

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND

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:
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v.

**C.A. No. M16-0011
16404505453**

ANDREW THOMSON

DECISION

PER CURIAM: Before this Panel on March 8, 2017—Magistrate Kruse Weller (Chair), Magistrate DiSandro, III, and Magistrate Goulart, sitting—is Andrew Thomson’s (Appellant) appeal from the decision of Judge George E. Furtado (Trial Judge) of the East Providence Municipal Court, sustaining Appellant’s charged violation of G.L. 1956 § 31-17-4, “Vehicle entering stop or yield intersection.” The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On September 27, 2016, police dispatch sent Officer Michael Crowley (Officer Crowley) of the East Providence Police Department to “the area of North Broadway in front of the U-Haul . . . for [a] motor vehicle accident involving a truck, tractor-trailer and motorcycle with injury.” (Tr. at 5.) The accident took place immediately after the northern exit of the Rebello Tunnel on North Broadway and the Taunton Avenue access road. *Id.* at 6. “This access road merges with North Broadway right in the area of U-Haul” and “is controlled by a posted yield sign at that location.” *Id.* Officer Crowley mailed Appellant the abovementioned citation for failing to obey the posted yield sign. *Id.* at 8.

At Appellant's trial for the charged violation, on December 22, 2016, Officer Crowley testified that after arriving on scene, he identified Appellant as the operator of the motorcycle and noted that he had injuries "to his right foot and leg area caused by the accident." *Id.* at 5. Rescue personnel responded to the scene to treat Appellant's injuries. *Id.* at 6. Officer Crowley also "observed a . . . tractor-trailer which was partially in the . . . U-Haul parking lot." *Id.* Officer Crowley testified that at that time, Appellant stated that he "didn't realize" that the "tractor-trailer was making a right turn into the U-Haul parking lot, and he was unable to stop in time to avoid an accident." *Id.*

Officer Crowley testified that he spoke with two other witnesses who said "the motorcycle operator never stopped to avoid the collision at the yield sign." *Id.* at 8. One of the two witnesses Officer Crowley spoke with at the scene, Robert Souza (Souza), appeared to testify at trial. *Id.* at 7. Officer Crowley also noted that he did not observe the accident. *Id.* at 42.

Joseph Cabral (Cabral) operated the tractor-trailer that was involved in the accident. *Id.* at 9. Cabral testified that just before the accident occurred, he had travelled through the Rebello Tunnel and when he emerged, he engaged the tractor-trailer's directional to signal his intention to turn into the U-Haul parking lot. *Id.* He testified that he was driving slowly because the U-Haul parking lot is generally a high traffic area. *Id.* Cabral stated that after he began turning into the parking lot, he "glanced back over to the side . . . [and] saw a black motorcycle. That's when [he] slammed on the brakes." *Id.*

During cross-examination, Cabral explained that the tractor-trailer's directional lights are located on the right side of the truck, on the cab, in the middle of the trailer, and on the fender. *Id.* at 20. Cabral also testified that he did not have to stop before turning into the parking lot,

since “there was nobody coming from the right” and his directional was already engaged. *Id.* at 19.

Additionally, Souza testified that he “was [driving] behind the tractor-trailer” and “about three-quarters” of the way through the tunnel, he saw a motorcycle “parallel to [his] passenger window.” *Id.* at 23-24. As Souza reached the yield sign, he noticed that the tractor-trailer had its directional engaged. *Id.* at 24. Souza went on to testify that his vehicle and the tractor-trailer “almost came to a dead stop.” *Id.* at 27. He continued stating that when the tractor-trailer began to turn, the motorcycle had not yet come to a complete stop. *Id.* at 24, 27. According to Souza’s testimony, by that time, Appellant “ha[d] no choice but to veer towards the curb.” *Id.* at 24. He stated that he observed “the truck hit[] the bike.” *Id.*

Next, the Trial Judge heard testimony from Appellant. *Id.* at 30. Appellant testified that on September 27, 2016, he was out driving his motorcycle during his lunch break at work. *Id.* at 32-33. He explained that he was traveling at “twenty-five miles [per hour] or less” and as he approached the yield sign in question, “there was no reason to stop, [] people were being polite to each other.” *Id.* at 34-35.

Appellant continued, stating that as he approached the tractor-trailer, “[t]here was no way to go around it. [The tractor-trailer] was blocking [the road] waiting to go into U-Haul.” *Id.* He added that he did not see the tractor-trailer’s turn signal. *Id.* Appellant went on to testify that he “pulled up alongside the tractor-trailer . . . near [its] rear wheels,” stopped, and then stood up on his motorcycle because he “had a big ring of keys in my pocket, a couple tools, cell phone, and they were poking [him].” *Id.* at 36. He stated that he did not begin to move again after stopping until he noticed that the tractor-trailer was turning into the U-Haul parking lot. *Id.* at 36, 38. When Appellant noticed the tractor-trailer turning he attempted to get off his motorcycle but was

unable to. *Id.* at 37, 40. The tractor-trailer trapped the rear wheels of Appellant’s motorcycle causing his foot injury. *Id.* at 37.

