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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Withdrawn, Substituted, and Refiled November 2, 2022)

Appellate Case No. 2022-001688

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Isaac D. Brailey, Claimant, . . . . . Respondent,

v.

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

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Court of Appeals reached the right result when it reversed the Appellate Panel of the Workers' Compensation Commission and held Isaac Brailey was entitled to workers' compensation benefits under Title 42. As such, there is no compelling reason for this Court to issue the writ.

Nonetheless, the decision below is not a perfect one. On the primary issue in the case – whether Michelin could void the employment relationship under the Cooper defense – the Court of Appeals applied an incorrect standard of review. To wit, the court applied the *substantial evidence* standard of review rather than the *preponderance of the evidence* standard applicable to the jurisdictional issues raised under Cooper v. McDevitt & Street, 260 S.C. 463, 196 S.E.2d 833 (1973).

As to this one issue, "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242 (b)(4), SCACR. See, Brayboy v. Workforce, 383 S.C. 463, 681 S.E. 2d 567 (2009)("The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review."), *quoting* Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 170 (2d ed. 2002). Should the Court issue the writ, it should be for the sole purpose of clarifying and correcting the standard of review, along with addressing the first two prongs of the Cooper defense where the Court of Appeals affirmed erroneous findings under the substantial evidence standard of review.

The specific questions presented for certiorari are:

1. Did the Court of Appeals:

    A. incorrectly analyze the Cooper defense under the substantial evidence standard of review when jurisdictional issues must be reviewed under the less deferential preponderance of the evidence standard of review,

such that its findings on the misrepresentation and reliance prongs were erroneous and should be reversed; and

B. Did the Court of Appeals correctly hold that Michelin failed to prove a causal connection between the alleged misrepresentation and the injury when the undisputed lay and medical evidence confirmed that a minor back strain twenty years earlier with no evidence of ongoing back issues in the interim had no connection with the objective evidence of a new injury requiring surgery to a different part of the back as a result of the work accident?

2. Did the Court of Appeals correctly reverse the Appellate Panel's finding on the Capers v. Flautt, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991) issue and correctly hold that a remand was not warranted when there was neither evidence nor legal grounds to support such a defense?

3. Did the Court of Appeals correctly reverse the Appellate Panel's finding that Brailey failed to prove he sustained an injury by accident on June 24, 2017, when the fact of an incident/accident is proven and uncontradicted expert medical confirmed that the incident/accident caused the injury?

## STATEMENT OF THE CASE

This appeal from the Workers' Compensation Commission arises out of injuries suffered by Respondent Isaac Brailey on June 24, 2017 while employed by Petitioner Michelin North America, Inc. The case was tried before Commissioner Avery Wilkerson on March 23, 2018.

The single commissioner denied Brailey's claim for benefits. He held (1) Michelin proved all three elements of 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; (3) Brailey was barred by Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct.App.1991); and (4) Brailey intentionally injured himself and is thus barred under Section 42-9-60. [R.P. 21-24].

The Appellate Panel affirmed with modifications. [R.P. 42-46].

The Court of Appeals reversed. In a refiled opinion, the court held (1) substantial evidence

did not support the Appellate Panel's finding that Michelin proved a causal connection between Brailey's alleged misrepresentation and the injury; (2) that Capers did not apply to the facts of the case; (3) that Michelin failed to prove Brailey intended to injure himself; and (4) that the Appellate Panel erred in finding Brailey did not injured his back in an accident arising out of his employment. Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32).

Petitioner Isaac Brailey had previously filed a workers' compensation claim in 1997 for a low back strain. He was seen twice by Dr. Norris, who diagnosed him with lumbar and thoracic strain. X-rays were "essentially normal." On the second visit, Dr. Norris noted "his condition has improved." He did place him on "no heavy lifting until he sees . . . Dr. Bethea at Moore Clinic [who] would certainly put this to rest most expediently." [R. P. 158-159]. Brailey ultimately settled his claim for $2,500.00 without ever seeing Dr. Bethea or any other doctors. [R.P. 149].

