

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Appeal from South Carolina Worker's Compensation Commission

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

Danny B. Cane,

Petitioner,

v.

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

Respondents.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Court of Appeals correctly affirm the Appellate Panel's unanimous findings of fact that Petitioner reached maximum medical improvement on March 31, 2014, when the finding was supported by substantial evidence including medical records and Petitioner's testimony?
- II. Did the Court of Appeals correctly affirm the Appellate Panel's unanimous findings of fact that Petitioner was not entitled to additional medical care when the finding was supported by substantial evidence including medical records and Petitioner's testimony?
- III. Did the Court of Appeals correctly affirm the Appellate Panel's unanimous findings that Petitioner was not a credible witness when the finding was supported by substantial evidence including medical records and Petitioner's testimony?
- IV. Did the Court of Appeals correctly affirm the Appellate Panel's unanimous findings of fact that Petitioner sustained no permanent disability when the finding was supported by substantial evidence including medical records and Petitioner's testimony?
- V. Did the Court of Appeals correctly reverse the Workers' Compensation Commission Appellate Panel's finding that appellant was not entitled to temporary total disability compensation after March 31, 2014 where there is a doctor's work excuse note in the record and evidence Petitioner returned to work after the accident.¹

STATEMENT OF THE CASE

This workers' compensation appeal arises out of alleged injuries claimed by Petitioner Danny Crane to have been sustained while working at Raber's Discount Tire Rack on February 19, 2014. Crane filed a Form 50 (Request for Hearing) on March 11, 2014 alleging injury to his "Head/brain, Ears (hearing), and face." [App. p. 79]. Respondent S.C. Uninsured Employers Fund (UEF) filed a Form 51 (Employer's Answer to Request for Hearing) on March 24, 2014 denying the claim generally as "there has been no proof[,] and further that there had been no order from the Workers'

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

Compensation Commission finding the employer is subject to Title 42. [App. at 80-81]. Respondent Raber's Discount Tire Rack filed a Form 51 on May 5, 2014.

A hearing was held before Commissioner Susan S. Barden on June 26, 2014. [App. pp. 20-59]. Prior to entering a final decision, Petitioner filed a Motion to Submit Additional Evidence on December 16, 2014, which was granted, and Petitioner submitted a third audiogram, a report from audiologist Ronald Lunn, and a report from Dr. Rocco Cassone (ENT). [App. 181-87]. After observing Petitioner's behavior and testimony during the hearing and reviewing the medical records, on April 30, 2015, Commissioner Barden issued a Decision and Order which held:

ORDERED, ADJUDICATED, AND DECREED that Employer is subject to the Act.

IT IS FURTHER ORDERED the Claimant is entitled to be reimbursed for the Emergency Room visit on the date of the accident, the CT scans and associated visits, the two visits with Dr. Ansley, and the February 25, 2014 and March 31, 2014 visits to Barnwell Family Practice.

IT IS FURTHER ORDERED the Claimant is not entitled to any future medical or psychological benefits.

IT IS FURTHER ORDERED the Claimant is not entitled to any temporary total disability payments as a result of the incident.

IT IS FURTHER ORDERED the Claimant is not entitled to any permanent impairment as a result of the incident as any injuries resolved or returned to baseline.

AND IT IS SO ORDERED.

[App. at 58-59].

On May 12, 2015, Petitioner filed a Form 30 (Notice of Appeal). [App. pp. 188-89]. Petitioner withdrew his claim of brain injury and proceeded on claims of hearing loss, vestibular problems, and depression. [Pet. Brief p. 3]. The Workers' Compensation

Commission Appellate Panel (Appellate Panel) heard oral arguments on July 21, 2015 and issued its Decision and Order on October 1, 2015 affirming Commissioner Barden's Decision and Order. [App. pp. 60-78].

Petitioner appealed to the South Carolina Court of Appeals which affirmed all the Appellate Panel's findings except the denial of total temporary disability as there was evidence of a work excuse in the record. [App. pp. 1-3]. As such, the court reversed the Appellate Panel's order regarding the total temporary disability and remanded to the Appellate Panel to determine whether Petitioner was out of work as a result of the accident and whether he was entitled to total temporary disability. [App. pp. 1-3]. Petitioner filed a Petition for Rehearing on March 1, 2018. [App. pp. 4-14]. The court of appeals did not find any material fact or principle of law that had been overlooked or disregarded and therefore denied the Petition for Rehearing. [App. p. 15-16].

