on a question of fact but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). 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 same conclusion the administrative agency reached in order to justify its action. *Fishburne v. ATI Syst. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). "The possibility of drawing two inconsistent conclusions from the evidence does not

prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Prod., Inc.*, 336 S.C. 154,160,519 S.E.2d 102, 105 (1999).

ARGUMENT

I. Substantial evidence supports the Appellate Panel's denial of Appellant's claim for a repetitive trauma injury.

Subsection 42-1-172(A) of the South Carolina Code defines "repetitive trauma injury" as "an injury which is gradual in onset and caused by the cumulative effects of **repetitive traumatic events**." (emphasis added). "A 'repetitive trauma injury' is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D). Moreover, an injury is not considered a compensable repetitive trauma injury unless a commissioner "makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the **repetitive activities** that occurred while the employee was engaged in the regular duties of his employment and the injury." S.C. Code Ann. § 42-1-172(B) (emphasis added).

Appellant's appeal is essentially that the Appellate Panel should have assigned more weight to Dr. Loudermilk's opinion over the ergonomics report issued by Glen Adams and/or assigned more weight to Appellant's testimony. Respondents assert these were issues that went to the weight assigned to the evidence and credibility, which were issues for the Appellate Panel to decide as the factfinder. *See Shealy v. Aiken Cnty.*, 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 [Appellate Panel]. It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]."). Therefore, the appeal should be affirmed.

A. Section 42-1-172 of the South Carolina Code requires a claimant to prove his job is repetitive to recover for a repetitive trauma injury.

Appellant appears to take the position that section 42-1-172 of the South Carolina Code does not require him to prove the job is repetitive. This is not supported by the language of the statute. Notably, subsection 42-1-172(B) states an "injury is not considered a repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the *repetitive activities* that occurred while the employee was engaged in the regular duties of his employment and the injury." (emphasis added). Thus, Respondents respectfully assert that, the statute requires there to be "repetitive activities" that occurred in the employee's job that caused his repetitive trauma injury. It seems logical to think that the Legislature intended the phrase "repetitive activities that occurred while he was engaged in the regular duties of employment and the injury" to mean the claimant must prove he was performing a repetitive job for him suffer a repetitive trauma injury. Such an interpretation of subsection 42-1-172(B) comes from the plain language of the statute and simply, to borrow a phrase from Appellant, "[c]ommon sense." (App. Br. p. 16). Respondents agree with Appellant that section 42-1-172 also requires a claimant to prove that "by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D). However, Respondents respectfully assert that, as the Appellate Panel found in its order:

> The plain language of S.C. Code Ann. § 42-1-172 indicates there is a two-part analysis a claimant must meet in order to meet his burden of proving a compensable repetitive trauma injury. First, there must be medical evidence establishing a causal connection between the "condition under which the work is performed and the injury." § 42-1-172(D). Additionally, there is an independent requirement that a Commissioner find by a preponderance of evidence that the claimant's specific job activities are repetitive. § 42-1-172(B).

(R. p. 9).

Here, Appellant failed to prove that the job activities of a "Switcher" were sufficiently repetitive. Therefore, he failed to meet his burden of a repetitive trauma injury under the plain language of section 42-1-172. Unfortunately for Appellant, the Appellate Panel chose to place more weight on the Adams ergonomics report that found the "Switcher" job was not repetitive. (R. pp. 9-11). Specifically, the Appellate Panel stated:

> [W]e find the unbiased opinion of Glen Adams that [Appellant]'s job duties were not sufficiently repetitive *is entitled to greater weight than [Appellant]'s testimony* on that issue.
>
> We likewise find that *Dr. Loudermilk's opinion is entitled to less weight* because he appears to have relied on [Appellant]'s own self-serving statements as to the alleged repetitive job activities of a "Switcher" as well as a description of those job activities from [Appellant]'s attorney included in questionnaires.

(R. pp. 9-11 (*citing* R. pp. 309-310, 315-16)).

Thus, the Appellate Panel found that Appellant did not sustain his burden of proving the "Switcher" job was sufficiently repetitive to recover under section 42-1-172.

