PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5906 (S.C. Ct. App. filed April 27, 2022,
Withdrawn, Substituted, and Refiled November 2, 2022)

Issac D. Brailey, Claimant ..... Respondent,

v.

Michelin North America, Inc. (US7), Employer
And Safety National Casualty Corp., Carrier, ... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on November 2, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the Full Commission and finding Michelin failed to prove there was a causal connection between Brailey's false representation and the alleged injury to satisfy Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973) where the Court misapplied the standard of review it relied upon, made an error of law in finding evidence of predisposition to back injury is required for a causal connection, and erroneously extrapolated facts related to the treating physician's deposition and to Brailey's prior employment while ignoring other facts which support the Commission's decision, and where the Court's opinion conflicts with this Court's rulings in Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003)?

2. Did the Court of Appeals err in inappropriately stepping into the fact-finding role of the Full Commission in ruling on the Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) issue instead of remanding to the Full Commission to make its own findings of fact and conclusions of law when Capers is directly applicable and the Court's initial opinion was that the Commission's order "does not contain sufficient findings of fact and conclusions of law relating to Capers"?

3. Did the Court of Appeals err in finding the Full Commission erred in finding Brailey failed to prove he sustained an injury by accident on June 24, 2017, when substantial evidence in the record supports the Full Commission's ruling?

STATEMENT OF THE CASE

Respondent Issac Brailey began working at Petitioner Michelin North America, Inc. and Safety National Casualty Corp. (collectively, "Michelin") on April 17, 2017. Almost immediately after starting the physical component of the job,[1] by May 2017, Brailey complained to doctors that he had 10 out of 10 back pain allegedly from work at Michelin. (R. 61). On June 11, 2017, Brailey went to a doctor complaining of back pain allegedly after lifting at work. (R. 67). A few days later, on June 13, 2017, Brailey returned to a doctor complaining of back pains

[1] The first two weeks of Brailey's job at Michelin was classroom training.

allegedly after heavy lifting at work. Brailey did not inform any person at Michelin of the alleged back pain or of the June doctors' visits. On the morning of June 24, 2017, Brailey went to an emergency room complaining of lower back pain from lifting/pulling the prior night. (R. 70).

On October 4, 2017, Brailey brought this action by filing a workers compensation claim against Michelin. In the claim, Brailey alleged he sustained an injury by accident to his back on June 24, 2017, arising out of and in the course of his brief employment with Michelin. Michelin denied the claim, arguing among other things, fraud in the application defense because it discovered Brailey had lied on his employment application regarding his longstanding history of back issues. Specifically, Michelin discovered that on his application, Brailey failed to inform Michelin of a prior strenuous manual labor job and worker compensation claim he had against Richtex Brick. In fact, like his claim at Michelin, at Richtex, Brailey had filed a workers compensation claim almost immediately after starting the job. At Richtex, Brailey told the treating physician that "he knows something is wrong with his back and he wants to go to a back specialist." (Appx. 901-08). The treating physician informed him that he was unable to perform the physical demands of the job and restricted him from work until he visited a specialist. (Appx. 901-08). Brailey never visited a specialist before applying to work at Michelin.[2]

Michelin further argued to the Commission lack of notice because Brailey complained of back problems prior to June 24, 2017, without informing Michelin. Additionally, Michelin maintained that even if Brailey injured his back on June 24, 2017, he intentionally and willfully did so given his prior history and failure to report.

Following a hearing, the Single Commissioner denied the claim, finding (1) Brailey

[2] Michelin thoroughly outlined the facts related to Brailey's employment application, prior work history and injury, and the alleged injury and reporting in the instant matter in its brief to the Court of Appeals. (Appx. 901-08).

committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits pursuant to Section 42-1-130 of the South Carolina Code and Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973); (2) Brailey failed to meet his burden of proof under Section 42-1-160 to prove he sustained a compensable injury to his low back while under the employ of Michelin on June 24, 2017; (3) Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) barred Brailey's claims; and (4) even assuming Brailey actually sustained an injury by accident to his low back on June 24, 2017, he intentionally and willfully did so by (a) failing to alert or notify Michelin that he was allegedly suffering from ten out of ten low back pain for at least four weeks prior to that date, and (b) seeking medical treatment on his own without any knowledge by Michelin due to Brailey's failure to provide notice.

The Full Commission unanimously found the Single Commissioner's Decision and Order was supported by the greater weight of the evidence and affirmed the Order in its entirety with minor amendments. (R. 25-26).

The Court of Appeals reversed the judgment of the Full Commission. In its first opinion, the Court of Appeals held (1) substantial evidence did not support the Full Commission concluding Michelin proved a causal connection between Brailey's false representation and the injury to meet the third prong of Cooper; (2) Capers may be applicable but the Full Commission's order does not contain sufficient findings of fact and conclusions of law or properly apply the facts to the law relating to Capers; and (3) the Full Commission erred in finding Brailey did not injure his back in an accident arising out of his employment at Michelin. Isaac Brailey v. Michelin North America, Inc. (US7) & Safety National Casualty Corp., Op. No. 5906 (S.C. Ct.App. filed April 27, 2022). Michelin filed a Petition for Rehearing.