Over the next two decades, Brailey had no recurrent problems with his back. He worked uneventfully for Westinghouse in an industrial job for 16 years.

After being laid off by Westinghouse, Brailey began working for Michelin on April 17, 2017. As part of the hiring process, Brailey was required to complete a *Confidential Health Questionnaire for Post-Offer Examination* and undergo a physical examination. When completing the form, Brailey omitted the back strain from twenty years earlier. [R.P. 176]. Brailey was cleared to work by Michelin's company doctor based on the physical examination. [R.P. 778]

Brailey began experiencing muscle soreness in his back soon after starting work. His coworkers assured him this was normal and expected. [R.P. 259-262; 429, line 23-p. 430, line 5; 664, lines 1-2; 708, 1-11; 778, line 25-p. 781, line 1]. To be on the safe side, he saw the emergency

room and his family doctor. Both doctors cleared him to continue working attributing his pain to "likely strained muscles due to heavier work load at new job." [R.P. 65].

On June 24, 2017, Brailey was "stretching rubber" when he felt a sharp pain in his back. As it was Saturday, the nurse's station was closed. Brailey went to the emergency room and spoke to the nurse on the phone. The emergency room doctor referred him to a nsurosurgeon, prescribed medication and wrote him out of work for three days. On Monday morning, he was seen by Michelin's company doctor, Dr. Izard, who told him not to follow the orders from the emergency room doctor. Brailey never returned to work at Michelin.

Brailey saw Dr. Scott Boyd, a neurosurgeon, in July 2017. After an MRI, Dr. Boyd recommended back surgery. Dr. Boyd testified in his deposition, during which he was cross-examined on Brailey's medical records including records from the weeks before the accident. At the conclusion of the deposition, Dr. Boyd opined, "I believe, based on his history and in his records, that [the injury] was related to his work at Michelin in the continuum with some event on about June 24 that made things worse."

Subsequent to Dr. Boyd's deposition, Michelin obtained the medical records of Dr. Norris from Brailey's 1997 back strain. At the hearing, Michelin was given the opportunity to reconvene Dr. Boyd's deposition (requested by Brailey). Michelin declined and the record was closed.

## ARGUMENT

### 1. The Court of Appeals should have reviewed the record under the *Preponderance of the Evidence* standard and held Michelin cannot prove *any of the three* elements of the *fraud in the application* defense.

Michelin argues "[t]he Court of Appeals did not properly apply the standard of review it relied upon in its opinion – the substantial evidence standard." [Petition, page 7]. To be clear, the standard of review applicable here is *not* substantial evidence; it is preponderance of the evidence.

Under Cooper, the employer can void the employment relationship, thus divesting the Commission of jurisdiction, if it proves "(1) The employee must have knowingly and wilfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and (3) There must have been a causal connection between the false representation and the injury." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973). All three factors must be present for the employer to avoid paying benefits to the employee. Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993).

The court held that Michelin failed to prove a causal connection between the allegedly false representation and the injury. However, when reviewed under the preponderance of evidence standard of review, Michelin failed to prove *any* of the three elements of the Cooper defense.

#### A. This case should have been reviewed under a preponderance of the evidence standard.

Petitioners argue the Court of Appeals misapplied the *substantial evidence* standard of review. The court did indeed apply the *substantial evidence* standard to this case. This was error, as the court is required to apply the less deferential *preponderance of the evidence* standard.

The Cooper defense is the sole common law defense to a workers' compensation claim appearing in our jurisprudence. If the employer can prove all three elements, it can retroactively void the employment relationship. Without an employee/employer relationship, the Commission lacks subject matter jurisdiction to adjudicate a claim. "The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review."[1] See eg., Brayboy v. Workforce, 383 S.C. 463, 681 S.E. 2d 567 (2009); Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516, 519 (Ct.App. 2009), *quoting* Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 170 (2d ed. 2002).