After testimony concluded, the Trial Judge stated his findings of fact on the record. *Id.* at 45. The Trial Judge found that he “had the opportunity to observe the appearance of Officer Crowley, the driver, the witness, as well as the defendant.” *Id.* He explained that his decision on this matter rested on his credibility determination. *Id.* The Trial Judge determined “based on the totality of the circumstances” that Souza, Cabral, and Officer Crowley provided credible testimony. *Id.* Based on the credibility determinations, the Trial Judge found Appellant guilty of violating § 31-17-4. *Id.* at 45-46. Thereafter, Appellant filed a timely appeal. Forthwith is this Panel’s decision.

II

Standard of Review

Pursuant to § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

“The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge’s findings, inferences, conclusions or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the judge or magistrate;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error of law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

In reviewing a hearing judge or magistrate’s decision pursuant to § 31-41.1-8, this Panel “lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact.” *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993) (citing *Liberty Mut. Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). “The review of the Appeals Panel is confined to a reading of the record to determine whether the judge’s [or magistrate’s] decision is supported by legally competent evidence or is affected by an error of law.” *Id.* (citing *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). “In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision.” *Id.* Otherwise, it must affirm the hearing judge’s (or magistrate’s) conclusions on appeal. *See Janes*, 586 A.2d at 537.

III

Analysis

On appeal, Appellant contends the Trial Judge’s decision was “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” Sec. 31-41.1-8(f)(5). Specifically, Appellant asserts that the Trial Judge: (1) did not properly consider Appellant’s testimony; (2) lacked sufficient evidence to find that Appellant violated § 31-17-4; (3) disregarded uncontradicted and unimpeached testimony without reason; and (4) did not provide sufficient findings of fact to support his decision.¹

¹ Appellant pursues a tangential argument that he made a “practical stop” and, therefore, he did not fail to yield. Under Rhode Island law, the term “practical stop” is not statutorily defined, nor is it considered permissible conduct under § 31-17-4. Moreover, in Rhode Island there is no case

A

Witness Credibility

Appellant asserts several arguments related to the Trial Judge's credibility determinations. Specifically, Appellant contends that the Trial Judge did not properly consider his testimony.

It is well-settled that this Panel “lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact.” *Link*, 633 A.2d at 1348 (citing *Liberty Mutual Insurance Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). This Panel is not permitted to second-guess the Trial Magistrate's “impressions as he . . . observe[d] [the witnesses] [,] listened to [their] testimony [and] . . . determine[ed] . . . what to accept and what to disregard[,] . . . what . . . [to] believe[] and disbelieve[.]” *Environmental Scientific Corp.*, 621 A.2d at 206. Accordingly, this Panel will not disturb a trial judge's decision to expressly accept the testimony of one witness, thereby, implicitly rejecting the testimony of another. *Turgeon v. Davis*, 120 R.I. 586, 592, 388 A.2d 1172, 1175 (1978) (“Where the testimony of two witnesses is conflicting and the trier of fact expressly accepts the testimony of one of the witnesses, he [or she] implicitly rejects that of the other”).

The record before this Panel indicates that the Trial Judge credited testimony given by Officer Crowley, Souza, and Cabral. (Tr. at 45.) In expressly crediting the testimony of the

law that governs “practical stops.” The Kentucky Supreme Court addressed “practical stops” in *Huber & Huber Motor Exp. v. Croley* and held that a “practical stop” does not alleviate the duty for an “automobile to stop and yield the right of way . . . if [a vehicle] was so near the intersection as to constitute an immediate hazard” in a negligence case. 303 Ky. 101, 102-04 (1946). Consequently, this Panel finds that the Trial Judge's decision was not “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record” as Appellant's argument is without merit. Sec. 31-41.1-8(f)(5).

three witnesses and not the conflicting testimony provided by Appellant’s—specifically, Cabral’s testimony that Appellant never came to a complete stop—the Trial Judge implicitly rejected Appellant’s testimony asserting that he came to a complete stop and then stood up to adjust the items in his pockets. *See id.* at 24, 27, 36; *Turgeon*, 120 R.I. at 592, 388 A.2d. at 1175.

As it is impermissible to second-guess a trial judge’s credibility determination, this Panel will not question the Trial Judge’s decision to reject Appellant’s testimony on the basis of his credibility. *See* Tr. at 45; *Link*, 633 A.2d at 1348; *Environmental Scientific Corp.*, 621 A.2d at 206. Thus the Trial Judge’s decision was not “[c]learly erroneous in view of the reliable, probative, and substantial evidence.” Sec. 31-41.1-8(f)(5).