The Court of Appeals denied the Petition, but withdrew, substituted, and refiled its opinion. Isaac Brailey v. Michelin North America, Inc. (US7) & Safety National Casualty Corp., Op. No. 5906 (S.C. Ct. App. filed April 27, 2022, Withdrawn, Substituted, and Refiled November 2, 2022). In its substituted opinion, the Court of Appeals compounded its errors by changing its holding regarding Capers to opine that Capers is inapplicable. The Court then went on to erroneously find facts and conclusions of law outside the purview of the Court of Appeals' standard of review to support its holding regarding Capers. Id.

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE FULL COMMISSION AND FINDING MICHELIN FAILED TO PROVE THERE WAS A CAUSAL CONNECTION BETWEEN BRAILEY'S FALSE REPRESENTATION AND THE ALLEGED INJURY TO SATISFY COOPER BECAUSE THE COURT MISAPPLIED THE STANDARD OF REVIEW IT RELIED UPON, MADE AN ERROR OF LAW IN FINDING EVIDENCE OF PREDISPOSITION TO A BACK INJURY IS REQUIRED FOR A CAUSAL CONNECTION, ERRONEOUSLY EXTRAPOLATED FACTS RELATED TO THE TREATING PHYSICIAN'S DEPOSITION AND TO BRAILEY'S PRIOR EMPLOYMENT WHILE IGNORING OTHER FACTS WHICH SUPPORT THE COMMISSION'S DECISION, AND THE COURT'S OPINION CONFLICTS WITH THIS COURT'S RULINGS IN JONES V. GEORGIA-PACIFIC CORP., 355 S.C. 413, 586 S.E.2d 111 (2003).

A. The Court of Appeals erred in applying the standard of review it relied upon.

The Court of Appeals did not properly apply the standard of review it relied upon in its opinion—the substantial evidence standard. Under that standard, a "decision of the Worker's Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record." Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). Here, the Court improperly weighed the evidence, and the Court's errors controlled the analysis which led to a finding in favor of Brailey. Instead of

looking for what in the Court's view should have been included in the record, the Court's sole duty was to consider whether what is in the record supports the Commission's decision.

The Court put on blinders to the facts supporting the Commission's decision and created facts from evidence not in the record thereby ignoring the substantial evidence in the record supporting the Full Commission's decision. Indeed, the lens through which the Court of Appeals viewed the facts to reach its conclusion to reverse the Commission erroneously relied on Brailey's testimony even though the Commission, as the ultimate finder of fact, determined Brailey lacked credibility. See Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986) (holding the Full Commission is the ultimate fact finder and makes the final determination of witness credibility and the weight to be accorded evidence); Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969) (same). It was not the task of the Court of Appeals to weigh the evidence as found by the Full Commission. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981). The skewed view by with the Court of Appeals used to reach it decision is erroneous and requires reversal.[3]

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[3] For example, the Court relied on the fact that Brailey "passed a physical during Michelin's hiring process and was cleared for full duty" even though Michelin's nurse, Nurse Sirois, explained that if a job applicant wanted the job at Michelin bad enough, as Brailey claimed he did, then applicants could provide false information in order to pass the initial physical examination. (R. 753-758). The Court relied on this even though it found substantial evidence supports the Commission's findings that Brailey willfully and knowingly made false statements as to his physical condition to Michelin. Thus, the fact that Brailey "passed a physical" does not mean he was physically able to do the job as implied by the Court's opinion. The record before the Court demonstrates Brailey lied to doctors when necessary to get what he wanted—i.e., to get a job. The Court's implicit credibility findings bleed into its decision that the Full Commission's decision is not supported by substantial evidence.

The Court accepted, for example, Brailey claims that (1) he was never trained in correct procedures for filing workers' compensation claims or for reporting injuries at work even though Michelin employees testified otherwise, (2) called his supervisors during his visit to the ER on June 24, 2017, and the supervisor told him to go to the nurse which is inconsistent with the record, (3) "tried to see the Michelin nurse but the office was closed" despite the testimony from Michelin's training manager that the employees were trained that if the medical department was not open, they were to go directly to security because Michelin's security officers are trained EMTs and the employees were specifically instructed not to go to the family health center for work-related injuries; and (4) missed the follow up appointment with

B. The Court of Appeals misapprehended and misapplied the facts related to Dr. Scott Boyd.

The core of the Court of Appeals' decision on the Cooper defense is that although the Full Commission found Dr. Boyd was not aware of the extent of Brailey's prior back injury, according to the Court of Appeals, the Full Commission's decision must be reversed because the record contains no evidence that the prior injury did not resolve or any evidence of the extent of the prior injury. (Appx. 1038). In reaching its decision, the Court ignored the fact that Brailey admitted he did not tell Dr. Boyd about previously being placed under restrictions because of his back or his prior back injury. (R. 599). Instead, the only thing Dr. Boyd knew was what Brailey told him—that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment." Thus, Dr. Boyd only had false information because Brailey reported 10/10 back pain only weeks prior to the appointment with Dr. Boyd.[4] Further, Brailey did not tell Dr. Boyd that he previously told Dr. Norris at Richtex Brick that he "knows something is wrong with his back and he wants to go to a back specialist." He did not inform Dr. Boyd that Dr. Norris advised Brailey not to do any heavy lifting until he sees the surgeon, and that he never visited a specialist. Furthermore, as explained by the Safety Manager, Mark Gross, Michelin and its doctor were not able to investigate the full extent of the prior injury because Brailey did not inform the company of prior back issues and the prior workers' compensation claim.

