THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2020-000723

Frederick Nelson, Employee,.....Respondent,

v.

City of North Charleston, Employer and Carrier.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE APPELLATE PANEL ERR IN FAILING TO PROVIDE DETAILED EXPLANATIONS AS TO HOW IT CAME TO A DETERMINATION OF PERMANENT AND TOTAL DISABILITY?

II. DID THE APPELLATE PANEL ERR IN RELYING ON AN INCORRECT LEGAL STANDARD WHEN DETERMINING PERMANENT AND TOTAL DISABILITY?

III. DID THE APPELLATE PANEL ERR IN DIRECTLY MISQUOTING AN EXPERT EVALUATION IN THE RECORD AND THEN RELYING ON THAT MISQUOTE TO MAKE A DETERMINATION OF PERMANENT AND TOTAL DISABILITY?

IV. DID THE APPELLATE PANEL ERR IN MAKING A CREDIBILITY FINDING THAT IS NOT BACED BY THE EVIDENCE IN THE RECORD OR HEARING TESTIMONY?

STATEMENT OF THE CASE

Claimant/Respondent ("Respondent") sustained an admitted accident arising out of the course and scope of his employment on November 29, 2019, when he tripped and fell over a forklift blade at work. Respondent sustained injuries to his right ankle, right thumb, and left knee as a result of this work-related accident. A hearing was held on the Form 21 before Commissioner Michael Campbell, II in Isle of Palms, South Carolina on July 12, 2018. Commissioner Campbell issued an Order on September 19, 2018, finding that Respondent was not at maximum medical improvement, that an adjudication of permanency was premature, and that Respondent should be awarded an additional MRI of the left knee and bracing and custom orthotics as recommended by the IME doctor. Defendant/Appellant ("Appellant") appealed that Order.

On April 22, 2019, the Appellate Panel reversed Commissioner Campbell's Order and found that the Respondent had reached MMI in regard to his right ankle, right thumb, and left knee, and that he should not be awarded future medical treatment including the MRI, bracing, or custom orthotics. The Appellate Panel remanded the case to Commissioner Campbell to adjudicate permanency based on the record. On August 16, 2019, Commissioner Campbell issued a second Order finding that Respondent is permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10. In a Decision dated March 27, 2020, the Appellate Panel affirmed the Order of Commissioner Campbell in full. From that March 27, 2020 Order, Appellant now files this appeal.

STATEMENT OF THE FACTS

Respondent sustained admitted injuries to his right ankle, right thumb, and left knee on November 29, 2019, and he received appropriate medical treatment until being released at maximum medical improvement.

Regarding his right ankle, Respondent presented to Dr. Robert B. Lowery on December 22, 2016, with complaints of right ankle pain. (Def. APA 1, p. 1). Dr. Lowery assessed Respondent with a right ankle contusion and instructed Respondent to begin physical therapy. (Def. APA 1, p. 2 – 3). On a Form 14B, Dr. Lowery released Respondent at maximum medical improvement for his right ankle as of February 2, 2017, and he assigned Respondent a zero percent (0%) impairment rating to his right ankle. (Def. APA 1, p. 6). Dr. Lowery indicated that Respondent did not sustain any permanent physical impairment or limitations as a result of the injury and stated that the Respondent would not require any future medical treatment. *Id.*

However, on October 23, 2017, Respondent again returned to Dr. Lowery with complaints of worsening symptoms in his right ankle. (Def. APA 1, p. 8). Respondent stated his ankle pain was aggravated by his left knee surgery as well as by walking and lifting activities in physical therapy. *Id.* In his note, Dr. Lowery reported "[w]e have explained to him that his MRI scan only showed a mild contusion." *Id.* Once again, Dr. Lowery found the Respondent remained at maximum medical improvement, and he could not see any further diagnostic or therapeutic interventions that would benefit the Respondent. (Def. APA 1, pp. 8 – 10). Because Respondent suffered only a mild contusion to the right ankle, Dr. Lowery again discharged the Respondent on October 23, 2017, and affirmed his previous assessment that Respondent sustained no impairment (0%) to his foot and ankle from his injury. *Id.*

With regard to the injury to his right thumb, the authorized treating physician was Dr. Ernst, who Respondent first reported to on February 23, 2017. (Def. APA 2, p. 11). Dr. Ernst performed a right trigger thumb release operation on Respondent's A1 pulley on May 19, 2017. (Def. APA 2, p. 22). Dr. Ernst released the Respondent from his care on July 19, 2017, and assigned a five percent (5%) impairment rating to the thumb. (Def. APA 2, p. 33A). Respondent underwent a

functional capacity evaluation on January 23, 2018. (Def. APA 5, p. 93). Regarding the right upper extremity, grip strength testing showed Respondent exhibited no significant signs of physical discomfort. (Def. APA 5, p. 95). Furthermore, there was no medical evidence submitted at the hearing to contradict Dr. Ernst's findings.