Under the preponderance of the evidence standard, the appellate court makes findings of fact

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[1]Jones – relied on by Petitioner – applied the substantial evidence standard of review rather than the correct preponderance of the evidence standard. Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) There are a handful of cases which have done the same – including the case *sub judice*. Jones was decided in 2003. However, four years after Jones, this Court clarified the standard of review in Brayboy v. WorkForce, 383 S.C. 463, 464, 681 S.E.2d 567, 567 (2009). The Court held that when reviewing an employer's attempt to void the employment relationship under Cooper, the appellate courts review the Appellate Panel's findings on the relationship's existence according to its own view of the preponderance of the evidence. Id. See also Rabon v. Arrow Exterminating Inc., 393 S.C. 510, 713 S.E.2d 347 (Ct. App. 2011)(relying on Brayboy's pronouncement on the standard of review to find "because [employer] never asked Rabon if he had any current or prior injuries, and regardless of his injuries, Rabon was physically able to do all the jobs [employer] hired him to do, we find Rabon did not knowingly and willfully make a false representation as to his physical condition."). Other cases, both before and after Brayboy have confirmed that these case are to be reviewed under the *preponderance of the evidence* standard. See, e.g., Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997); Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993); Givens v. Steel Structures, Inc., 279 S.C. 12, 13, 301 S.E.2d 545, 546 (1983); Cooper v. McDevitt & St. Co., 260 S.C. 463, 466, 196 S.E.2d 833, 834 (1973); Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971); Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (S.C. App. 1983). Indeed, even the author of the Jones opinion stated so in her influential treatise on appellate practice. See Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 170 (2d ed. 2002)) ("The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review.")

based on its own view of the evidence. No deference is given to the Commission's findings, as the appellate court "has both the power and the duty to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission." Watson v. Wannamaker &. Wells Inc, 212 S.C. 506, 48 S.E.2d 447 (1948). As such, Michelin's argument that "the Court [of Appeals] improperly weighed the evidence" fails as a matter of law.

B. The employee must knowingly and wilfully made a false representation as to his physical condition.

The Court of Appeals held "*Substantial evidence* supports the Commission's findings that Brailey willfully and knowingly made false statements as to his physical condition to Michelin on his employment application." Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32, 39 n.5)(emphasis added). As the court reversed on the causal connection element, the court did not engage in detailed analysis of this issue.

Respondent believes the court misapprehended this issue by applying the incorrect standard of review. Should this Court issue the writ, Respondent requests the Court reexamine the evidence and find that Michelin failed to prove that Brailey made a knowing and wilful misrepresentation about his physical condition.

Brailey checked "no" to the question "Are you presently being treated for any condition that may inhibit your ability to work?" His response to this question – the only relevant one – was true and accurate. He had not been treated for back pain for over twenty years. Indeed, the required element is a "false statement about his [current] physical condition;" not whether he *previously* had back pain, a back injury, or a workers' compensation claim. Cooper at 469, 196 S.E.2d at 835.

The other questions were: "Do you have problems with, or have you ever had medical

attention for any of the following?" As Brailey did not have problems with his back at the time he completed the questionnaire, his "no" answer on that portion was true.

He did admittedly have medical treatment for back pain *twenty years* prior to answering the question. However, a failure to disclose a short course of treatment for a minor back injury from twenty years ago does not rise to the level of a *knowing and wilful* false statement intended to deceive Michelin into hiring him. See Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(noting Commission found two-year old medical record to be "stale" and not indicative of claimant's current work status).

To rise to that level, the employee would have to *know* he had a physical condition so serious that he would not be hired were he to disclose it to the potential employer, yet *willfully* proceed to make a false statement to induce the employer to hire him.

The employee in Cooper freely admitted he purposefully deceived the employer to get a job, knowing he would be fired off the job if the employer knew about his "back problem and [that he] could do no heavy work or lifting . . ." Referencing Cooper's testimony, this Court stated "Admittedly, the foregoing answer of the appellant was false, intentional and a material misrepresentation." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973).