Dr. Izard "because he did not want to drive while taking pain medication" when in fact Brailey denied the transportation offered and lied to the Single Commissioner regarding his reasons for not attending the follow up appointment. More importantly, as discussed in this Petition, the Court appears to have accepted Brailey's claim that his current pain was in "a different area of his back" than the prior injury in holding that there was no causal connection between the false representation to Michelin and the current injury. This was error.

[4] Dr. Boyd testified that "[p]roper application of the scale, [ten out of ten], should be the worst pain you could experience." (R. 322).

Finally, even if the Court was correct that there was no evidence that the 1997 injury did not resolve, the opposite of the Court's reasoning on the resolution of injury is also true—there is no evidence Brailey's injury did "resolve." The medical records indicate Brailey was "on disability" following his job at Westinghouse and before beginning employment with Michelin. (R. 58). In any event, the evidence is not necessary for a finding that the Full Commission's decision is supported by substantial evidence.

C. The Court of Appeals decision conflicts with this Court's decision in Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

By adding a requirement that the record contain medical evidence that the prior back injury contributed to the alleged current injury or evidence that the claimant was predisposed to the injury conflicts with this Court's decision in Jones. (Appx. 1038, reversing because "[t]he record contains no medical evidence that Brailey's 1997 back injury somehow contributed to the June 24 injury or that he was predisposed to back injury"). In Jones, when determining whether an employer proved the third element of Cooper, this Court held "there is a causal connection between Claimant's injuries and the false representation as she had documented back problems prior to employment and claims that she injured her back while working for Respondent." Jones, 355 S.C. at 419, 586 S.E.2d at 114. That is exactly the case here. Brailey had documented back problems to his low/middle back prior to employment with Michelin—which he specifically denied to Dr. Boyd—and claims he injured his low/middle back while working for Michelin. The inquiry stops there. Instead of properly applying Jones, the Court of Appeals went further and lodged additional unknown requirements upon an employer to prove the fraud in application defense under Cooper.

The Court of Appeals ignored the fact that Brailey's claims in the instant action are the exact same claims which led to a workers' compensation injury and settlement for the prior back

injury. Indeed, the prior medical records and reports demonstrate the current issue involves the same part of Brailey's back as the prior issue that he failed to include in his application for employment with Michelin—low and middle back that hurts when he bends. In the December 4, 1997 medical report, the note states "back exam shows tenderness to palpation of the *intervertebral space at L2-3* . . . . There is tenderness and muscle spasm in the *bilateral lumbar region* . . . ." (R. 158) (emphases added). Further, the Workers' Compensation Commission's database shows the location as "*low back* area" for the 1997 claim. (R. 166) (emphasis added). Brailey's Form 50 Request for a Hearing in the instant case alleges he sustained an injury to his "back," indicating an issue with any part of his back. In the instant action, Brailey completed Michelin's Post-Injury Questionnaire claiming the injury was to his "*lower left & middle back.*" (R. 80) (emphasis added). He claimed, "severe pain, ba[re]ly can move can't been (sic) down." Id. Likewise, in the medical record from the December 11, 1997 visit with Dr. Norris, Brailey reported "the pain is in the *middle of his back*, hurts sometimes when . . . he bends." (R. 159) (emphasis added).

Like the prior injury at Richtex Brick, within three weeks after starting the physical aspect of his job at Michelin, Brailey reported low back pain and did not follow the instructions of the treating physician, and instead sought care by Doctors Care. As previously stated, the treating physician at Richtex, Dr. Norris, directly informed Brailey that he was "unable to perform the job" and that because he had been having pain the entire time he worked for the job, he should consider finding different employment. (R. 158-59). Dr. Norris instructed him to see a specialist for his "low back injury." Id. Dr. Norris' medical records provide that Brailey told Dr. Norris that he knows something is wrong with his back and he wants to go to a back

specialist. Id. Dr. Norris' last medical instruction to Brailey states, "I will place him on no heavy lifting until he sees the surgeon." Id. Brailey never visited a specialist.

Furthermore, medical evidence of predisposition to back injury or that the prior injury contributed to the current injury is not required under Jones or any other law in South Carolina. But even if it was necessary, Dr. Norris' notes provide the medical evidence to support the Full Commission's decision. Dr. Norris opined that if Brailey does a job he is unable to perform, he can injure his back. Jermaine Lemon, who trained Brailey, testified Brailey had difficulty doing his job at Michelin. (R. 659-663). Training manager, Troy Lowman, testified Brailey never successfully completed validation and could not do the job safely. (R. 697-98). Michelin employees explained that Brailey, who was previously told by a doctor that he could not perform heavy lifting, could not perform Brailey's job at Michelin. (R. 667).