Petitioner filed his Petition for Writ of Certiorari on May 23, 2018 and Respondent UEF filed its Return to Petition for Writ of Certiorari on June 20, 2018. Petitioner filed his Reply on July 2, 2018. This Court granted the Petition for Writ of Certiorari on April 22, 2019.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs the standard of judicial review in workers' compensation cases and states "[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). The statute does permit an appellate court authority to modify or reverse a decision by the Appellate Panel if it is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the

whole record.” S.C. Code Ann. § 1-23-380(5). “[T]he language of the statute clearly indicates that its application is only in those cases where a manifest or gross error of law has been committed by the administrative agency[,]” and “the decision under appeal must be ‘clearly erroneous’ in view of the substantial evidence on the whole record.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence “is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” Lark at 135, 276 S.E.2d at 306. “It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury” Lark at 135-36, 276 S.E.2d at 307 (quoting Consolo v. Fed. Mar. Com., 383 U.S. 607, 620, 86 S. Ct. 1018, 1026 (1966)).

The Court has cautioned the bench as to the use of the substantial evidence standard stating the “test ‘need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment’; and a judgment upon which reasonable men might differ will not be set aside.” Lark at 136, 276 S.E.2d at 307 (quoting Dickinson-Tidewater, Inc. v. Supervisor of Assessments, 273 Md. 245, 329 A.2d 18, 25 (1974)). The Court further instructed “we will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” Lark at 136, 276 S.E.2d at 307 (quoting Indep. Stave Co. v. Fulton, 251 Ark. 1086, 476 S.W.2d 792 (1972)). Further, the Court has held “it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. . . . That function belongs to the Appellate Panel alone.” Sanders v.

MeadWestvaco Corp., 371 S.C. 284, 292, 638 S.E.2d 66, 71 (Ct. App. 2006) (quoting Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)).

“The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact.” Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007). Where “there are conflicts in the evidence over a factual issue[,]” the findings of the Appellate Panel are conclusive. Id. “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.” Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

STATEMENT OF FACTS

On June 26, 2014, a hearing was held before Commissioner Susan Barden during which she found Petitioner's testimony was untruthful, evasive, inconsistent, lacked credibility, and was in sharp contrast to the evidence submitted. [App. pp. 20-59]. Commissioner Barden also found Petitioner's actions and testimony during the hearing to be inconsistent or contradictory with the other evidence. [App. p. 64]. Petitioner, who alleged severe hearing loss, was observed during the hearing answering questions asked in a normal volume even when Petitioner had his back to the questioner. [App. p. 40-41]. Petitioner claimed memory loss, but was able to remember exact details helpful to his case, while unable to remember details that may have been unhelpful to his case. [App. p. 41]. Petitioner denied having various pre-existing conditions during the hearing, but had admitted the same to his doctor one month before the hearing. [App. p. 68-70].

On February 19, 2014, Petitioner, Danny Crane, was involved in a work related incident arising out of and during the course and scope of his employment as a mechanic for James Raber d/b/a Raber's Discount Tire Rack when an air hose "popped loose" from a pneumatic powered tire changer.² [App. pp. 23, 26-28]. Security cameras recorded the incident and the events following the same during which Petitioner is recorded speaking with two other employees while working to repair the air hose minutes after the incident occurred. [App. pp. 32-33]. Petitioner's wife picked him up at work and transported him to Barnwell County Hospital for examination. [App. p. 28]. Petitioner's reporting of the events and claimed hearing loss was noted, he was discharged with a prescription for ear drops, and instructed to follow up with an ear, nose, and throat doctor (ENT), John F. Ansley, M.D. [App. pp. 28, 88-96].

Petitioner followed up the next day with Dr. Ansley who noted Petitioner's complaint of difficulty hearing in both ears, reviewed an audiogram indicating a severe sensorineural hearing loss in both ears, and discharged Petitioner to obtain a CT scan of his temporal bones. [App. p. 108]. Dr. Ansley's notes indicate "[h]opefully his thresholds will improve." [App. p. 108]. Approximately six days after the incident, on February 25, 2014, Petitioner underwent a CT scan indicating: "Normal appearance of bilateral temporal bone structures on unenhanced temporal bone CT. If the patient has sensorineural hearing loss, consider further evaluation with MRI brain and internal auditory canals. Chronic Sinusitis." [App. p. 110]. That same day Petitioner was seen by his family doctor, Dr. Dean Koukos, at Barnwell Family Practice, complaining of hearing loss and for the first time complained of "some dizziness" and "right side

² Petitioner was determined to be an employee of Raber's and not an independent contractor.

headache.” [App. pp. 126-27]. Dr. Koukos’ objective exam reveals Petitioner was “alert and oriented X3 with no impairment of recent or remote memory, normal attention span and ability to concentrate, able to name objects and repeat phrases . . . [and] normal hearing . . .” [App. p. 127]. On March 6, 2014, Petitioner underwent a second audiogram indicating petitioner “actually had a shift downward on the audiogram.” [App. p. 111]. Records from Dr. Ainsley and the audiograms are void of any subjective complaints or objective findings of headaches, dizziness, depression, balance problems, memory loss, or bleeding from ears. Dr. Ansley’s assessment was “rule out sensorineural hearing loss[,]” and Petitioner was scheduled for an auditory brainstem response test (ABR) at MUSC “to obtain more objective measure of his hearing[,]” after which a follow up appointment with Dr. Ansley would be scheduled. [App. pp. 111-12 (emphasis added)]. Petitioner never underwent the ABR as recommended, never had a follow up appointment with Dr. Ansley, nor did Petitioner submit a causation opinion from Dr. Ansley, notwithstanding that Dr. Ansley was Petitioner’s treating ENT physician. [App. pp. 36-37]. Absent from Dr. Ansley’s records is any documentation indicating Petitioner informed Dr. Ansley the ABR was not covered by his insurance. [App. pp. 67-68].