Appellant places great weight on the fact that Dr. Loudermilk was the only medical evidence regarding causation, which Respondents dispute. However, Appellant does not seem to grasp that, in addition to medical causation, section 42-1-172 has an independent requirement that a claimant prove his job is sufficiently repetitive in order to recover for a repetitive trauma injury. Respondents presented evidence, in the form of the Glen Adams ergonomics report, showing the job was not sufficiently repetitive to cause the injuries he alleges. The Appellate Panel chose to place more weight on this evidence, which was within its authority. Likewise, the Appellate

Panel was within its authority to accept or reject Dr. Loudermilk's opinion regarding causation. *See Pack v. State Dep't of Transp.*, 381 S.C. 526, 536, 673 S.E.2d 461, 466–67 (Ct. App. 2009) ("The [Appellate Panel] need not accept or believe medical or other expert testimony, *even when it is unanimous, uncontroverted, or uncontradicted.* Thus, even sharply contradicted evidence of injury can constitute substantial evidence for purposes of review." (emphasis added)).

Furthermore, Appellant appears to assert in his brief that Dr. Loudermilk actually did review a job description and/or relied on Appellant's report of the job duties that were repetitive. First, Appellant testified at the hearing that "all" duties of his job were repetitive; therefore, Respondents assert that Appellant's report of the job activities to Dr. Loudermilk has minimal, if any, probative value. (R. pp. 154-55). Specifically, if Appellant reported that all of his job activities are repetitive, there would be no basis for Dr. Loudermilk to articulate which activities of Appellant's job were sufficiently repetitive to cause the alleged injuries to his back. *Id.* On the other hand, Glen Adams reviewed and observed several specific tasks of Appellant's job and concluded the job involved two activities with forward bending (connecting the harness and entering and exiting the cab); however, neither of those tasks involved elevated risks for the development of lumbar musculoskeletal disorders. (R. pp. 344-45). Consequently, the Appellate Panel chose to assign more weight to the Adams report than Appellant's testimony or the opinion of Dr. Loudermilk.

Appellant also claims Dr. Loudermilk's negative response to the question "does the attached ergonomics report change your opinion in any way" indicates that he reviewed "at least one description of Appellant's job—the ergonomist report." (App. Br. p. 18). However, as previously stated, it is unclear whether the Adams ergonomics report was included with that questionnaire to Dr. Loudermilk as Appellant did not present the Adams report in his evidence to the Commission. Secondly, whether Dr. Loudermilk's opinion "changed in any way"

affirmatively or negatively would not constitute an opinion on the repetitive nature of the "Switcher" job because Dr. Loudermilk never offered one before or after having, supposedly, reviewed the Adams report. Simply put, the Glen Adams report could not affect Dr. Loudermilk's opinion on the repetitive nature (or lack thereof) of Appellant's job activities because Dr. Loudermilk never offered an opinion as to that issue.

Appellant again notes that Respondents never deposed Dr. Loudermilk to challenge this answer; however, as previously stated, the claimant, not the defendant, bears the burden of proof in workers' compensation claims. (App. Br. p. 18). *See Clade*, 330 S.C. at 11, 496 S.E.2d at 857 (stating "[t]he Claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation").

Finally, and perhaps most importantly, Respondents point to the following excerpt from the first oral argument before the Appellate Panel on March 19, 2018. There, the Appellate Panel questioned Appellant regarding whether there was a finding by the single commissioner that the "Switcher" job was repetitive:

> **Mr. Chair:** "[W]here did the [single] commissioner find this was a repetitive job in the Order . . . ?
>
> **Appellant:** "He found that . . . [in] Finding of Fact Number 14 and in the second line [the single commissioner] says, 'Based on the preponderance of evidence before me . . . I must conclude [Appellant] suffered a compensable repetitive trauma injury to his low back affecting his right leg.'"

(R. p. 66, ll. 2-11 (*quoting* R. p. 28)).

The Appellate Panel went on to further press Appellant to identify a specific finding of fact by the single commissioner that the "Switcher" position was "a repetitive job" however, aside from the general finding in Finding of Fact #14 that the injury was compensable, Appellant was unable to identify such a finding. (R. pp. 66-67); (R. p. 28). Respondents respectfully assert this exchange is telling of the fact that there was no such finding by the single commissioner because there was no evidence—aside from Appellant's self-serving testimony—the "Switcher" position was repetitive. Thus, this argument is also without merit.