In the same vein, the Court of Appeals also improperly weighed the evidence by placing great weight on the fact that Brailey worked at Westinghouse in the time between his employment with Richtex and Michelin. First, the Court ignored the fact that Brailey lied on his Medical History and Examination Form for his position at Westinghouse. When Brailey applied to Westinghouse, he falsely denied ever having had a work-related injury or illness; ever being restricted medically from doing any part of his job; ever having any pain, numbness, limited motion, or injury of the back; ever having a work injury, workers' compensation claim, or receiving a settlement for any injury; or having had a previous job with similar physical demands. (R. 177-79). Thus, the Court of Appeals again inappropriately relied on Brailey's testimony that he allegedly worked without issue at Westinghouse to conclude there was no causal connection between Brailey's false representation and the alleged injury.

The record lacks credible evidence that Brailey was able to safely perform the job at

Westinghouse without issue whereas the evidence in the record is clear that Brailey could not perform his job at Richtex or Michelin. More importantly, there is no credible evidence for the Court of Appeals to conclude Brailey never complained to Westinghouse about back issues or that Westinghouse never sent Brailey for any medical treatment inhouse or elsewhere, resolving the matter internally. The record does not include testimony from any Westinghouse representative. In fact, the medical records indicate Brailey was "on disability" following his job at Westinghouse and before beginning employment with Michelin. (R. 58).

Furthermore, although during the hearing before the Single Commissioner, Brailey alleged his position at Westinghouse required that he lift pallet containers and push carts of wrenches and rods weighing up to 800 pounds (R. 411, 413), in his deposition testimony, Brailey testified that his Westinghouse job, "was not too much physical demand on that job. It was just basic. It was really light." (R. 247). A "light" job cannot compare to the physical demands placed upon Brailey at Richtex Brick and Michelin. Accordingly, the Court of Appeals' opinion should be reversed and the Full Commission's order reinstated. See Jones, 355 S.C. at 418, 586 S.E.2d at 113 ("Our standard of review does not permit us to weigh the evidence and make our own determination."); S.C. Code Ann. § 1-23-610 (Supp. 2020) (noting that the reviewing Court shall not substitute its judgment for that of the agency "as to the weight of evidence on questions of fact").

D. Alternatively, even if the Court of Appeals applied the preponderance of the evidence standard, it still should have affirmed the Full Commission.

Even if the Court of Appeals had applied the preponderance of the evidence standard to the determination of whether an employer-employee relationship existed, the Court nonetheless should have affirmed the Full Commission. As an initial matter, even under the broad preponderance of the evidence standard, the final determination of witness credibility is reserved

to the Full Commission. See Hernandez-Zuniga v. Tickle, 374 S.C. 235, 243-44, 647 S.E.2d 691, 695 (Ct. App. 2007) (providing that even when analyzing a workers' compensation issue under the preponderance of evidence standard, "the final determination of witness credibility is usually reserved to the Appellate Panel"); Paschal v. Price, 392 S.C. 128, 133, 708 S.E.2d 771, 773 (2011) (same). As previously discussed, the Court of Appeals erroneously relied a great deal on Brailey's credibility to reach its conclusions reversing the Full Commission despite the Full Commission's credibility finding and the overwhelming evidence in the record that Brailey lacks credibility.

Moreover, the facts of this case are similar to the facts outlined in Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009)—a case applying the preponderance of the evidence standard and which Brailey urged the Court of Appeals to follow. The claimant in Brayboy sustained a back injury in 2003. Id. at 464, 681 S.E.2d at 567. Brayboy's employment application included disclaimers similar to those outlined in Brailey's post-hire questionnaire. Id. at 464-65, 681 S.E.2d at 567-68. As in the instant case, "[n]otably, Brayboy signed his name under these cautionary statements. Despite these warnings, Brayboy responded in the negative to all questions inquiring if Brayboy had prior back injuries, physical defects, medical conditions, or previous workers' compensation claims." Id. at 465, 681 S.E.2d at 568. "Brayboy testified he did not report any of his prior injuries to WorkForce as he did not feel the injuries were relevant to a construction job. Also, Brayboy stated he did not include the cave-in injury as it had 'cleared up very quickly.'" Id. at 466, 681 S.E.2d at 568. Similarly, here, although Brailey executed the declaration and authorization portion of the form, he claims he quickly completed the forms and suggests that because he believed the prior workers' compensation claim was minor and occurred some years prior, Michelin did not need to know that information.

Like Brayboy, Brailey failed to report his back problems and admitted he provided false information on Michelin's application as well as Westinghouse's employment documents. Id. at 467, 681 S.E.2d at 569.

As in Brayboy, Michelin presented credible evidence that it relied upon Brailey's false statements, and there was irrefutable evidence of a causal connection between the false information and the current injury because the injury is "primarily in the same area" as the prior back injury. Id. at 467-68. As this Court decided in Brayboy, this Court should be "firmly convinced" Michelin established all three factors of Cooper and the Court of Appeals erred. *Id.* at 569.

II. THE COURT OF APPEALS SHOULD HAVE EITHER AFFIRMED THE FULL COMMISSION'S RULING ON THE CAPERS V. FLAUTT, 305 S.C. 254, 407 S.E.2D 660 (CT. APP. 1991) ISSUE OR REMANDED TO THE FULL COMMISSION TO MAKE ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. The Court of Appeals erred in finding Capers is inapplicable to this case.