Regarding the injury to his left knee, Respondent first presented to Dr. Kenneth M. Caldwell on March 2, 2017, describing a flexion twisting injury to his left knee. (Def. APA 3, p. 34). Dr. Caldwell indicated the MRI results showed an undersurface tear of the posterior horn of the medial meniscus, which probably represented a small flap tear. (Def. APA 3, p. 35). On May 25, 2017, Respondent reported complaints of sharp mechanical pain at the medial aspect of his left knee and intermittent popliteal discomfort. (Def. APA 3, p. 41).

Dr. Caldwell performed a left knee arthroscopy on Respondent on June 14, 2017. (Def. APA 3, p. 44). On August 15, 2017, Respondent returned to Dr. Caldwell with continued complaints of diffuse left knee pain. (Def. APA 3, p. 51). On September 19, 2017, Dr. Caldwell noted Respondent's slow progress in therapy. (Def. APA 3, p. 55). Dr. Caldwell stated there was no knee swelling, laxity, nor joint pannus to suggest ongoing joint line issues. *Id.* Respondent continued subjective pain complaints in therapy, and Dr. Caldwell repeated his concern about Respondent's malingering. *Id.* Dr. Caldwell indicated that Respondent could return to work light duty on October 16, 2017. (Def. APA 3, p. 57).

On February 8, 2018, Respondent returned to Dr. Caldwell to review his functional capacity evaluation results. (Def. APA 3, p. 60A). The functional capacity evaluation revealed Respondent was capable of light-medium work capability with most difficulties being in kneeling, squatting, and lifting heavier loads. (Def. APA 3, p. 60B). Dr. Caldwell indicated that in light of the report, Respondent was not capable of returning to an unrestricted status with his previous job

description. *Id.* Accordingly, Dr. Caldwell placed Respondent on permanent restrictions with no kneeling, climbing, squatting, or lifting more than thirty-five (35) pounds. (Def. APA 3, p. 61). Dr. Caldwell completed a Form 14B Physician's Statement where he found that Respondent reached maximum medical improvement for his left knee injury on February 8, 2018. (Def. APA 3, p. 60B). Dr. Caldwell further assigned an eleven percent (11%) impairment rating to the left lower extremity. *Id.* He also stated that Respondent would not require any further medical, surgical, or hospital treatment for his left knee. *Id.*

After his medical treatment was completed, the Respondent's attorney referred him for two independent medical evaluations for litigation purposes. On March 9, 2018, based on a one-time evaluation, Dr. Adam Schaaf found the Respondent sustained a fourteen percent (14%) impairment rating to the left leg and a five percent (5%) impairment rating to the right ankle. (Cl. APA 8, p. 134). On June 22, 2018, based on a one-time evaluation, Dr. Daniel Wartinbee found the Respondent sustained an eleven percent (11%) impairment rating to his right arm or a twelve percent (12%) impairment rating of his right hand. (Cl. APA 9, p. 139).

Prior to the hearing, the Respondent also underwent two vocational evaluations. The Respondent hired David Price to complete an assessment on April 20, 2018. David Price indicated that based on his observations of the Respondent and the produced medical records, the Respondent is vocationally disabled. (Cl. APA 10, p. 146). On June 8, 2018, the Respondent was evaluated by Joel D. Leonard. In the vocational evaluation, Mr. Leonard divided the Respondent's employability into three separate profiles. The first profile, Profile A, looked solely at the Respondent's subjective complaints. (Def. APA 6, p. 126). In analyzing Profile A, Mr. Leonard explicitly stated, "[w]ith regard to such circumstances, the parties are advised that I do not consider Mr. Nelson to be 'vocationally disabled' as set forth in Profile A." (Def. APA 6, p. 127). Profiles