On March 14, 2014³, a second CT scan of Petitioner’s head was performed at Aiken Regional Medical Center in response to subjective complaints of “constant headache, hearing loss” which resulted in the objective impression: “Normal unenhanced head CT.” [App. pp. 37, 125]. Approximately 35 days after the accident, on March 26, 2014, Petitioner was seen at Barnwell County Hospital Emergency Room for a rib fracture he sustained when he tripped and fell getting out of the shower. [App. pp. 37, 120-24].

³ Brief of Petitioner mistakenly indicates this CT Scan was performed on March 17, 2014.

Absent from these records are any subjective complaints or objective findings of headaches, dizziness, depression, or balance problems as contributing to petitioner's fall, nor is there any recordation of bleeding from ears or memory loss. [App. pp. 37, 120-24].

Petitioner follows up at Barnwell Family Medicine on March 31, 2014:

Patient words: Fell last Tuesday morning getting out of bath. Was seen in ER and given oxycodone for pain management but now out of medication. Patient is now in pain on right side. Patient did not hit head when fell (sic). Having some trouble (sic) obtaining a full breath. Stopped smoking early last week.

The patient is a 37 year old male who presents with a complaint of RIGHT RIB PAIN.

[App. p. 114]. Similarly absent are any subjective complaints or objective findings of headaches, dizziness, depression, balance problems, bleeding from ears, or memory loss. [App. pp. 37-38, 114-18]. To the contrary, examination of the ears, nose, mouth, and throat reveals, inter alia, "normal pinnae with no scars, masses or lesions, otoscopic exam reveals normal external auditory canals with tympanic membranes clear and mobile" [App. p. 115].

Petitioner received no further medical treatment until he was referred by his attorney to David S. Rogers, M.D. for an independent medical examination (IME) performed on May 19, 2014 at Oaktree Medical Centre Department of Neurology – three months after the incident. [App. pp. 19, 134-40]. For the first time, Petitioner reports a hose clamp hit him in the head. [App. p. 134]. For the first time, Petitioner's subjective complaints include: several falls attributed to a claimed lack of balance; bleeding from his ears; a lot of dizziness causing him to feel off balance; and difficulties with concentration, memory, thinking, and planning. [App. pp. 39, 135]. Dr. Rogers did not review Petitioner's February 25th exam by Dr. Koukos finding "no impairment of recent or remote memory,

normal attention span and ability to concentrate, able to name objects and repeat phrases . . . [and] normal hearing" [App. pp. 127, 134-40]. Nor did Dr. Rogers review Petitioner's March 31st exam also lacking reference to any symptoms of headaches, dizziness, depression, balance problems, reports of bleeding from ears, or memory loss. [App. pp. 114-18, 134-40]. Without any objective testing, such as the ABR recommended by Dr. Ansley, and without any explanation of the inconsistent audiograms, Dr. Rogers assigned Petitioner permanent impairments including a "closed head injury with resultant post-concussive syndrome." [App. p. 138].

This case was tried before Commissioner Susan Barden on June 26, 2014 and, subsequent to the hearing, claimant was permitted to submit additional evidence. [App. pp. 20, 42-43]. The additional evidence submitted by Petitioner included a third audiogram test performed after the hearing, report from audiologist Ronald Lunn, and report from Rocco Cassone, MD. [App. pp. 42-43, 183-85]. Dr. Cassone's report fails to acknowledge, much less discuss, Dr. Ansley's prior recommendation for an ABR as an objective measuring of potential hearing issues, or audiologist Lunn's report finding inter- and intra-inconsistencies between the multiple audiograms, despite the fact Dr. Cassone works with Dr. Ansley and audiologist Lunn at Carolina Ear, Nose, and Throat Clinic. [App. pp. 184]. Audiologist Lunn's report indicates Petitioner "was seen on several previous occasions for purposes of audiological assessment with findings demonstrating inter-, and intra-test inconsistencies, with recommendations made for auditory brainstem response studies, as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing." [App. pp. 42-43, 183 (emphasis added)].