B. Appellant's argument that the Appellate Panel created a requirement that the claimant must present an ergonomics report to prove his job is repetitive is not supported by the plain language of section 42-1-172.

Appellant next asserts that he presented sufficient medical evidence to prove a repetitive trauma injury and "[r]equiring anything further creates a legal requirement for workers with repetitive motion injuries to pay for their own ergonomics report[, which is] . . . a requirement that does not exist." (App. Br. pp. 18-19). Respondents note that this argument was not raised to or ruled upon by the Appellate Panel. *See generally* (R. pp. 1-13, 32-70). Therefore, we believe it is unpreserved for appellate review. *See Smith,* 369 S.C. at 256, 631 S.E.2d at 279 ("Only issues raised and ruled upon by the [Appellate Panel] are cognizable on appeal.").

Regardless, Respondents note that the Appellate Panel's denial of benefits here does not create a requirement that the claimant present an ergonomics report to prove a repetitive trauma injury. Rather, as the Appellate Panel noted during the March 9, 2018 oral argument regarding section 42-1-172, "there has to be some independent evidence about the particular job itself being repetitive, and . . . it does [not] have to be by a doctor, sometimes it is if the doctor has the job description and can make a finding." (R. p. 64, ll. 8-12). Appellant, however, failed to prove that

the "Switcher" job was sufficiently repetitive through either medical or ergonomic evidence. Consequently, the denial of his repetitive trauma claim was proper.

C. The ergonomics report by Glen Adams provides substantial evidence the "Switcher" job was not sufficiently repetitive as required under section 42-1-172.

Respondents next assert the ergonomics report issued by Glen Adams provides substantial evidence that the "Switcher" position was not sufficiently repetitive. As previously stated, Appellant testified his injury occurred from "getting in and out of the truck so much . . . ." (R. p. 111). Specifically, he stated his job duties as a "Switcher" required him to climb steps, stoop, bend over, and twist his body. (Hr. Tr. pp. 93-95, 111).

However, Glen Adams reviewed Appellant's deposition, his medical records, and visited the job site where Appellant worked as a "Switcher." (R. pp. 339-45). Adams found that Appellant would be able to enter and exit the cab of the truck without having to bend over. (R. p. 344). He further found that the job tasks of a "Switcher" do not require lifting that exceeds any recommended safe lifting limits. (R. p. 345). Finally, Adams concluded the job involved two activities with forward bending (connecting the harness and entering and exiting the cab); however, neither of those tasks involved elevated risks for the development of lumbar musculoskeletal disorders. (R. pp. 344-45). Respondents respectfully assert that the ergonomics report provides substantial evidence that the job tasks of a "Switcher" are not sufficiently repetitive for a repetitive trauma injury.

Appellant also asserts in his brief that the ergonomics report does not make his injury "impossible." (App. Br. p. 14). He also asserts it would "be different if the [Adams] report said **no** risk of injury. But it doesn't." *Id.* (emphasis in original). Respondents assert that whether the employer / respondent is able to prove an alleged injury is "impossible" is irrelevant. The Act

does not require the Respondents to disprove the existence of an injury. *Cf. Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) (stating "[t]he Claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation"). Appellant bears the burden of proving a compensable work-related injury. *Id.* Furthermore, Appellant's attempt to place the burden on Respondents is even less appropriate considering he, as the appellant in this appeal, has the burden of proving reversible error by the factfinder. *See McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008) (stating the burden is on the appellant to demonstrate reversible error). Thus, Appellant's argument that the Glen Adams ergonomics report does not make his alleged work injury impossible is without merit and irrelevant for purposes of this appeal.

Similarly, Appellant also asserts in his brief that Respondents should have deposed Dr. Loudermilk. (App. Br. pp. 14-15). Again, Respondents do not bear the burden of disproving the existence of an injury by accident or repetitive trauma injury. *See Clade*, 330 S.C. at 11, 496 S.E.2d at 857.