B

Insufficient Evidence

Appellant also argues that the Trial Judge lacked sufficient evidence to support his decision finding Appellant guilty of violating § 31-17-4. Section 31-17-4 states:

“The driver of a vehicle approaching a yield sign shall . . . slow down to a speed reasonable for the existing conditions and, if required for safety to stop, shall stop at a clearly marked stop line . . . After slowing or stopping, the driver shall yield the right-of-way to . . . any vehicle in the intersection or approaching on another highway so closely as to constitute an immediate hazard during the time the driver is moving across or within the intersection.” Sec. 31-17-4(c).

Accordingly, to be found guilty of violating the statute, a trial judge must find by clear and convincing evidence that a motorist failed to: (1) slow down to a reasonable speed based on the existing conditions; (2) stop before entering the intersection if safety required; or (3) yield the right-of-way to any oncoming vehicle that constituted an immediate hazard. *Id.*

Here, the record contains evidence indicating that Appellant failed to stop before entering the intersection and that safety required Appellant to do so. *Id.* First, Souza testified that “the

motorcycle never came to a complete stop . . . [Appellant] got to about a mile or two miles an hour [and] took his feet off the pegs.” *Id.* at 24. Second, Cabral testified that the tractor-trailer’s directional was engaged when it turned. (Tr. at 9.) Souza corroborated that account by testifying that he, too, saw the tractor-trailer’s directional engaged. *Id.* at 24. Ultimately, the Trial Judge found “the independent witness’s [Souza] testimony to be very credible . . . the truck driver’s [Cabral] testimony to be credible [] [a]nd . . . the testimony of Officer Crowley to be likewise credible.” *Id.* at 45. The Trial Judge added that “based on the credibility determinations, I find the defendant guilty.” *Id.*

The testimony of the credible witnesses and the fact that there was an accident in this case provided the Trial Judge with a sufficient evidentiary basis to conclude that safety required Appellant to come to a complete stop before proceeding through the intersection. Tr. at 45; § 31-17-4(c). In consideration of the fact that the Trial Judge’s decision rested on his credibility determination, his findings will not be disturbed by the members of this Panel. *Link*, 633 A.2d at 1348 (citing *Liberty Mutual Insurance Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)) (finding that the Rhode Island Traffic Tribunal Appeals Panel “lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact.”) As such, this Panel concludes that the Trial Judge’s decision was supported by reliable, probative, and substantial evidence. Sec. 31-41.1-8(f).

C

Findings of Fact

Next, Appellant argues that the Trial Judge did not properly assert his findings of fact on the record. When a trial judge sits as the fact finder, he or she must make findings of fact and conclusions of law on the record so that a reviewing court may “pass upon the appropriateness of

the order and the grounds upon which it rests.” *Now Courier, LLC v. Better Carrier Corp.*, 965 A.2d 429, 434 (R.I. 2009) (quoting *Chiaradio v. Falck*, 794 A.2d 494, 496 (R.I. 2002)). “A trial justice need not ‘categorically accept or reject each piece of evidence in his [or her] decision [to be] [upheld] [] because implicit in the trial justice’s decision are sufficient findings of fact to support his rulings.’” *Notarantonio v. Notarantonio*, 941 A.2d 138, 147 (R.I. 2008) (quoting *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 102 (R.I. 2006)). At a minimum, a trial judge’s findings “must contain . . . a factual finding and a conclusion of law on each cause of action adjudicated.” *Cathay Cathay, Inc. v. Vindalu, LLC*, 136 A.3d 1113, 1119 (R.I. 2016) (citing *Cathay Cathay, Inc. v. Vindalu, LLC*, 962 A.2d 740, 747-48 (R.I. 2009)). Moreover, “‘if the [a] decision reasonably indicates that [a trial judge] exercised [his or her] independent judgment in passing on the weight of the testimony and the credibility of the witnesses it will not be disturbed on appeal unless it is clearly wrong or otherwise incorrect as a matter of law.’” *V. George Rustigian Rugs, Inc. v. Renaissance Gallery, Inc.*, 853 A.2d 1220, 1225 (R.I. 2004) (quoting *Connor v. Sullivan*, 826 A.2d 953, 960 (R.I. 2003) (per curiam)) (citations omitted).