The difference here is that Cooper knew he would not get hired if the employer knew of the recent "serious injury to his back," so he wilfully and intentionally lied to get the job. Brailey had no such knowledge and no intent to deceive. When asked "Do you think if Michelin had known that you had back pain twenty (20) years ago that they would have not hired you?;" he responded "They would hire me." [R.P. 422, lines 10-13]. Brailey testified similarly on cross examination.

This Court can take its own view of the evidence and make its own findings of fact on this

issue. The Court should find as a fact that Brailey's failure to disclose medical treatment for a minor injury from two decades ago did not rise to the level of a *knowing and wilful* false statement intended to deceive Michelin into hiring him. Having so found, the Court should reverse the decisions below and hold Michelin did not prove the first element of the Cooper defense.

C. The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.

The Court of Appeals also held the Commission's finding on the reliance factor was supported by substantial evidence. As with the misrepresentation factor, the court applied an incorrect and overly deferential standard of review. Should the writ be issued, Respondent requests that the Court review the evidence under the preponderance of the evidence standard.

In its recitation of the facts, the Court of Appeals stated the safety manager at Michelin, Mark Gross, "verified that Michelin relies on the answers give by employees on hiring forms." Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32). Gross's self-serving testimony – in response to a leading question from Michelin's counsel – is the only evidence in the record that could potentially be considered substantial evidence to sustain the Appellate Panel's finding.[2]

At no point did Gross testify that this reliance had anything to do with the actual hiring process; only that Michelin would investigate further. And if the information came back *from the physical exam* showing the employee could not do the PAP job, Michelin would "probably not" look

[2]As argued in more detail in Respondent's Brief, Michelin's other witnesses had neither the knowledge nor the seniority to speak for Michelin on this issue. Jermaine Lemon was neither a supervisor nor a manager. Nurse Sirois knew only that the company doctor would examine the new employee and clear him or her to work at Michelin. [R.P. 745, line 11-page 278, line 5]. She was not involved in the hiring process nor did she have any personal knowledge of the physical exams done on the new employees.

for other jobs the employee potentially could perform. [R.P. 777, lines 19-24].

Even if this nonspecific testimony could – without more – establish the reliance prong, Michelin's proof fails because Gross further testified that "if [Dr. Tomarchio] cleared him; [we] were good to go." [R.P. 778, lines 14-24; p. 776, lines 19-24]. Gross admitted that "No doctor that [Brailey] saw after he came to work at Michelin had [put him under restrictions]." [R.P. 781, line 15-p. 782, line 8]. Gross also testified he expected new employees to be sore, but wanted to make sure the soreness was not an injury. When asked whether he would know anything different had he been informed that Brailey had gotten the new job soreness taken care of and been cleared to work by a doctor. He responded "Probably not, no." [R.P. 778, line 25-p.781, line 1].

The fact is Michelin did not really rely on the questionnaire – they relied on Dr. Tomarchio to do a complete physical exam.[3] By all accounts this is exactly what he did. And once Dr. Tomarchio cleared Brailey to work full unrestricted duty as a PAP Operator, Michelin had "what [they] needed to know" to put Brailey to work. [R.P. 778, lines 14-24].

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[3]Michelin argues their nurse, Nurse Sirois, explained that if a job applicant wanted the job at Michelin bad enough, as Appellant claimed he did, then applicants could provide false information in order to pass the physical examination." [Petition for Rehearing, page 3]. Nurse Sirois testified she did not do the physical exams and medical questionnaires that the new employees fill out. [R.P. 737, lines 8-11]. She had no personal knowledge of how thorough the exams actually were. [R.P. 763, lines 7-20] She only knew the company doctor would examine the new employee and clear him or her to work at Michelin. [R.P. 745, line 11-page 278, line 5].