Next, Appellant argues the Appellate Panel erred in "attack[ing] the credibility of Dr. Loudermilk with a hairsplitting detail" regarding the date of onset because, pursuant to *Schulknight v. City of North Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002), repetitive trauma injuries do not require a specific date of injury. (App. Br. p. 16). Respondents do not dispute the holding in *Schulknight*; however, this argument is a red herring. The Appellate Panel's finding cited by Appellant—that the records from Appellant's initial visit with Dr. Loudermilk indicate he reported his back and leg pain began since around January 3, 2017, but at the hearing, Appellant testified he did not give Dr. Loudermilk a specific date—was used to show the conflicting statements Appellant made. (R. p. 10). Appellant testified at the hearing that he did

not give Dr. Loudermilk a specific date of onset. (R. p. 135). The probative value of this evidence is Appellant disputed the records of when he reported the date of onset to Dr. Loudermilk. Thus, as previously explained, this evidence was used as an issue of credibility. They were not used directly to show Appellant failed to prove a repetitive trauma injury; rather, they were used to show Appellant's testimony lacked credibility. In other words, the probative value was that Appellant's testimony changed from medical visits, to his deposition, to the hearing. The Appellate Panel—unlike the single commissioner—recognized the discrepancies in Appellant's testimony and made the reasonable decision to accord it less weight than other evidence. *See Shealy v. Aiken Cnty.*, 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 [Appellate Panel]. It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]."). Again, Respondents respectfully assert these were decisions for the factfinder to make and there is more than substantial evidence to support their decision.

Next, Appellant argues the Appellate Panel erred in relying on the fact that Dr. Loudermilk did not review a job description for a "Switcher" to justify its denial of benefits because "the law does not require" that the physician review the employee's job description. (App. Br. p. 17). Again, this was one of many factors the Appellate Panel identified as grounds for finding Appellant failed to meet his burden of proving a repetitive trauma injury. Although Appellant does not agree with this decision, that is not a ground for reversal on appeal when a reasonable person could reach the conclusion the Appellate Panel made. *See Dozier*, 411 S.C. at 293, 768 S.E.2d at 232 ("Although we may have found differently from the Appellate Panel, when conflicting medical evidence is presented, this court must not substitute its judgment for that of the fact finder, which in this case was the Appellate Panel."). Therefore, Respondents

assert the Appellate Panel was well within its authority to rely on the fact that Dr. Loudermilk did not review the job description and assign his opinion less weight as a result.

D. Appellant's appeal requests the Court of Appeals to reverse the Appellate Panel's finding regarding Appellant's credibility.

As previously stated, the Appellate Panel made the following finding of fact:

> [W]e find the unbiased opinion of Glen Adams that [Appellant]'s job duties were not sufficiently repetitive *is entitled to greater weight than [Appellant]'s testimony* on that issue.
>
> We likewise find that *Dr. Loudermilk's opinion is entitled to less weight* because he appears to have relied on [Appellant]'s own self-serving statements as to the alleged repetitive job activities of a "Switcher" as well as a description of those job activities from [Appellant]'s attorney included in questionnaires.

(R. pp. 9-11 (*citing* R. pp. 309-310, 315-16)).

Thus, the Appellate Panel found Appellant's description of the incident lacked credibility. Respondents assert substantial evidence supports this finding and therefore it should not be disturbed on appeal. *See Shealy*, 341 S.C. at 455, 535 S.E.2d at 442 ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]. It is not the task of this Court to weigh the evidence as found by the [Appellate Panel].").

Notably, at the hearing before the single commissioner, Appellant testified that he told every medical provider that his back injury occurred from him "getting in and out of the truck so much . . . ." (R. p. 111). However, this allegation was not supported by some of the medical records from his initial treatment. In a questionnaire from Appellant's first visit with St. Francis Workwell, under the box entitled, "Description of Accident," Appellant states "experiencing lower back pain sitting

is the worst." (R. p. 333). He does not describe an injury by accident or repetitive trauma injury. Moreover, in another questionnaire from Workwell entitled, "Worker's Compensation Initial Medical Questionnaire," Appellant is asked whether he has "recently had" various symptoms including back or neck pain. (R. p. 331). The questionnaire then states: "If yes, please explain." Appellant checks the box "Yes" and states "One time I felt [extreme] pain while sitting and I could not hold my urine-right leg pins needles after sitting right leg-loss of use for a few min." *Id.* Notably, when Appellant did report an alleged cause of his back pain, he reported a one-time incident on January 17, 2017 when he was entering his truck rather than the repetitive trauma injury he now alleges. (R. p. 295). Thus, Appellant's testimony that he told every provider his back injury was from "getting in and out of the truck so much" was not supported by some of the medical records and, as such, indicates Appellant's allegation is less than accurrate. (R. p. 111).