After observing Petitioner's inconsistent and contradictory behavior and testimony during the hearing and reviewing the medical records, Commissioner Barden rendered a Decision and Order filed on April 30, 2015. [App. p. 20]. The Appellate Panel unanimously "determined all of the Hearing Commissioner's finding of fact and conclusions of law are correctly stated[,]" and therefore affirmed Commissioner Barden's Decision and Order. [App. p. 62]. The Court of Appeals affirmed the Appellate Panel's findings on four of five issues having determined the Appellate Panel's findings were supported by substantial evidence in the record. [App. pp. 1-3]. The sole issue reversed and remanded was the denial of total temporary disability based on evidence of a doctor's work excuse note in the record, as well as, some evidence Petitioner returned to work after the accident. [App. pp. 1-3]. Petitioner's appeal to this Court followed.

ARGUMENT

"The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Shealy v. Aiken Cty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). All of Petitioner's arguments challenge the weight accorded medical records and Petitioner's credibility as determined by the Appellate Panel. As such, Petitioner's appeal requests this Court to review the factual findings and credibility findings of the Appellate Panel. To overturn the Appellate Panel's findings of fact, this Court needs not to merely find Petitioner's assertions may have support from the evidence, but rather there is no reasonable probability that the evidence supports Commission Barden's or the Appellate Panel's findings.

"The Commission is the ultimate factfinder in workers' compensation cases." Burnette v. City of Greenville, 401 S.C. 417, 427, 737 S.E.2d 200, 205 (Ct. App. 2012).

As the ultimate factfinder, “the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record.” Id. Similarly, the Appellate Panel may grant more weight to the lay testimony of a claimant than to contradictory expert medical opinion. Ballenger v. S. Worsted Corp., 209 S.C. 463, 469, 40 S.E.2d 681, 684 (1946). “When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive.” Cranford v. Hutchinson Constr., 399 S.C. 65, 72, 731 S.E.2d 303, 307 (Ct. App. 2012). Similarly, “[w]here the medical evidence conflicts, the findings of fact of the Commission are conclusive.” Mullinax v. Winn-Dixie Stores, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995). The Court has held “it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. . . . That function belongs to the Appellate Panel alone.” Sanders v. MeadWestvaco Corp., 371 S.C. 284, 292, 638 S.E.2d 66, 71 (Ct. App. 2006) (quoting Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)).

- I. **The Appellate Panel’s findings of fact determined Petitioner’s injuries had resolved or returned to baseline based on substantial evidence in the record indicating he had reached Maximum Medical Improvement on March 31, 2014.**

Petitioner seeks to have this Court substitute its judgment for that of the Appellate Panel as to the weight accorded the evidence supporting the Appellate Panel's findings of fact. The evidence supporting the Appellate Panel's factual findings is derived from Petitioner’s medical records and testimony at the hearing. [App. pp. 60-78].

During the hearing, Commissioner Barden found Petitioner’s testimony was untruthful, evasive, inconsistent, lacked credibility, and was in sharp contrast to the evidence submitted. [App. pp. 20-59]. Commissioner Barden also found Petitioner’s

actions and testimony to be inconsistent or contradictory with the other evidence. [App. p. 64]. Petitioner's lack of credibility is fully discussed in Part III.

The Appellate Panel found reports from Dr. Ansley (ENT) (February 20, 2014 & March 6, 2014) were void of any subjective complaints or objective findings of "headache, head injury, dizziness, memory loss, psychological difficulty, cognitive difficulty, or bleeding from the ears[.]" and that Dr. Ansley had referred Petitioner "to MUSC for a 'more objective' test" due to inconsistencies in the audiogram tests [App. pp. 67-68]. Additionally, in between visits with Dr. Ansley, Petitioner was seen by his family doctor and the Appellate Panel found those records indicate "Claimant's ENT exam did not note any problems with Claimant's tympanic membranes." [App. p. 68]. The Appellate Panel also found Audiologist Ronald Lunn concluded the results of all 3 audiogram tests demonstrated "inter-, and intra-test inconsistencies, with recommendations made for auditory brainstem response studies, as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing." [App. pp. 42-43, 68, 75-76, 183 (emphasis added)].

The Appellate Panel further found medical records from Petitioner's March 26, 2014 emergency room visit lacked any subjective complaints or objective findings of headaches, dizziness, loss of balance, memory loss, or bleeding, along with absence of "alleged sequelae" from the accident at issue. [App. pp. 65-66]. Additionally, the "Past History" section indicated a 1990 coma, leg injury, and other pre-existing conditions, but did not contain any reference to Petitioner's claimed near total deafness which was purportedly caused one month earlier. [App. p. 66]. The Appellate Panel further found Petitioner had a history of pre-existing migraines and Petitioner's complaints of constant

headaches are refuted by the medical records which are void of evidence of the same. [App. pp. 66-67].

In making its factual findings, the Appellate Panel also reviewed Petitioner's March 31, 2014 medical records following the ER visit for his rib injury and similarly found it striking that those records too lacked any subjective complaints or objective findings related to hearing loss, memory loss, headaches, dizziness, bleeding, or psychological difficulty. [App. p. 65-67]. Petitioner's two CT scans were also reviewed which were normal except for indication of chronic sinusitis. [App. p. 68].