Despite her complete lack of firsthand knowledge, Sirois was allowed to testify over Respondent's objection as to her *opinion* as a "medical person" on the reliability of a physical examination done by Dr. Tomarchio. Michelin argued at the hearing that "her answers were not as an expert witness" – which, if true, would mean she was not qualified and should not have been allowed to state her opinions. Despite Michelin's characterization, the Hearing Commissioner plainly considered her tantamount to an expert witness, for after asking if she had a medical degree, he stated she was "[t]he only person in this room that can testify to a medical situation, I mean, she's got a degree in nursing; nobody else has that degree." [R.P. 757, line 25-p. 761, line 19]. Her testimony was incompetent and should be rejected as evidence of reliance.

The questionnaire was never grounded in finding the truth and preventing injuries; it is and always has been used by Michelin as a shield – a *gotcha* – to ensnare unsuspecting employees who give pro forma answers to a confusing piece of new hire paperwork. Those employees who, like Brailey, do not fully understand what they are signing and "pencil whip" their new hire paperwork ultimately learn to their dismay – after a serious injury – that Michelin had all along concealed a poison pill in the stack of documents they were given when hired. Never mind that they were cleared by Michelin's doctor; it is this one seemingly innocuous document that will determine their fate.

The Court should find that Michelin failed to prove the reliance prong.

D. The Court of Appeals correctly held there was no causal connection between the allegedly false representation and the injury.

The third prong of Cooper is " a causal connection between the false representation and the injury." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973). Applying a substantial evidence standard of review, the Court of Appeals held Michelin failed to prove this element finding "[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." Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32). This holding is correct. Michelin's arguments to the contrary should be rejected.

The crux of Michelin's argument is that "in reaching its decision, the [c]ourt 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." [Petition, page 9]. Michelin wants this Court to believe that Brailey had been under restrictions for twenty years merely because he had not seen "Dr. Bethea at Moore Clinic [who] would put this to rest most expediently . . ." [R.p. 159]. This argument fails

because Brailey was cleared for full duty work by three separate doctors (Drs. Tomarchio, Marom and Donato) in the weeks prior to his June 24, 2017 accident. [R.P. 61-69, 778]. Moreover, there is no evidence Brailey had any back problems in the interim between 1997 and 2017.

Perhaps even more importantly, Michelin had the opportunity to reconvene Dr. Boyd's deposition to cross-examine him with the medical records from 1997 that had not been available for the original deposition. At the close of trial, Michelin withdrew its pending "motion to depose or reconvene the deposition of Dr. Boyd." [R.P. 803, lines 1-3]. Michelin cannot now complain about the sufficiency of Dr. Boyd's testimony. See Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011)(party bound by its own tactical decision to postpone deposition of doctor).

**2. The Court neither overlooked nor misapplied any issues related to *Jones v. Georgia-Pacific Corp.***

Michelin devotes much of its Petition to Jones v. Georgia-Pacific Corp., as if Jones were some sort of silver bullet requiring the Court to blindly accept their allegations regardless of the actual evidence. Michelin argues "Brailey had documented back problems to his low/middle back prior to employment with Michelin . . . and claims he injured his low/middle back while working for Michelin. The inquiry stops there." [Petition, page 10]. Alas for Michelin, it is not so simple.

To begin with, as discussed *supra* at pages 4-6, Jones applied the substantial evidence standard of review rather than the correct preponderance of the evidence standard. As to Jones itself, the Court reviewed conflicting opinions from multiple doctors – again through the lens of looking for substantial evidence to affirm the decision below. Jones was seen by Dr. Poole, Dr. Hodge and three other doctors. The Court observed "Claimant saw many doctors after her accident on August 7, 1997, and there is *conflicting testimony* as to whether the *doctors* believed that the accident caused

Claimant's subsequent back problems." Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003)(emphasis added). The Court ultimately deferred to the Commission's weighing of this conflicting evidence under the substantial evidence standard.

Here there is nothing to weigh. There is no conflicting testimony. The dispositive medical testimony comes from Dr. Boyd. The doctors from two emergency room visits and Doctors Care also diagnosed Brailey with a work-related back injury. [R.P. 170-74, 87-105]. Even Dr. Izard – who misdiagnosed Brailey with a urinary tract infection – "explained to the employee that at the worst he has a back strain which should require only treatment with NSAID's and a muscle relaxant." The back strain may have been an underdiagnosis, yet is consistent with a work-related injury as stated by every other doctor. [R.P. 80-82].