B and C differed based on an administrative determination as to whether the Respondent was at MMI. *Id.* In the Decision and Order dated April 22, 2019, the Appellate Panel expressly found that Respondent was at MMI and further medical treatment was not needed. As a result, the profile Mr. Leonard would endorse is Profile C. (Def. APA 6, p. 127). In Profile C, the Respondent would not be disabled from all work, and he could still obtain positions as a "medical lab courier, shuttle driver, assembly and process inspector, production worker, gate guard, etc." *Id.*

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e) (2008). Under the scope of review established in the Administrative Procedures Act, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(5)(d) (2008).

Additionally, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). If the findings of the Commission are based on surmise, speculation or

conjecture, then the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965).

ARGUMENTS

I. THE APPELLATE PANEL ERRED IN FAILING TO PROVIDE DETAILED EXPLANATIONS AS TO HOW IT CAME TO A DETERMINATION OF PERMANENT AND TOTAL DISABILITY.

Throughout the Order, the Appellate Panel failed to state a reasonable and meaningful basis as to the reasons why it relied on certain evidence to make a determination of permanent and total disability. Under S.C. Code Ann. section 42-9-5, and the supporting case law, any award under the Act must be based upon specific and written detailed findings of fact substantiating the award and explaining how and why the Appellate Panel reached its factual findings and conclusions as to allow meaningful review upon appeal. The findings of fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). Where an order of the worker's compensation commission fails to set forth findings of fact sufficient to allow for meaningful appellate review, the case should be remanded to the commission to make specific findings of fact and conclusions of law. *See* Campbell v. La-Z-Boy East, 295 S.C. 384, 368 S.E.2d 679 (S.C. Ct. App. 1988); S.C. Code Ann. § 42-17-40. In Hutson v. South Carolina State Ports Authority, the Court stated that an award under the Workers' Compensation Act may not rest upon surmise, conjecture, or speculation, but instead, must be founded on evidence of sufficient substance to afford a reasonable basis for it. 399 S.C. 381, 732 S.E.2d 500 (S.C. 2012). This was not done in this case.

In coming to the conclusion of permanent and total disability, the Appellate Panel gives more weight to the opinions of Dr. Schaaf and Dr. Wartinbee, who were both one-time independent

medical evaluation doctors, over the opinions of the established, authorized treating physicians. Dr. Lowery treated the Respondent for almost a full year and then released him at MMI with a zero percent (0%) impairment rating to the right ankle. Dr. Ernst performed surgery on the Respondent and then continued to treat him for five months before releasing him with a five percent (5%) impairment rating to the thumb. The Respondent treated with Dr. Caldwell for his left knee injury from March 2, 2017, through February 8, 2018. Following that treatment, Dr. Caldwell assigned an eleven percent (11%) impairment rating to the leg. The ratings from his treating physicians indicate that the Respondent suffered minor injuries with no significant lasting effects. Further, his FCE shows that the Respondent is clearly able to work. Doctors Lowery and Ernst gave him no work restrictions, and Dr. Caldwell said the Respondent still had light to medium work capability. No doctor has indicated the Respondent is unable to work.

Instead of relying on this medical evidence from the actual treating doctors, the Appellate Panel chose to depend on the opinions of Respondent's one-time IME doctors. These physicians provided no treatment for injuries, only opinions as to the legal issues involved in this claim. Nowhere in the Decision and Order does the Appellate Panel provide a meaningful and reasonable basis as to why it would do so. "Under Hutson, when the commission's factual finding is not 'founded on evidence of sufficient substance to afford a reasonable basis' for the finding, we will not uphold it." Crane v. Raber's Disc. Tire Rack, No. 27951, 2020 S.C. LEXIS 33, at *11 (Mar. 11, 2020)

The Appellate Panel cannot simply recite conclusory findings. It must give explanation or a basis for such findings to allow for meaningful appellate review. Defendants do not dispute that the Appellate Panel has the right to weigh evidence and make a factual determination; however, if the Appellate Panel chooses to rely on one opinion over another, it must provide an explanation

so as to 1) not leave the parties guessing as to why it came to that conclusion and 2) allow for meaningful review on appeal. Based upon the evidence from the treating doctors, neither the nature of Respondent's injuries, the resulting low rating, or the permanent restrictions give a legitimate basis to an award of total disability. If the Appellate Panel is going to discount that evidence, or give it little weight, it must provide an explanation for doing so. Failure to provide a reasonable basis or explanation for relying on one-time IME doctors and giving little to no weight to the authorized treating physicians was legal error, and the Appellate Panel's Decision should be reversed and remanded as such.