Petitioner's brief argues the March 26, 2014 and March 31, 2014 treatment was for an unrelated rib injury and therefore not substantial evidence to be considered by the Appellate Panel in its determination, notwithstanding the fact that Petitioner's complaints to Dr. Rogers include "several falls due to being 'off balance', with the March 25, 2014 fall resulting in a rib fracture[,]” which Petitioner attributes to dizziness and balance issues caused by this accident. [Pet. Brief p. 15, App. p. 135]. While acknowledging the two visits were for a rib injury, the Appellate Panel found it striking that one month after an accident, allegedly causing near total deafness with headaches and dizziness, those records are void of any indication, subjective or objective, regarding the constellation of symptoms Petitioner claims were caused by the accident. [App. pp. 65-67].

Petitioner's brief to the Court attempts to provide lay medical opinion as to portions of certain medical records that are "boilerplate" language. However, Petitioner and his counsel are not qualified to offer expert opinions. [Pet. Brief 16-18]. The Record is absolutely void of any medical records or qualified testimony offering a professional opinion at all, much less an opinion to a reasonable degree of medical certainty, on which

parts of the medical records should be ignored and which parts should be considered. As discussed below, Dr. Rogers did not review the records of Dr. Ky and Dr. Koukos which Petitioner's brief cites in discussing "boilerplate" language. As there is no support at all in the record for Petitioner's lay medical opinion, these arguments should be rejected by this Court. Furthermore, Petitioner is again instructing this Court as to the weight to be accorded the evidence – a duty reserved to the province of the fact-finder.

Petitioner further argues the Appellate Panel failed to consider Dr. Rogers' opinion. [Pet. Brief p. 18]. In fact, the Appellate Panel considered Dr. Rogers' report and found several omissions and inconsistencies with other evidence in the record. First, Petitioner's subjective complaints to Dr. Rogers (including being struck in the head by a hose clamp, brain injury, dizziness, cognitive difficulties, memory loss, headaches, bleeding from ears, and aggravation of pre-existing psychological conditions) are not supported by medical records documenting treatment pre-dating the one-time appointment with Dr. Rogers. [App. pp. 63-65, 70-73, 76]. Second, the Appellate Panel found Dr. Rogers' report was based on incomplete medical information and therefore unreliable. [App. p. 71]. Dr. Rogers' report indicates he did not review the medical records of Dr. Koukos (2/25/14), the second CT scan (3/14/14), and the medical records from Barnwell Family Practice (3/31/14). [App. p. 134]. Third, the Appellate Panel found "Dr. Rogers' report does not explain the reason for the inconsistent audiograms." [App. p. 71]. Fourth, the Appellate Panel found Dr. Rogers' conclusion that Petitioner suffers from post-concussive syndrome is inconsistent with emergency room records from the date of the accident and records from Barnwell Family medicine indicating a normal neurologic exam. [App. p. 72]. Fifth, the Appellate Panel found it inconsistent that

Petitioner had not had further objective hearing tests as recommended, but Dr. Rogers concluded his hearing loss is permanent. [App. p. 72]. Finally, the Appellate Panel found Dr. Rogers' report failed to explain "the long list of symptoms Claimant presented to him that are not noted in any of the other previous records/reports." [App. p. 73]. Based on the foregoing "inconsistencies and omissions," the Appellate Panel's findings of fact determined Dr. Rogers' report to be "generally and wholly unreliable, and therefore, give it no weight." [App. p. 72].

Petitioner additionally asserts the Appellate Panel relied on Commissioner Barden's internet research and personal medical opinion. [Pet. Brief p. 15]. Both Commissioner Barden's decision and order and the Appellate Panel's affirmance discuss in a single paragraph information from the Mayo Clinic and the National Institute of Health. The single paragraph begins "Although not dispositive, and even unnecessary to the conclusions [I/we] reach" [App. pp. 54, 73 (emphasis added)]. The conclusion of that single paragraph states "Claimant's condition resolved as of March 31, 2014, per the records of Claimant's family physician." [App. pp. 54, 73]. The record is clear neither Commissioner Barden nor the Appellate Panel relied upon their own research in determining the findings of fact. As such, it is clear that "research" was not relied upon, and the substantial evidence relied upon, including medical records and Petitioner's inconsistent and contradictory testimony, supports the factual findings.

Finally, Petitioner argues various alternate dates at which he believes he could have been found to reach maximum medical improvement. [Pet. Brief 19]. Petitioner is simply putting forth an alternative interpretation of factual conclusions that might have been drawn. Petitioner's own argument demonstrates there is more than one reasonable

inference that might be drawn and therefore, this is a matter of fact for the fact-finder, not a matter of law for the Court. The ability to draw inconsistent conclusions from the evidence does not prevent the Appellate Panel's findings of fact from being supported by substantial evidence. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

As discussed above, substantial evidence is simply evidence that could lead reasonable minds to the conclusion reached by the Appellate Panel. As fact finders, it is the Appellate Panel's very province to determine the weight accorded to the evidence. Based on the foregoing, there is substantial evidence in the record supporting the Appellate Panel's finding of fact that Petitioner's injuries had resolved or returned to baseline based on substantial evidence in the record indicating he had reached Maximum Medical Improvement on March 31, 2014.