Not only does Jones not provide controlling authority, the case is distinguishable.

A. The Court of Appeals correctly found that Brailey's prior back strain was to a different part of his back.

Michelin argues "[t]he Court of Appeals ignored the fact that Brailey's claims in the instant action are the same claims which led to a workers' compensation injury and settlement for the prior back injury." [Petition, pages 10-11]. The evidence shows otherwise.

Michelin points out that the medical note from 1997 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* . . . ." [Petition, page 11, citing R. 158 (emphasis added by Petitioners)]. They argue this record "demonstrate[s] the current issue involves the same part of Brailey's back as the prior issue . . ." [Petition, page 11].

This argument fails. The 1997 injury was at L2-3; the 2017 injury is at L4-5. Dr. Boyd

diagnosed Brailey with "Low back pain with LEFT lumbar radiculopathy L4." His 2017 MRI showed a "Left paracentral disc extrusion at L4-5." The same MRI shows L2-L3 as "unremarkable." [R. P. 114]. Brailey's testimony that he injured a different part of his back is borne out by objective medical evidence. [R. P. 408-410]. Furthermore, the fact the MRI shows his L2-3 disk was unremarkable some twenty years after his prior back strain confirms he did indeed fully heal from that episode (as the Richtex doctor predicted). The court correctly held the 2017 injury was to a different part of the back.

B. The Court of Appeals did not misapprehend or misapply the facts related to Dr. Boyd.

Michelin argues the Court of Appeals "ignored the fact that Brailey admitted he did not tell Dr. Boyd that the prior injury did not resolve or any evidence of the extent of the prior injury. . . . thus Dr. Boyd only had false information . . ." [Petition, page 9]. In reality, Brailey had no back problems whatsoever after the 1997 back strain (which Dr. Norris noted "has improved" by the second visit). [R. P. 159]. Brailey testified he had no back problems and sought no treatment for back pain between 1997 and 2017. [R. P. 257, 408-411]. There is no evidence of back pain in this twenty year period.

Brailey told Dr. Boyd he had a previous episode of back pain some 25 years ago. He also testified in his deposition about his previous back strain and workers' compensation claim with Richtex twenty years prior. Michelin knew about the prior back strain because Brailey told them. Michelin's attorney cross-examined Dr. Boyd at length about his opinions during which he reviewed the medical records from the weeks prior to the June 24, 2017 accident when Brailey reported 10/10 back pain from lifting at his new job. Dr. Boyd explained his reasoning and confirmed his opinion

that Brailey had herniated the L4-L5 disc working at Michelin.

Michelin wants to argue that if only Dr. Boyd had known the "extent" of Brailey's 1997 injury, then surely he would have opined otherwise. Michelin had the opportunity to reopen Dr. Boyd's deposition. Yet, at the conclusion of the trial, Michelin withdrew its motion to depose or reconvene the deposition of Dr. Boyd. In so doing, Michelin waived any objection to the sufficiency of Dr. Boyd's testimony. See Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011)(where a party rescheduled a doctor's deposition solely for its own tactical reasons, the Commission acted within its authority in refusing to leave record open for a reconvened deposition).

Lastly, Michelin doubles down on their Jones theory by concluding that "the evidence is not necessary for a finding that the Full Commission's decision is supported by substantial evidence."[4] [Petition, page 10]. No disrespect is intended towards Petitioners, but this statement is absurd on its face. Petitioners had the burden of proving the causal connection. One way to prove this would have been a showing that Brailey had a previous herniated disc at L4-L5, or showing ongoing treatment for back problems, or showing he had missed time from work at Westinghouse due to back problems. To suggest, as Michelin does, that "there is no evidence Brailey's injury did 'resolve'" ignores that Michelin bears the burden of proving their affirmative defense. Their argument that they need no evidence shows they have no evidence.