There were other examples where Appellant's testimony was inconsistent with the medical records from his treatment. Specifically, Appellant testified records from Greenville Health System dated January 20, 2017 that indicated his back had been hurting for one week were "wrong." (R. p. 138 (*citing* R. p. 329)). Moreover, Appellant testified he did not give his doctor, Dr. Eric Loudermilk, a specific date of onset of his symptoms, yet the record from his initial visit notes the date of onset as "around January 3, 2017." (R. p. 135 (*citing* R. p. 306)).

There was other evidence that showed Appellant lacked credibility. Following his alleged accident, Appellant and his supervisor, Joe Slattery, exchanged several text messages. (R. pp. 336-38). In these text messages, Appellant initially told Slattery he was out of work due to the flu. (R. p. 336). The next day Appellant reported that he would not be reporting to work on Thursday January 19, 2017, but that he hoped to work the next day. *Id.* He stated that green tea, Theraflu,

and rest had helped. *Id.* Finally, in his third text message, and, apparently after knowing for over two weeks of an alleged work accident, he reported:

> I need to go to Benore's doctor. Every day my back has been aching from in and out of the truck. . . . Today I barely can get out of bed. I know I have the flue (sic) but my back is much more painful to where it's super stiff. Advil doesn't seem to help[.] I need to at least get it checked out.
>
> Plus I f[oun]d out [B]enore never processed my health insurance.

Id.

Later that day, Appellant again indicated what he was experiencing "may be the flue (sic)." (R. p. 337). The texts show that Appellant finally mentioned a work-related injury to his back after he believed Benore had "dropped the ball" on his health insurance. (R. pp. 336-37). Thus, Appellant's delay in reporting a work-related event despite admitting to knowing that the policy was to report accidents immediately demonstrates this allegation is not credible.

Finally, Respondents note that Appellant's delay in reporting a work-related incident is even more concerning due to his employment history as it shows Appellant knew to report a work injury immediately. Appellant worked as a safety director for a trucking company, and he testified the company policy for the trucking company is that employees are to report accidents "as soon as it occurred," which is standard for the trucking industry. (R. pp. 212-14, 216-17). Moreover, Appellant was also aware of Benore's policy to immediately report work-related accidents because a Benore employee had previously reported a work-related accident to him. (R. pp. 215-17). Furthermore, Appellant alleged he had suffered two work-related accidents in the first month of his hiring at Benore, and, when asked if he reported those accidents, Appellant responded, "of

course" and further stated he reported them "immediately" to his supervisor, Donna, because "[t]hat was the procedure." (R. pp. 233-35).

Despite this background of knowledge and experience with work-related accidents, Appellant delayed in reporting his latest alledged work-related accident to Benore and only did so after believing Benore had not processed his health insurance. Appellant's credibility is important in this case because the only evidence Appellant put forth that his job was repetitive as required under section 42-1-172 was his own testimony.[2] Based on the aforementioned examples where Appellant's testimony and/or explanation was inconsistent with the other evidence, the Appellate Panel decided to place more weight on other evidence. Respondents assert that the Appellate Panel was within its authority to do so as the factfinder in this case. *See Thomas*, 412 S.C. at 9, 770 S.E.2d at 187 ("In workers' compensation cases, the Appellate Panel is the ultimate finder of fact"). Since substantial evidence supports the Appellate Panel's finding to assign more weight to the Glen Adams report than either Dr. Loudermilk's opinion or Appellant's testimony, Respondents respectfully assert that the finding should not be disturbed. *See Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (stating an appellate court should affirm the decision of the Appellate Panel unless it is clearly erroneous in view of the substantial evidence of the whole record).