II. The Appellate Panel's findings of fact determined Petitioner is not entitled to additional medical treatment based on substantial evidence in the record indicating he had reached Maximum Medical Improvement on March 31, 2014.

Petitioner seeks to have this Court substitute its judgment for that of the Appellate Panel as to the weight accorded the evidence supporting the Appellate Panel's findings of fact. The evidence supporting the Appellate Panel's factual findings is derived from Petitioner's medical records and testimony at the hearing. [App. pp. 60-78].

The Appellate Panel made a finding of fact that Petitioner had reached maximum medical improvement on March 31, 2014. [supra Part I]. As discussed in Part I, this finding is supported by medical records including the initial emergency room visit, the two CT scans, Barnwell Family Practice visits, and the Barnwell emergency room records. [supra Part I]. Additionally, the report of audiologist Lunn confirmed Petitioner "was seen

on several previous occasions for purposes of audiological assessment with findings demonstrating inter-, and intra-test inconsistencies, with recommendations made for auditory brainstem response studies, as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing." [App. p. 183 (emphasis added)]. Furthermore, as discussed in Part I, the Appellate Panel found Dr. Rogers' report to be unreliable based on omissions, inconsistencies, and a lack of any explanation for the inconsistent audiograms. [App. pp. 42-43, 68, 71-72].

Petitioner's disagreement with the weight accorded the evidence by the Appellate Panel and Petitioner's opinion as to the factual conclusions to be drawn from the evidence does not rise to the standard of review and in no way shows the Appellate Panel's findings are not based on substantial evidence. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). Based on the foregoing, there is substantial evidence in the record supporting the Appellate Panel's finding of fact that Petitioner is not entitled to additional medical treatment.

III. The Appellate Panel's findings determined Petitioner is not credible based on substantial evidence in the record including inconsistencies of alleged injuries reported to medical providers, Petitioner's behavior during the hearing, and Petitioner's testimony contradicting itself.

Petitioner seeks to have this Court substitute its judgment for that of the Appellate Panel as to the weight accorded the evidence supporting the Appellate Panel's findings of Petitioner's credibility. The evidence supporting the Appellate Panel's findings as to Petitioner's credibility consists of Petitioner's inconsistent and contradictory testimony,

Petitioner's behavior during the hearing, and inconsistencies with Petitioner's subjective complaints to multiple medical providers. [App. pp. 60-78].

Commissioner Barden found petitioner's actions and testimony to be inconsistent or contradictory with the other evidence. [App. p. 64]. Commissioner Barden stated she paid close attention to Petitioner's ability to hear and respond to questions of different volumes and also observed whether Petitioner was facing or turned away from the questioner. [App. p. 64]. Prior to the hearing, Petitioner informed Commissioner Barden she would need to raise her voice so the Petitioner could hear her. [App. p. 64]. However, Petitioner was able to hear and answer the questions of his attorney who spoke at a normal volume, and did not ask his attorney to raise his voice. [App. p. 64]. Additionally, while watching a video of the incident during the hearing, with his back turned to defense counsel, Petitioner heard and answered questions asked of him spoken at a normal volume. [App. p. 64]. Commissioner Barden also found it unconvincing that Petitioner would continue to repair the hose and tell co-workers to get him things for the repair if he could not hear after the incident. [App. p. 64].

Commissioner Barden further found Petitioner to be evasive, untruthful, and inconsistent in answering questions. [App. pp. 56, 74]. While claiming memory loss, Petitioner was able to remember

exactly what he texted his wife after the incident ("come get me"), he remembers finding a metal hose clamp by his hat shortly after the accident, he remembers telling everyone he worked with that he could not hear; however, Claimant alleges he does not remember that he continued to work on the tire changer after the accident occurred.

[R. pp. 64-65]. Additionally, three months after the incident, Petitioner was able to recount to Dr. Rogers exactly how the incident occurred. [R. pp. 65].

During the hearing, Petitioner denied having pre-existing conditions, including depression, anxiety and Bipolar disorder, but had admitted those pre-existing conditions to Dr. Rogers one month earlier. [App. pp. 68-70]. Petitioner also reported to Dr. Rogers he just sits at home now, but inconsistently testified during the hearing he still works as a volunteer fireman, but remains in the truck on calls. [App. pp. 68-70]. Petitioner testified “he cannot work because it is too loud and causes him to develop headaches and that he cannot hear his children talking in the back seat when he is driving.” [App. p. 70]. Contradicting himself, Petitioner testified he still responds to fire calls and listens to the radio so loud with his children in the car that his ears bleed. [App. p.70].