II. THE APPELLATE PANEL RELIED ON AN INCORRECT LEGAL STANDARD WHEN DETERMINING PERMANENT AND TOTAL DISABILITY.

In Findings of Fact #16, #17, #18, and Conclusion of Law #10, the Appellate Panel uses an incorrect standard in determining permanent and total disability. Total disability is when "the incapacity for work resulting from an injury is total." *See* S.C. Code. Ann. § 42-9-10. The burden is on the employee to prove, in accordance with the generally acceptable test of total disability, that he is unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965). As explained in Wynn v. Peoples Natural Gas Co., the fact that a Claimant cannot return to work at his previous job does not mean he should be considered permanently and totally disabled. 238 S.C. 1, 118 S.E.2d 812 (1961). Relying on an incorrect standard is an error of law. While an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, it may reverse where the decision is affected by an error of law or is unsupported by substantial evidence. *See* Grant v. Grant Textiles, 372 S.C. 196, 200-01, 641 S.E.2d 869, 871 (2007).

The Appellate Panel incorrectly assumes in Findings of Fact #16, #17, #18, and Conclusion of Law #10 that because Respondent was unable to return to his previous job with his Employer, he was disabled. That is not the correct legal standard. Further, had the correct standard been used, the lay testimony and evidence at the hearing indicates there are several opportunities for employment still available to the Respondent.

None of the doctors in this claim have indicated the Respondent is unable to work. Dr. Caldwell indicated the Respondent could perform at a light to medium level pursuant to the functional capacity evaluation. (Def. APA 3, p. 60B.) Even the doctors hired by Respondent indicated he could return to work. Dr. Wartinbee indicated his work restrictions should be as indicated by the FCE, and Dr. Schaaf indicated he had restrictions of no climbing, crawling, or ladders, minimal squatting, and that he may need frequent breaks. (Cl. APA p. 139; Cl. APA p. 134).

At the hearing, Appellant submitted the vocational evaluation of Joel Leonard from June 8, 2018. (Def. APA 6, p. 119). Mr. Leonard indicated that Respondent maintains a favorable employment history, has a valid Class A CDL license, and possesses a clean criminal record. (Def. APA 6, p. 125). Because the Appellate Panel expressly found that Respondent was at maximum medical improvement and further medical treatment was not needed in its April 22, 2019 Order, the profile endorsed by vocational expert Leonard is Profile C. Profile C states that Respondent can still perform other work such as a medical lab courier, shuttle driver, assembly and process inspector, production worker, or gate guard, and that he had the potential to earn approximately $444.80 per week. (Def. APA 6, p. 127). Based upon this evidence, Respondent is not totally disabled because there is still employment available to him.

Furthermore, Respondent testified at the hearing that he has applied for approximately twenty to thirty jobs. (Hrg. Tr. p. 43, lines 13-16). However, he has a Class A CDL license, which is very marketable in the workforce, but has not applied to a single job that requires one. (Hrg. Tr. p. 52, lines 18-20). Respondent testified that he believes he had not received any job offers due to his work restrictions. (Hrg. Tr. p. 42, lines 17-18). However, Respondent testified that even if he did receive a job offer, he did not think he would be able to perform as the employer would require. (Hrg. T. p. 55, lines 1-3). When asked on cross examination why he applied for jobs if he was supposedly unable to perform, Respondent testified that he thought that there are some jobs available within his restrictions, and that he would try to work if offered. (Hrg. Tr. p. 56, lines 5-13). Based upon the above evidence, the Respondent is not vocationally disabled as there are multiple opportunities for employment available to him. This testimony directly contradicts a finding of total disability.

It is clear that the only evidence the Appellate Panel relied on was Respondent's inability to return to his previous occupation to judge this claim, as it is mentioned in three Findings of Fact and one Conclusion of Law. However, this is the wrong standard. By using the wrong standard of whether the Respondent could return to his previous job, the Appellate Panel erred as a matter of law. Using an incorrect standard when determining disability was an error of law, and as such, this case should be remanded. *See, e.g.*, Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 400-01, 782 S.E.2d 753, 756 (Ct. App. 2016) ("Mindful of our standard of review of factual finding, we nevertheless conclude the Commission erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence."). As a result, the Decision should be overturned and remanded for a modified determination on permanent partial disability.