In the present matter, the Trial Judge stated that after having the opportunity to listen to and observe the witnesses testify, “this [case] becomes a matter of credibility.” (Tr. at 45.) The Trial Judge indicated that he found “the independent witness’s [Souza] testimony to be very credible . . . the truck driver’s [Cabral] testimony to be credible [] [a]nd . . . the testimony of Officer Crowley to be likewise credible.” *Id.* The Trial Judge added that “based on the credibility determinations, I find the defendant guilty.” *Id.*

In light of our Supreme Court’s holding in *Notarantoni*—that a Trial Judge is not required to “categorically accept or reject each piece of evidence in his decision”—this Panel finds that the Trial Judge’s credibility determination sufficiently described the evidence accepted

as fact. (Tr. at 45.) The Trial Judge also provided his conclusion of law by determining the credibility of each witness, and stating that he found Appellant guilty based on those determinations. *Id.* at 45-46; *Cathay Cathay, Inc.*, 136 A.3d at 1119 (determining that findings of fact “must contain, at the very minimum, a factual finding and a conclusion of law on each cause of action adjudicated”). Moreover, the Trial Judge “exercised [his] independent judgment in passing on the weight of the testimony and the credibility of the witnesses” by acknowledging the testimony that he found credible in his findings of fact. (Tr. at 45.)

Based on the record and the relevant case law, this Panel finds that the Trial Judge properly asserted his factual findings and conclusion of law. As a result, the Trial Judge did not err by making improper findings of fact.

D

Uncontradicted and Unimpeached Testimony

In addition, Appellant urges this Panel to consider our Supreme Court’s holding in *Jackowitz v. Deslauriers*, arguing that unimpeached and uncontradicted testimony is to be treated as fact. 92 R.I. 269, 162 A.2d 528, 530-31 (1960). In *Jackowitz*, the witness delivered uncontradicted testimony regarding the period of time during which “he began to exercise dominion of the land in [that] dispute.” *Id.* at 531. In that case, the Court stated: “It is the well-settled law in this state that a trier of facts must accept completely uncontradicted and unimpeached testimony as probative of the fact it was adduced to prove.” *Id.* at 530 (citing *Gorman v. Hand Brewing Co.*, 28 R.I. 180, 66 A. 209 (1907)). However, “[s]uch testimony may be impeached by improbability or contradiction inherent within it. It may also be impeached . . . by the witness himself and the manner in which he testified.” *Id.* (Emphasis added.) In the somewhat rare instance where testimony is unimpeached or uncontradicted, it “cannot be

disregarded and will control the decision of the trier of facts.” *Id.* at 530-31 (citing *Walsh-Kaiser Co. v. Della Morte*, 76 R.I. 325, 330, 69 A.2d 689, 691 (1949)).

Here, Appellant argues that the Trial Judge did not state the underlying reasons for his rejection of Appellant’s uncontradicted and unimpeached testimony. *Id.* This assertion, however, is presumptuous as it is evident that the record contains contradictory testimony, which renders *Jackowitz* inapplicable in this case. *See Jackowitz*, 92 R.I. at 162 A.2d at 530-31 (only when a witness is “impeached by reason of some extrinsic fact observed in the witness or in the manner in which he testified,” the trial judge must advert to that reason).

First, Appellant’s testimony regarding the fact that he stopped his motorcycle before entering the intersection was contradicted by Souza’s testimony. (Tr. at 20, 27, 36.) Appellant testified that he stopped the motorcycle and stood up to adjust several items in his pocket before continuing through the yield sign. *Id.* at 36. Souza contradicted that assertion stating that “[Appellant’s] motorcycle never came to a complete stop.” *Id.* at 24, 27.

Second, the Trial Judge also heard conflicting testimony regarding the tractor-trailer’s directional. *See* Tr. at 9, 24, 35. Cabral testified that he engaged the tractor-trailer’s directional before he began turning into the U-Haul parking lot. *Id.* at 9. Souza also testified that he saw the tractor-trailer’s directional engaged. *Id.* at 24. In contrast, Appellant testified that he did not observe the tractor-trailer’s directional. *Id.* at 35. Ultimately, the Trial Judge found that Cabral and Souza provided credible testimony. *Id.* at 45.

Being that Appellant’s testimony clearly contradicted the credible testimony of the other witnesses, our Supreme Court’s holding in *Jackowitz*—requiring a court to provide its reasoning for rejecting or disregarding uncontradicted and unimpeached testimony—is not applicable. 92 R.I. at 162 A.2d at 531. Therefore, the Trial Judge was not required to provide his reason for

rejecting Appellant’s testimony. *Id.* As such, this Panel finds that the Trial Judge’s decision was not “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the record.” Sec. 31-41.1-8(f).

IV

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Trial Judge’s decision was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The substantial rights of Appellant have not been prejudiced. Accordingly, Appellant’s appeal is denied, and the charged violation is upheld.

ENTERED:

Magistrate Erika Kruse Weller (Chair)

Magistrate Domenic A. DiSandro III

Magistrate Alan R. Goulart

DATE: _____