As detailed in Petitioner's Final Brief to the Court of Appeals, in Capers, just as the instant case, the Commission denied benefits because the claimant knowingly and willfully made a false statement on his employment application and because the Commission found the claimant did not sustain an accidental injury as contemplated within S.C. Code Ann. Section 42-1-160 (1976), partly based upon the credibility of the witnesses.[5] The claimant previously experienced a medical condition which led to a workers' compensation claim and hindered the claimant's ability to perform his job. Id. at 256-58, S.E.2d. at 661. The claimant did not inform the new employer of the prior injury and instead continued to perform a job that could cause the same type of injury. The Commission found the injury was not an injury by accident because the

[5] Petitioner also provided the Court of Appeals with several other similar cases which rely upon Capers and support the Full Commission's decision in the instant matter. (Appx. 29-34).

claimant "had been aware of the situation for several years and had previously left a job due to the same problem." Id.

Capers is not distinguishable from this case. It is instead, directly on point. It is difficult to imagine a situation in which Capers would not apply to these circumstances. Brailey knew for many years that performing the strenuous type of job he performed at Michelin had the potential to injure his back. And at Richtex, Dr. Norris' medical records succinctly state that Dr. Norris told Brailey that if he performed a laborious job that he is incapable of performing, he can injure his back. (R. 158-59). Brailey then failed to inform Michelin of his prior employment with Richtex and his prior workers compensation for his back. Moreover, the medical records show he went to the doctor weeks before the vague injury he reported on June 24, 2017, and reported that he had been experiencing back problems for several weeks due to his job at Michelin. At his doctors visit on June 13, 2017, Brailey reported that he had been having lower back problems for the prior two weeks, meaning Brailey had been experiencing back problems at Michelin since at least May 2017. Brailey did not report those back problems to any person at Michelin. Thus, like the claimant in Capers, Brailey's had been aware of the situation for several years, had previously left a job due to the same problem, and had experienced the same problem for several weeks prior to June 24, 2017. The Court of Appeals seemingly ignored Brailey's two medical visits right before the alleged date of accident. Given Brailey's testimony that he had been told this type of strenuous work often led to muscular and soreness issues and Brailey's history at Richtex Brick, culminating in 10 out of 10 pain before the date of accident, under Capers Brailey had a duty to inform Michelin of the issues because he knew or should have known he would eventually suffer a worsening condition which is exactly what happened if the Court accepts Brailey's story as true.

Accordingly, substantial evidence supports the Full Commission's conclusion under Capers that Brailey problem was not an unlooked for event which he did not expect. It was, in fact, an event which he could anticipate given his past experience.

B. Because Capers is directly applicable, if the Court of Appeals was going to reverse the Full Commission on the Capers issue, it should have remanded to the Full Commission to make its own findings of fact and conclusions of law.

Alternatively, because Capers is directly applicable to this case, it is black letter law in this state that if an appellate court determines the Full Commission's findings of fact and conclusions of law were not sufficiently detailed, South Carolina law requires the Court to remand to the Commission for sufficiently detailed findings and conclusions before an appellate court can determine whether the Commission's decision regarding Capers was erroneous. See Turner v. Campbell Soup Co., 252 S.C. 446, 450, 166 S.E.2d 817, 818 (1969) (finding remand is appropriate when the appellate court determines the Commission failed to make an essential finding of fact or when the appellate court concludes the Commission's findings are so indefinite or general as to afford no reasonable basis for the appellate court to determine whether findings of fact are supported by evidence and whether the law has been properly applied to the findings); Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 129, 127 S.E.2d 288, 295 (1962) (holding an issue that impacts the "ultimate liability in the case" is "one upon which the Commission is required to make an express finding of fact" and "failure to do so requires that the case be remanded to the Commission for such finding" (superseded by statute)).[6]

[6] See also Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (remanding for administrative body to make detailed factual findings before appellate court could determine whether decision was erroneous, stating "[i]t is impossible for an appellate court to review the order for error, since the reasons underlying the decision are left to speculation"); Baldwin v. James River Corp., 304 S.C. 485, 487, 405 S.E.2d 421, 422-23 (Ct. App. 1991) (same); Pack v. State Dep't of Transp., 381 S.C. 526, 538, 673 S.E.2d 461, 468 (Ct. App. 2009) (same); Canteen v. McLeod Reg'l Med. Ctr., 400 S.C. 551, 558, 735 S.E.2d 246, 250 (Ct. App. 2012) (holding circuit court improperly weighed evidence

III. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE FULL COMMISSION'S FINDING THAT BRAILEY FAILED TO PROVE HE SUSTAINED AN INJURY BY ACCIDENT ON JUNE 24, 2017, BECAUSE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE FULL COMMISSION'S FINDING AND THE COURT MISAPPLIED CRANE V. RABER'S DISCOUNT TIRE RACK, 429 S.C. 636, 842 S.E.2d 349 (2020).

A. Substantial evidence supports the Full Commission finding Brailey failed to prove an injury by accident arising out of and in the course of employment on June 24, 2017.