E. *Michau v. Georgetown County* is distinguishable from the current case

Appellant next relies on *Michau v. Georgetown County*, 396 S.C. 589, 723 S.E.2d 805 (2012) in arguing that section 42-1-172 only requires the claimant to present medical evidence of causation, and because claimant did that, the Appellate Panel erred by requiring him to present ergonomics evidence that his job was sufficiently repetitive. (App. Br. pp. 10-12). Respondents initially note that this particular argument was not presented to the Appellate Panel and is

[2] Appellant alleges Dr. Loudermilk opined that the "Switcher" job was sufficiently repetitive; however, Respondents dispute this argument as noted herein. (App. Br. p. 18).

therefore unpreserved for appellate review. *See generally* (App. Panel Hr. Tr. March 19, 2018); (App. Panel Hr. Tr. June 18, 2018); *Smith v. NCCI, Inc.,* 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) ("Only issues raised and ruled upon by the [Appellate Panel] are cognizable on appeal."). Nevertheless, Respondents respectfully assert that *Michau* is distinguishable from the current case.

As Appellant notes, the issue in *Michau* concerned whether the employer's report from a medical provider that indicated the claimant's job activities did not cause his alleged injury was "medical opinion or testimony" and, therefore, whether it had to be stated to a reasonable degree of medical certainty to be admissible. *Id.* The Court found that the report (1) was medical opinion or testimony for purposes of section 42-1-172 and, (2) therefore, it had to be stated to a reasonable degree of medical certainty to be admissible. *Id.* at 595-96, 723 S.E.2d at 808. As such, the Appellate Panel erred in admitting the report. Thus, the issue in *Michau* concerned the admissibility of "medical evidence." However, the case did not address the issue here, which was whether the job duties of a "Switcher" were sufficiently repetitive for Appellant to prove a compensable repetitive trauma injury. Furthermore, *Michau* does not hold that the Appellate Panel has to accept or reject a medical opinion offered by a party. As such, Respondents believe *Michau* is readily distinguishable from the current case.

F. *Murphy v. Owens Corning* is distinguishable from the current case

Finally, Appellant argues that the Appellate Panel erred in finding the single commissioner did not make a causation finding under section 42-1-172. (App. Br. pp. 19-21). Essentially, he relies on *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011), to argue that the single commissioner's findings of fact amounted to a finding of medical causation; therefore, the Appellate Panel erred in concluding no such finding existed.

Respondents assert this argument also lacks merit because *Murphy* is easily distinguishable from the case at bar.

It is important to understand the background of *Murphy*. Notably, prior to July 1, 2007, repetitive trauma injuries were compensable under section 42-1-160. 393 S.C. at 83, 710 S.E.2d at 457 ("Appellants concede that repetitive trauma injuries were compensable under section 42-1-160 prior to July 1, 2007."). Effective July 1, 2007 the repetitive trauma statute, section 42-1-172, was added and section 42-1-160 was amended to specifically exclude repetitive trauma injuries. *See* S.C. Code Ann. 42-1-160(F) ("The word "accident" . . . must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time[,which] . . . must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 or an occupational disease . . . ."). *Murphy* involved a repetitive trauma claim dated September 7, 2007; however, it was brought as an injury by accident pursuant to section 42-1-160. The Appellate Panel held that under section 42-1-160, the Appellant "sustained an injury by accident to her back/neck arising out of and in the course of her employment on September 7, 2007." *See* WCC File No. 0716612, *available at* 2009 WL 1425600 (Appellate Panel Feb. 25, 2009).

The Employer appealed to the Court of Appeals, arguing the Appellate Panel erred in finding the claimant suffered an injury by accident under section 42-1-160 because the repetitive trauma statute, section 42-1-172 "defines and sets forth new requirements for repetitive trauma injuries." *Id.* at 83, 710 S.E.2d at 457. The Court of Appeals agreed that "the compensability of a repetitive trauma injury must be determined by the [Appellate Panel] under the provisions of section 42-1-172"; however, it affirmed the Appellate Panel's decision, as modified, because,

although the Appellate Panel cited section 42-1-160, it made the required findings under section 42-1-172. *Id.* at 84, 710 S.E.2d at 458.