III. THE APPELLATE PANEL DIRECTLY MISQUOTES AN EXPERT EVALUATION IN THE RECORD AND THEN RELIES ON THAT MISQUOTE TO MAKE A DETERMINATION OF PERMANENT AND TOTAL DISABILITY.

Prior to the hearing, the Respondent underwent two vocational assessments. In the report submitted by vocational expert Mr. Joel Leonard, Mr. Leonard divided the prospective employability of Respondent into three profiles. (Def. APA 6, p. 126). Profile A states that Respondent would be vocationally disabled if his subjective complaints are accepted as true. *Id.* The difference between Profiles B and C turns on an administrative determination as to whether or not the Respondent required more medical treatment. *Id.* Because the Appellate Panel expressly found that Respondent was at maximum medical improvement and further medical treatment was not needed in its April 22, 2019 Order, the profile endorsed by vocational expert Leonard is Profile C. As stated above, Profile C states that Respondent could still perform other work such as a medical lab courier, shuttle driver, assembly and process inspector, production worker, or gate guard, and that he had the potential to earn approximately $444.80 per week. (Def. APA 6, p. 127).

While, in Finding of Fact #20, the Appellate Panel correctly states the Respondent was evaluated by Mr. Joel Leonard, and Mr. Leonard offered three employment profiles labeled as A, B, and C, the Appellate Panel then completely misconstrues Profile A. Profile A would conclude the Respondent was vocationally disabled based on the Respondent's subjective complaints, but Mr. Leonard explicitly states *twice* that he does not consider Profile A to be applicable. (*See* Def. APA p. 127 and Def. APA p. 128). Commissioner T. Scott Beck aptly pointed this out at the hearing before the Appellate Panel. (Full Commission Hrg. Tr. p. 18, lines 17-25). However, the Appellate Panel order simply leaves this part out. Appellate Panel Order #10 explicitly states "...based on the vocational opinions of Mr. Price and Profile A of the vocational evaluation of Mr. Leonard...." As a result, it is apparent the Appellate Panel relied on a direct misquote of evidence

in the record, and relying on Profile A is both a factual error and an error of law. As such, the Appellate Panel's reliance on Profile A in Finding of Fact #20 and Conclusion of Law #10 is inappropriate and incorrect. Therefore, this Court should reverse the decision of the Appellate Panel and remand for a determination of permanency.

Additionally, it was error for the Appellate Panel to rely on the vocational assessment of Mr. Price in Findings of Fact #19 and Conclusion of Law #10. Mr. Price's assessment directly contradicts the functional capacity evaluation ordered by Dr. Caldwell. While Mr. Price claims that Respondent could not meet the requirements of sedentary employment, Dr. Caldwell insisted Respondent actually has a light to medium work capacity. (Cla. APA 10, p. 146; Def. APA 3, p. 60B). Mr. Price's report is conclusory, dependent upon inaccurate facts, and relies heavily upon the complaints of Respondent, which are not credible. Further, the Appellate Panel fails to provide an explanation as to why it would give greater weight to the opinion of Mr. Price over that of Mr. Leonard. As stated repeatedly above, "the findings of fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings." Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). It is in the Appellate Panel's discretion to weigh the evidence, but it must provide a basis as to why it relies on certain opinions over others. Because the Appellate Panel failed to provide a meaningful basis as to why it relied on the opinion of Mr. Price over that of Mr. Leonard, the Decision and Order should be reversed and remanded.

IV. THE APPELLATE PANEL ERRED IN MAKING A CREDIBILITY FINDING THAT IS NOT BACKED BY THE EVIDENCE IN THE RECORD OR HEARING TESTIMONY.

The Appellate Panel made a credibility finding that is not based on evidence in the record. As the Supreme Court of South Carolina stated in Crane:

> To make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision.