The Court of Appeals broadly rules that the Full Commission erred in finding Brailey failed to prove he injured his back in an accident arising out of his employment with Michelin. (Appx. 1040-41). Yet, the Full Commission's order is more narrowly tailored than the Court of Appeals' opinion and should be affirmed because it is supported by substantial evidence. Specifically, the Full Commission found

> This claim is denied in its entirety based on evidence of numerous issues relating back to 1997 through 2017. The claimant has failed to carry his burden of proof of an accident being sustained on June 24, 2017, due to his lack of credibility, the lack of sufficient medical evidence to support his allegations, and, moreover, due to medical evidence to the contrary. We find the claimant was unable to return to work after June 24, 2017, due to a previous incident.

The Full Commission then concluded "[u]nder §42-1-160, the claimant did not sustain compensable injury to his low back while under the employ of [Michelin] on June 24, 2017, as alleged. Claimant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented." Thus, the question here is did Brailey prove an injury by accident arising out of his employment with Michelin on June 24, 2017. The answer to the question is no he did not.

The Court of Appeals ignored the fact that Brailey only claimed an injury by accident on June 24, 2017. He did not claim a repetitive trauma injury or an injury occurring on June 11,

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and made its own factual determinations, remanding to Commission for specific findings and conclusions).

2017, or June 13, 2017. Although there is record of Brailey visiting a medical facility on June 24, 2017, there are equally probative records evidencing similar complaints from weeks prior. Moreover, Michelin's doctor, Dr. Izard noted the cause of Brailey's condition was not known at the time. (R. 84). Brailey, thereafter, failed to return to Dr. Izard as instructed. Finally, Brailey admitted and medical records demonstrate that he was in less pain on June 24, 2017, than he had been on June 13, 2017. (R. 516). Also, Brailey admitted that he had hard coughing issues going on during this time which hurt his back and agreed he was coughing hard enough to herniate a disk. (R. 530-532). As Brailey has only alleged injury for Jun 24, 2017, it was reasonable for the Full Commission to find Brailey failed to meet his burden of proving an injury by accident on the date he has alleged. See Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999) (holding the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence); Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996) (noting substantial evidence is evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached).

Even if Brailey now argues a different date prior to June 24 or an aggravation of a preexisting injury, the assertions would not warrant reversal of the Full Commission because the Commission's decision is supported by substantial evidence. See Sharpe, 336 S.C. at 161-62, 519 S.E.2d at 106 (affirming the Commission's decision that the claimant failed to prove an injury by accident on a specific date and rejecting the argument that even if the claimant was injured on a different date, the claimant's work accident aggravated the pre-existing injury); id. ("Again, although there was evidence from which the Commissioner could have found that an accident occurred on July 21st, and from which he could have held a prior injury was aggravated,

there is ample evidence in the record from which reasonable minds could infer that Sharpe was actually injured on July 16th, that no accident occurred on July 21st, and that, in fact, Sharpe 'staged' the July 21st accident.").

The Court erred in holding "the medical evidence pertaining to his 2017 injury, which consists of an MRI and the expert medical opinion of a neurosurgeon, is not contradicted and constitutes substantial evidence that supports a reversal of the Commission's order." (Appx. 1041). First, Dr. Boyd testified that there was no way to tell from looking at Brailey's MRI scan how long the herniated disc was present. (R. 308, 326-27). It is plausible that the herniated disc could have been present long before Brailey even began working at Michelin. *See* R. 58 (noting Brailey was "on disability" following his position with Westinghouse). Although Brailey claimed there is no medical evidence showing a different incident or that the radiculopathy and herniated disc existed before June 24, 2017, the Court of Appeals ignored the evidence of Brailey experiencing back pain in 1997, so much so that he filed a workers' compensation claim and told the treating doctor that he needed to see a specialist and the 10/10 back pain that sent Brailey to two different doctors earlier in June 2017.

Next, Dr. Boyd testified he could not "be certain" as to whether Brailey's lower back problem could be caused by an accident on June 24, 2017. (R. 328-339). Dr. Boyd testified he could not be certain about a date of accident and that the questionnaire he executed for Brailey should actually say he was uncertain about the date. (R. 328-329). Dr. Boyd further testified the history given to him was different than the history given to Internal Medicine. (R. 320-321). Accordingly, the Commission did not err in concluding Brailey failed to meet his burden of proving an injury by accident on June 24, 2017. The Court of Appeals erred in reversing the Full Commission. See Brunson v. American Koyo Bearings, 395 S.C. 450, 718 S.E.2d 755 (2011)

(affirming finding that a claimant did not suffer a work-related injury where her claim that she had never suffered from respiratory issues prior to the claim was directly refuted by the medical records documenting her prior complaints, the evidence related to her claim was conflicting, and a doctor believed the claimant had ulterior motives for pursuing her claim); Fair v. Fluor Daniel, 309 S.C. 520, 424 S.E.2d 541 (Ct. App. 1992).