In addition to Petitioner’s inconsistent and contradictory testimony, and Petitioner’s behavior during the hearing, Commissioner Barden found Petitioner’s subjective complaints to medical providers contained inconsistencies and contradictions. At the May 19, 2014 exam with Dr. Rogers, approximately three months after the incident,⁴ Petitioner complains of, inter alia, balance problems caused by the incident and several falls resulting from lack of balance; bleeding from his ear; and “cognitive impairment with decreased concentration, alteration in recent memory, thinking, and planning;” resulting from a work related injury in which an air hose exploded and he was struck in the head by a hose clamp. [App. pp. 63, 134-35]. Petitioner’s medical records contradict his statements to Dr. Rogers.

The emergency room records from the date of the incident indicate petitioner’s head was “atraumatic,” and lack any mention of bruising to the head, balance problems,

⁴ The context of the Appellate Panel’s acknowledgment of the time of the IME was in regards to all the additional injuries claimed which are absent from Petitioner’s prior medical records. The Appellate Panel discredited Petitioner’s exam with Dr. Roger’s based on the omissions and inconsistencies discussed in supra Parts I & II, not the passage of time.

memory loss, cognitive issues, bleeding, or headaches. [App. pp. 63-64]. Similarly, medical records from Petitioner's visit to Dr. Ansley (ENT) on February 20, 2014, the day after the accident, and on March 6, 2014, lack mention of headache, head injury, balance problems, memory loss, cognitive difficulty, or bleeding from the ears. [App. pp. 67, 108, 111]. Petitioner did have a visit to his family doctor, Dr. Koukos, between visits with Dr. Ansley which indicate "some dizziness" and "right side headache," however, the neurological examination indicates "alert and oriented X3 with no impairment of recent or remote memory, normal attention span and ability to concentrate, able to name objects and repeat phrases . . . [and] normal hearing" [App. pp. 65, 68, 127].

Petitioner's brief argues for several pages the weight that should be accorded the three audiogram tests and cites to S.C. Code Ann. Regs. 67-1102 (2007) in support of the audiogram test. [Pet. Brief pp. 25-33]. Petitioner offers his lay medical opinion as to the procedure, effectiveness, and objectiveness of the audiogram test concluding Commissioner Barden speculated about the results of the tests when only one inference could be drawn, namely, Petitioner's lay medical conclusion that the three audiograms are consistent with each other and are positive medical evidence of hearing loss. [Pet. Brief 25-33]. Petitioner does not discuss the professional conclusion of audiologist Ronald Lunn finding all 3 audiogram tests demonstrated "inter-, and intra-test inconsistencies" which contradicts Petitioner's lay medical opinion and Petitioner's own findings of fact.

Petitioner's brief to this Court improperly attempts to offer several pages of lay medical opinion on how to read and interpret an audiogram. [Pet. Brief pp. 25-33]. Petitioner offers his lay medical opinion on what the patterns in the audiograms mean,

how to interpret an audiogram, and argues by looking at these pictures he can tell the patterns are consistent. [Pet. Brief pp. 26-27]. However, Petitioner, and his counsel, are not qualified to read an audiogram or offer any expert opinions. Petitioner's brief also provides lay medical opinion on the meaning and interpretation of a word discrimination score. [Pet. Brief p. 30]. The Record is absolutely void of any medical records or qualified testimony offering a professional opinion at all, much less an opinion to a reasonable degree of medical certainty, on how audiograms are performed or how to read and interpret an audiogram, and Petitioner is not qualified to do so. As there is no support at all in the record for Petitioner's lay medical opinions, these arguments should be rejected by this Court.

The Appellate Panel did not make any findings that the audiogram is not a proper test, but rather the three tests performed had inconsistencies as concluded by medical professionals in the medical records. The Appellate Panel found Dr. Ansley had referred Petitioner "to MUSC for a 'more objective' test" due to inconsistencies in the audiogram tests [App. pp. 67-68]. Audiologist Lunn concluded the results of all 3 audiogram tests demonstrated "inter-, and intra-test inconsistencies, with recommendations made of auditory brainstem response studies, as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing." [App. pp. 42-43, 68, 75-76, 183]. The Record does not contain an explanation for these documented inconsistencies.

Petitioner next invites this Court to legislate from the bench – an invitation which should be declined. Petitioner acknowledges the law of South Carolina holds the Appellate Panel's finding, that Petitioner is not a credible witness, is a determination

reserved “solely for the appellate panel and could not be reversed by the appellate courts. [Pet. Brief p. 23]. Petitioner further acknowledges great deference is given to the fact finder given their ability to observe the demeanor of a witness and that a determination of credibility is critical to fact finding. [Pet. Brief p. 37]. Petitioner argues the Commissioner substituted her credibility findings and disregarded the medical evidence. [Pet. Brief p. 37]. As discussed throughout Respondent’s brief, and supported by the Record, the findings of fact and credibility are based on the totality of the medical records as a whole, Petitioner’s inconsistent and contradictory testimony, Petitioner’s behavior during the hearing, and inconsistencies with Petitioner’s subjective complaints to multiple medical providers. Commissioner Barden’s finding that Petitioner is not credible was affirmed by the Appellate Panel.