2020 S.C. LEXIS 33, at *14 (Mar. 11, 2020). In Finding of Fact #7, the Appellate Panel indicates that the Respondent's description of his injuries and resulting problems were consistent with medical evidence and the Commissioner's observations at the hearing. However, this is false based on the evidence in the record and Respondent's sworn testimony. As stated above, South Carolina statutory law dictates that a reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e). Finding that the Respondent's subjective complaints were consistent with the medical evidence is clearly erroneous based on the evidence in the record and discrepancies between Respondent's testimony.

Respondent's treating physicians repeatedly took note of his malingering and exaggerating of symptoms. Dr. Caldwell expressed concern about Respondent's motivation to get better as early as May 25, 2017. (Def. APA 3, p. 41). Again, on August 15, 2017, Dr. Caldwell noted that Respondent continued to make slow progress in therapy. (Def. APA 3, pp. 51-52). Dr. Caldwell stated:

> [Respondent] has made progress in therapy but continues to complain of discomfort that subjectively is greater than is noted with his objective exam, which is favorable . . . He complains of diffuse peripatellar pain and continues to utilize a cane for ambulation even though he has a very smooth gait pattern. At this point I am concerned about a degree of malingering however his therapy will be increased to 3 times per week for the next month.

Id. For a third time, on September 19, 2017, Dr. Caldwell noted Respondent's very slow progress in therapy. (Def. APA 3, p. 59). Dr. Caldwell stated, "[Respondent's] clinical complaints are out

of proportion to what would be expected at this point and I have encouraged him to discontinue the use of the cane but he continues to use it." *Id.* Respondent's continual malingering and unwillingness to get better and return to work, as noted three times by his treating physician, is a direct indication that his credibility is in serious dispute.

Additionally, Respondent's testimony at the hearing directly contradicted his deposition testimony on multiple occasions. Regarding his thumb, Respondent testified at his deposition that he did not have pain in his thumb at rest, but only when grabbing something. (Hrg. Tr. p. 44, lines 12-25; p. 45, lines 1-25). At the hearing, however, Respondent testified that he feels a pain in his thumb even when at rest. (Hrg. Tr. p. 46, lines 1-10). He also subsequently testified that he does not feel something in his thumb at all times, and that there are periods of time when he does not feel any pain in his thumb. (Hrg. Tr. p. 46, lines 7-13).

Regarding his ankle, Respondent testified at his deposition that he did not have pain in his ankle while just sitting. (Hrg. Tr. p. 46, lines 24-25; p. 47, lines 1-4). However, at the hearing, Respondent stated he does experience pain while only sitting and relaxing. (Hrg. Tr. p. 47, lines 5-6). Again, Respondent testified at his deposition that he was walking for twenty to thirty minutes every other day. (Hrg. Tr. p. 50, lines 15-19). However, at the hearing, he testified he no longer is doing it. (Hrg. Tr. p. 50, lines 20-21). When asked what caused the sudden change, Respondent responded that the walking had caused increased pain. (Hrg. Tr. p. 51, lines 18-23).

The Respondent's testimony at the hearing was inconsistent, not credible, and unreliable. His treating physician voiced numerous concerns about the legitimacy of his complaints, and several discrepancies arose between his deposition testimony and his hearing testimony. The finding by the Appellate Panel that the Respondent's subjective complaints were consistent with the medical evidence was clearly erroneous based on the evidence presented above.

CONCLUSION

Based on the foregoing, this Court should reverse the Full Commission Decision and Order and remand for a modified award of permanent partial disability to the Respondent's right ankle, right thumb, and left knee.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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PROOF OF SERVICE

I do hereby certify that I have served the foregoing **INITIAL BRIEF OF APPELLANT** and the **APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on the 10th day of June, 2020 to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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June 10, 2020

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Frederick Nelson vs. City of North Charleston
WCC File No.: 1618027 DOI: 11/29/2016
Carrier: Planned Administrators, Inc. (PAI) - Claim No.: 810020000582
WJC&B File No.: 0225.00198
Appellate Case No. 2020-000723

Dear Ms. Kitchings:

Please find enclosed the following documents for filing in regards to the above-referenced case:

1. 1 copy of the Initial Brief of Appellant;
2. 1 copy of the Appellant's Designation of Matter;
3. 1 copy of the Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

Enclosures

cc: Malcolm M. Crosland, Jr., Esquire
Ms. Janice Pinckney (via e-mail)

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SOUTH CAROLINA COURT OF APPEALS
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