B. The Court of Appeals misapplied Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020).

This case is distinguishable from Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020). As this Court is aware, in Crane, the claimant was investigating the cause of a hissing noise when an air hose suddenly separated from its fitting and caused an explosion-like sound. Id. at 640, 842 S.E.2d at 350-51. Surveillance video from the time of the accident showed the claimant stepped away from the tire changer and covered his ears with his hands. Id. Shortly thereafter, the claimant's wife drove him to the hospital, where the claimant complained of difficulty hearing in both ears and assessed his ear pain as an eight out of ten. Id. There was no dispute in the record as to whether the accident occurred because the surveillance camera captured the entire accident. At a hearing, the single commissioner found the claimant lacked credibility in large part because he appeared to exaggerate his hearing loss at the hearing. Id. at 641, 842 S.E.2d at 351-53. Based primarily on the finding that the claimant's testimony was not credible, the commissioner denied the claimant's claims. Id. This Court reversed the Commission's decision because the claimant's credibility was not "reasonably and meaningfully" related to whether the claimant actually suffered hearing loss at his employment on February 19, 2014. Id. at 641-48, 842 S.E.2d at 351-55.

The Court held:

> Credibility can be important in resolving factual disputes before the commission. When credibility is a reasonable and meaningful basis on which to make a factual determination, and when there is evidence of sufficient substance to afford a reasonable basis for the credibility finding, we will uphold the commission's factual determinations on the basis of credibility.

Id. at 648, 842 S.E.2d at 355.

After Crane, in May 2021, in Rummage v. BGF Industries, 434 S.C. 441, 865 S.E.2d 380 (Ct. App. 2021), the Court of Appeals reiterated that credibility can be an important factor in resolving disputes before the Commission and the Commission can give less weight to medical opinions if it is believed that the claimant was untruthful in self-reporting of symptoms to the medical providers.

In Rummage, the claimant fell backward and struck her head into a hand truck. The claimant filed a workers' compensation claim and secured causation opinions from several doctors opining to a reasonable degree of medical certainty that the claimant suffered from psychological issues after her workplace injury, had not reached MMI, and required psychiatric treatment including therapy.

After a hearing, "the single commissioner denied Claimant's claim, by and large based on her assessment of Claimant's credibility." Id. at 452, 865 S.E.2d at 386. The single commissioner gave little weight to the medical opinions of the doctors who provided causation because "they had not been provided Claimant's accurate medical history and had based their opinions on Claimant's unreliable self-reporting." Id. at 453, 865 S.E.2d at 386. The Full Commission affirmed the single commissioner, and the Court of Appeals affirmed the Full Commission.

The Court concluded that even when a claimant is required to produce medical evidence to prove a claim, "this does not require the fact finder to ignore medical evidence that is not

expert opinion, other lay evidence, or the credibility of the Claimant." Id. at 458, 865 S.E.2d at 389. The Court of Appeals in Rummage recognized the holding in Crane and stated that "In this case, credibility was a substantial issue . . . . Therefore, the Appellate Panel could have properly given less weight to Claimant's doctor's opinions if it believed Claimant was untruthful in her self-reporting of symptoms or her presentation." Id. at 459, 865 S.E.2d at 390.

The Court in Rummage pointed to numerous incidences demonstrating the claimant's lack of credibility, including the claimant denying prior issues when the medical records showed otherwise, indicating she could "not remember" on specific issues, and two incidences in which the claimant had been dishonest. Ultimately, the Court held the claimant's medical experts' opinions "were substantially weakened in light of the credibility findings of the Appellate Panel as the opinions rely, at least in part, on an exaggerated presentation of symptoms." Id. at 460, 865 S.E.2d at 391.

Here, like in Rummage and other cases, credibility was a substantial issue that was "reasonably and meaningfully" related to whether Brailey actually suffered an injury at work on June 24, 2017, as alleged or as to the causation of his alleged injuries. This is a denied claim from a claimant who provided false statements to employers, medical professionals, and even the Single Commissioner at a hearing. As in Rummage, the Full Commission could give less weight to Dr. Boyd's opinions, and properly did so, because it is clear from the totality of the evidence that Brailey was untruthful in his self-reporting of symptoms, the dates he reported the symptoms, and the cause of the injury.

Furthermore, Dr. Boyd's testimony is not dispositive of the issue. The Full Commission has discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established and although medical testimony is entitled to great

respect, the fact finder may disregard it if other competent evidence is presented. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). Indeed, "medical testimony should not be held conclusive irrespective of other evidence." Id. at 467, 40 S.E.2d at 682-83. Further, the Court of Appeals ignored Dr. Boyd's testimony that he had no way of knowing how long Brailey's herniated disc had been present. (R. 308, 326-27). Dr. Boyd confirmed that his opinion was based 100% on the history Brailey gave him and on the records from Urgent Care he may have received. Therefore, a crucial component of Dr. Boyd's opinion was his ability to trust the history Brailey provided to him and as addressed throughout this Petition, the Single Commissioner (who observed Brailey testify) and Full Commission (the ultimate finder of fact) found Brailey lacked credibility.