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[4]Michelin injects irrelevant issues into the case by noting "The medical records indicated Brailey was 'on disability" following his job at Westinghouse and before beginning employment with Michelin." [Petition, page 10]. Brailey testified he had been on disability while "getting my blood pressure under control." [R.P. 141].

C. The Court of Appeals overlooked no evidence and correctly held that the Employer is required to prove with evidence the causal connection between the prior injury and the current injury.

Michelin again argues "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."[5] They then go on to argue that the 1997 notes provide the needed medical evidence. [Petition, page 12]. However, as noted above, a twenty-year-old back strain at L2-L3 has no connection to a herniated disc at L4-L5 – particularly when the L2-L3 disc is unremarkable. As to the lay testimony of Michelin employees referenced by Michelin, they cannot provide competent medical evidence as to the causal connection. Michelin's argument should be rejected.

D. The Court of Appeals did not misapprehend Brailey's work at Westinghouse.

Michelin argues "[t]he 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." [Petition, page 12]. As noted, to be faithful to the preponderance of evidence standard of review, the court is *supposed* to weigh the evidence. That being said, the court did no such thing – as there is no conflicting medical evidence to weigh.

In the Opinion, the Court states: "The record contains no medical evidence that Brailey's

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[5]Michelin's argument is untenable. Medical testimony is essential to proving a causal connection. See, e.g. Givens v. Steel Structures, Inc., 279 S.C. 12, 301 S.E.2d 545 (1983)"Expert medical testimony clearly indicated that claimant's condition was one of disc degeneration reflecting the cumulative effect of successive injuries."); Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009)(casual connection proven when doctor testified claimant's "preexisting disc herniation was the same disc herniation for which he treated her following her October 18, 2005 work accident" and he would have put her under work restrictions). *Cf.* Vines v. Champion Bldg. Products, 315 S.C. 13, 431 S.E.2d 585 (1993)(causal connection not proven where "although there was evidence indicating Vines was predisposed to back injuries because of his previous injury and surgery, Vines' physician testified the accident alone without any prior injury would have been sufficient to cause an injury of this nature.").

1997 back injury somehow contributed to the June 24 injury or that he was predisposed to back injury. Indeed, Brailey worked at Westinghouse for sixteen years without a back injury." Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32). This is hardly giving undue weight to Brailey's uneventful tenure at Westinghouse. It is a simple fact that he worked there for sixteen years without back problems or a back injury. This was proper evidence for the court to consider as it applies the facts to Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993)("There is no evidence Vines' previous injury contributed to the occurrence of the accident.").

Petitioners venture into speculation as they argue "[m]ore importantly, there is no credible evidence for the Court of Appeals to conclude Brailey never complained to Westinghouse about back issues or whether Westinghouse never sent Appellant for any medical treatment in house or elsewhere, resolving the matter internally."[6] The reason no evidence supports Michelin's argument is because Michelin – operating under the mistaken belief it did not need evidence to support its allegations – did "not include testimony from any Westinghouse representative . . ." [Petition, page 13]. Michelin's argument is "rank speculation without any evidentiary support [and is] manifestly without merit." Youmans v. Dept. of Transp., 670 S.E.2d 1, 380 S.C. 263 (Ct.App. 2008).

Michelin's argument that Jones relieves them of the burden of producing evidence to support their defenses should be summarily rejected. This is not only a complete misreading of Jones, but a wholly unsupportable argument antithetical to our entire system of jurisprudence.

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[6]The original argument made to the Court of Appeals stated "more importantly, this Court does not know if Appellant ever complained to Westinghouse about back issues or whether Westinghouse ever sent Appellant for any medical treatment in house or elsewhere."[Petition for Rehearing, page 8]. Michelin seeks to shift the blame from its own failure to prove its case.

### 3. The Court should reject the Petitioners' request for a remand on *Capers v. Flaut.*

In tacit recognition that the established facts of this case do not support a Capers defense, Michelin asks this Court to give the Commission a second bite of the apple. The Court should reject this request.