Petitioner’s arguments offering his own alternative findings does not rise to the standard of review, nor does it show the Appellate Panel’s findings are not based on substantial evidence and therefore clearly erroneous. As Petitioner acknowledges, findings of credibility are “solely for the appellate panel and could not be reversed by the appellate courts.” [Pet. Brief p. 23]. Based on the foregoing, this Court should decline to review Commissioner Barden’s finding that Petitioner is not a credible witness – which was unanimously affirmed by the Appellate Panel.

IV. The Appellate Panel’s findings of fact determined Petitioner failed to prove permanent injury based on substantial evidence in the record indicating Petitioner’s injuries had resolved or returned to baseline on March 31, 2014.

Petitioner seeks to have this Court substitute its judgment for that of the Appellate Panel as to the weight accorded the evidence supporting the Appellate Panel’s findings

of fact. The evidence supporting the Appellate Panel's factual findings is derived from Petitioner's medical records and testimony at the hearing. [App. pp. 60-78].

The Appellate Panel found Petitioner did not suffer from permanent injury based on medical records including Petitioner's March 26, 2014 emergency room visit, March 31, 2014 follow up, and inconsistent audiograms. [App. pp. 65-68]. The Appellate Panel found Dr. Ansley (ENT) referred Petitioner "to MUSC for a 'more objective' test" due to inconsistencies in the audiogram tests [App. pp. 67-68 (emphasis added)]. Audiologist Lunn concluded the results of all 3 audiogram tests demonstrated "inter-, and intra-test inconsistencies, with recommendations made of auditory brainstem response studies, as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing." [App. pp. 42-43, 68, 75-76, 183 (emphasis added)]. As discussed in Part I, the Appellate Panel considered Dr. Roger's report and found it contained "inconsistencies and omissions" based on both subjective complaints and objective findings, therefore concluding Dr. Rogers' report to be "generally and wholly unreliable, and therefore, give it no weight." [App. p. 72]. Neither Dr. Cassone's report, nor any other evidence in the Record, contains an explanation for the inconsistencies between the audiograms. Petitioner's inconsistent and contradictory testimony, behavior during the hearing, and inconsistencies with Petitioner's subjective complaints to medical providers, as discussed in supra Part III, also supports the Appellate Panel's findings of fact.

Again, Petitioner's argument addresses the weight accorded the evidence and testimony. Based on the foregoing, there is substantial evidence in the record supporting

the Appellate Panel's finding of fact that Petitioner failed to prove he suffered permanent injury and therefore the Appellate Panel's findings of fact are not clearly erroneous.

V. The Court of Appeal's reversal of the Appellate Panel's findings of fact as to total temporary disability was remanded to the Appellate Panel which has not yet made a determination and therefore this issue is not before the Court.

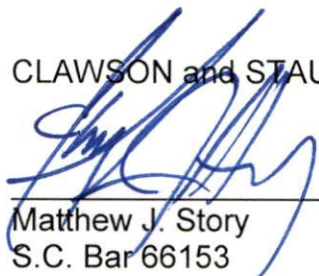
The court of appeals reversed the Appellate Panel's denial of total temporary disability which was based on a finding the record did not contain a work excuse and therefore Petitioner was not entitled to those benefits. [App. p. 2]. The court of appeals remanded the issue to the Appellate Panel to determine whether Petitioner "was out of work as a result of the accident and whether he was entitled to TTD." [App. p. 3]. The Appellate Panel has not yet made a finding on remand and therefore this issue is not ripe. Were this Court to make a finding of fact as to this issue, based on the evidence in the record, Petitioner would be entitled to TTD from March 6, 2014 to March 31, 2014 as that is when Petitioner reached maximum medical improvement.

CONCLUSION

Petitioner's appeal is based solely on his disagreement with the weight accorded the evidence by Commissioner Barden and the Appellate Panel supporting its factual findings and credibility findings. These findings are supported by the record, including medical records, Petitioner's inconsistent and contradictory testimony, and Commissioner Barden's direct observations of Petitioner's behavior during the hearing. Based on this substantial evidence, the Appellate Panel's findings are not clearly erroneous. Therefore, this Court should affirm the decision of the lower court.

[Signature on Following Page]

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Charleston, South Carolina
July 15, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Appeal from South Carolina Worker's Compensation Commission

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

Danny B. Cane,

Petitioner,

v.

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


Respondents.

PROOF OF SERVICE

I certify that I, Lauren Pearce, am a legal assistant to Matthew J. Story and have caused a copy of **Brief of Respondent** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on July 16, 2019, addresses to the following:

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July 16, 2019
Charleston, SC