Thus, in *Murphy*, the deficiency at issue was essentially that the Appellate Panel cited the wrong statute (section 42-1-160) in finding the claimant sustained a repetitive trauma injury. The Court of Appeals determined this was a distinction without a difference because the requisite findings for a repetitive trauma claim (as mandated by section 42-1-172) were made. *Id.* at 84, 710 S.E.2d at 458 ("[A]lthough [the Appellate Panel] cited section 42-1-160, [it] made the findings required under section 42-1-172."). In other words, the Court of Appeals chose not to elevate form over substance. This interpretation of *Murphy* is clear by one of the cases it cited as support, *Dykes v. Daniel Construction Company*, 262 S.C. 98, 109, 202 S.E.2d 646, 652 (1974), which concerned a question of substantial compliance with the predecessor to section 42-15-60, the statute that provides the Appellate Panel with authority to award further medical treatment. There, the employer argued that the Appellate Panel erred in requiring that further medical care be furnished by the employer because (1) there was no finding that additional medical care would tend to lessen the period of disability and (2) there was no evidence to support such award. *Id.* at 108, 202 S.E.2d at 651-52. The Supreme Court rejected this argument. It noted that while the Appellate Panel made no specific finding that additional medical treatment "will tend to lessen the period of disability," it did find that "further medical care is necessary" and should be furnished "under [the predecessor to section 42-15-60]"; therefore, the findings were sufficiently definite to enable the court to properly reach the question of whether there is evidence to support the Appellate Panel's decision to award future medical treatment. *Id.* at 109, 202 S.E.2d at 652. The Supreme Court then went on to find the record contained sufficient evidence to affirm the Appellate Panel's decision to award further treatment. *Id.* at 109-110, 202 S.E.2d at 652.

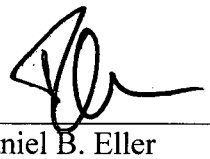
This case is distinguishable from *Murphy* and *Dykes*. Here, the single commissioner failed to make a finding that Appellant's job was sufficiently repetitive, which was not at issue in *Murphy*. *Contra Murphy*, W.C.C. File No. 0716612, (Appellate Panel Order Feb. 25, 2009), *available at* 2009 WL 1425600 ("Claimant's job on the sliver *required repetitive overhead work.* This finding is based on the record as a whole and the testimony of Claimant." (emphasis added)). Unlike *Murphy* and *Dykes*, the error in this case was substantive in that Appellant presented no credible evidence that the "Switcher" job was repetitive and consequently the single commissioner made no finding of same. Unlike *Murphy*, this was not a distinction without a difference because it concerned a well-established principle that the claimant must prove every element of his claim in order to be compensable. *See Clade*, 330 S.C. at 11, 496 S.E.2d at 857 (stating "[t]he Claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation"). Additionally, unlike the current case, in *Murphy* and *Dykes* the alleged deficiencies were in the Appellate Panel's order; however, here the deficiency was found to be in the single commissioner's order. Respondents assert this difference is significant because the Appellate Panel is the ultimate factfinder. *See Thomas*, 412 S.C. at 9, 770 S.E.2d at 187 (stating "[i]n workers' compensation cases, the Appellate Panel is the ultimate finder of fact"). As such, it could have decided to make its own finding of fact that Appellant met his burden of proving the "Switcher" was sufficiently repetitive; however, after considering the record, it decided against that which, again, was well within its province. *See id.* As such, Respondents assert *Murphy* is readily distinguishable and does not support reversal of the Appellate Panel's order.

CONCLUSION

Respondents assert Appellant's appeal challenges issues that concern the weight assigned to evidence and credibility, which are questions reserved for the Appellate Panel as the factfinder

in workers' compensation claims. Respondents believe the record contains more than substantial evidence to support the Appellant Panel's denial of benefits and Appellant has failed to demonstrate reversible error by the Appellate Panel. Therefore, Respondents respectfully request the Court of Appeals affirm the Appellate Panel's decision.

Respectfully Submitted,



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April 23, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2018-002087

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SC Court of Appeals

Dale Brooks, Employee, Appellant,

v.

Benore Logistics System, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

PROOF OF SERVICE

The undersigned certifies that he served Respondents' Final Brief on Appellant's attorney by depositing a copy of same in the United States mail, postage pre-paid, on this the 23rd day of April 2019, addressed to:

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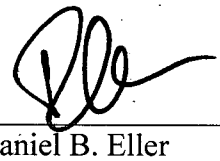

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CERTIFICATE OF COUNSEL

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

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