Moreover, the Court of Appeals misapprehended the Commission's credibility finding. The Commission's credibility finding was based on more than Brailey's "vague" and "rambling" responses. (App. 1040). Specifically, the Commission provided as follows:

> We find the claimant is not credible. This Finding is based upon the greater weight of the evidence in the record, the testimony of the claimant, the testimony of representatives from Michelin, as well as the Hearing Commissioner's observations of the claimant at the hearing. Specifically, the greater weight of the evidence shows that a couple of weeks after he began working for Richtex in 1997, the claimant had a very similar incident. In that claim, the claimant alleged back pain after he began physical work with the company. At Richtex, as in the current claim, instead of following the treating doctor's orders, the claimant sought treatment at Doctors Care.
>
> As further evidence of the claimant's lack of credibility, the claimant omitted information about a former employer—an employer for which he had a workers' compensation claim for a back injury from his employment application for Michelin. The claimant also denied any prior workers' compensation claims, which is untrue. Moreover, he repeatedly attempted to justify his answers during his testimony. We find that while testifying, the claimant gave confusing answers when asked direct questions by

> his attorney. As noted by the Hearing Commissioner throughout the proceeding, the claimant provided vague responses when questioned by defense counsel. He would not answer defense counsel's questions, rambling through responses. (H.T. 227).

(R. 43-44).

Here, the record is replete with evidence demonstrating Brailey's testimony was completely unreliable and lacked any credibility whatsoever because of his inconsistent and untrue statements. Including, but not limited to, the facts that Brailey

- falsely stated to employers he never had a workers' compensation claim (R. 415-16)
- falsely completed the Michelin's Post-Hire Health Questionnaire when he applied to Michelin (R. 461, 601-05)
- falsely completed Westinghouse's medical history form when he began working for Westinghouse only three and a half years after his back injury at Richtex (R. 606-10, 613-23)
- falsely told his family doctor that he never had prior back pain (R. 485-86)
- falsely stated he had never had any prior back problems or prior knee surgery when he met with Michelin's doctor on June 26, 2017 (R. 522-23)
- falsely completed Michelin's Post-Injury Questionnaire after he claimed he had a work accident
- falsely stated to Dr. Boyd on July 24, 2017, that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment" even though he had reported 10/10 back pain only weeks prior, and was in fact treated for a prior workers' compensation claim to his back by Dr. Norris
- admitted that he lied at the hearing when he said he did not return to see Dr. Izard because he did not have transportation, when in fact, Mark Gross did offer to provide him with transportation

Contrary to Brailey's contentions otherwise, this case is also distinguishable from Clark v. Philips Elecs./Shakespeare, because here, unlike Clark, the Full Commission explained both the basis of the credibility determination and how the determination rationally affects the disputed fact. 433 S.C. 186, 192, 857 S.E.2d 378, 381 (Ct. App. 2021), reh'g denied (Apr. 21, 2021). The Court in Clark in fact acknowledged that even under Crane "factual findings based

on credibility calls can, and often do, amount to substantial evidence that requires us to affirm." Id.

Indeed, the Court of Appeals in the instant matter agreed Brailey willfully and knowingly made false statements. Brailey lied to his employers, he lied to doctors, and provided inconsistent testimony between his deposition and hearing testimony. Substantial evidence supports the Full Commission's decision, and this Court should reverse the Court of Appeals and reinstate the Full Commission's order.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioner

December 2, 2022

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5906 (S.C. Ct. App. filed April 27, 2022,
Withdrawn, Substituted, and Refiled November 2, 2022)

Issac D. Brailey, Claimant .....Respondent,

v.

Michelin North America, Inc. (US7), Employer
And Safety National Casualty Corp., Carrier, ... Petitioners.

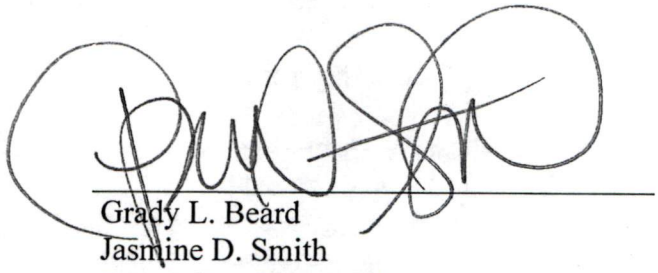
PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, I certify that I have caused **Petitioners' Petition for a Writ of Certiorari** and **Appendix** to be served on the following counsel of record by AIS email.

Stephen B. Samuels, Esquire
Samuels Reynolds Law Firm, LLC
1320 Richland Street
Columbia, SC 29201
803-779-4000
stephen@samuelsreynolds.com

Copy of Service email is attached herewith, as required.

I further certify that all parties required by the Rule to be served have been served.



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December 2, 2022

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December 2, 2022

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Brailey v. Michelin
Appellate Case No.: 2019-000556
RGSL File No.: 6555-8068

Dear Ms. Kitchings:

Enclosed herewith for filing please find two (2) copies of the following:

- Petitioners' Petition for a Writ of Certiorari;
- Proof of Service

Please file as appropriate and return a file-stamped copy to our office via our courier.

By copy of this letter and as evidenced by the Proof of Service, I am serving the above on counsel of record.

With kindest regards,

Cyndi Nygord
Paralegal

cdn:sec

cc: Stephen B. Samuels, Esquire (via email)
Jasmine D. Smith, Esquire (via email)
Grady L. Beard, Esquire (via email)