The Commission made a Conclusion of Law stating "Moreover the claim would be barred by *Capers v. Flautt."* [FC Order, page 22, Conclusion of Law 4]. The Order (drafted by Michelin's counsel) included no factual findings nor cited any evidence that would support a Capers defense. The Court of Appeals properly reversed the ruling on Capers.

Not only would a remand be procedurally improper, there is no evidence to support a Capers ruling. Capers was a dishwasher with a known allergy to dishwashing liquid which caused contact dermatitis. After claiming permanent and total disability in a previous workers' compensation case, he returned to work as a dishwasher. He again developed contact dermatitis and filed a second workers' compensation claim.

The Capers court held "Capers did not sustain an accidental injury as contemplated within S.C.Code Ann. Section 42-1-160 (1976)." Capers v. Flautt, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991). The court reasoned "the outbreak of dermatitis was not an unlooked for event which Capers did not expect. It was, in fact, an event which Capers could anticipate given his past experience." Id.

To say that Brailey knew with substantial certainty that he would herniate a disc in his back from working at Michelin is neither reasonable nor plausible. Although he had strained his back lifting bricks in 1997, he had no back problems for the next twenty years. Furthermore, unlike

Capers, Brailey had been cleared to work without restriction by multiple doctors even after he became sore from working at Michelin.

As the Court of Appeals explicated:

> We find the circumstances of the present case differ from Capers and render the case inapplicable. Here, Brailey recovered from his 1997 back injury, and there is no indication in the record that he could have expected to have similar back problems at Michelin in 2017. Significantly, Brailey worked at Westinghouse for sixteen years with no back problems. Brailey testified his 1997 back injury was in a different area of his back than the 2017 injury. Dr. Boyd's testimony and opinion, which is the only medical testimony and opinion relating to the 2017 injury, do not support the theory that Brailey's 2017 injury was non-accidental and could have been expected given past experience.

Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32, 40)

The court correctly concluded these were established facts such that the question could be decided as a matter of law. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) ("Where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission."). The court correctly reversed the Commission on the Capers issue. The Petition for a Writ of Certiorari should be denied.

## 4. The Court of Appeals correctly applied the facts to the law in holding Brailey prove that he injured his back working at Michelin on June 24, 2017

### A. The Court of Appeals did not misapprehend or misapply the facts to the law.

Michelin argues the "Court of Appeals ignored the fact that Appellant 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, 2017 or June 13, 2017." [Petition, pages 18-19]. Michelin wants to argue that, because Brailey went to the doctor before his accident for a sore back due to a new and physically demanding job, he really has a repetitive trauma claim that would be compensable if only he had pled such a

claim. This argument has no merit because Brailey proved he suffered a compensable injury by accident arising out of and in the course of his employment on June 24, 2017 – as pled on the Form 50.

Brailey developed some pain in his back "because of increased physical exertion with his new job at Michelin starting in April . . .." [R.P. 344, lines 8-14]. He had been told by his trainers and coworkers to expect his back to hurt until he got used to the physical nature of the work. [R.P. 259-262]. Brailey was told aches and pains were a normal part of getting used to the job. [R.P. 429, line 23-p. 430, line 5]. His trainer, Jermaine Lemon, confirmed he would have expected Brailey to have some pain with being new on the job. [R.P. 664, lines 1-2]. Troy Lowman, Michelin's Training Manager, also testified the job "requires lifting, pulling and stretching" and that pain for new employees is "a normal, expected, thing." [R.P. 708, 1-11]. Gross testified he would expect new employees to have "soreness" because "it's hard work and they're not used to it." [R.P. 778, line 25-p. 781, line 1].

To ensure he was not actually injured, Brailey went to Urgent Care on June 11, 2017 and his family doctor on June 13, 2017. [R.P. 65-69]. His family doctor reassured him it was merely "likely strained muscles due to heavier work load at new job." [R.P. 65].

Michelin argues "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." [Petition, page 20]. This is a mischaracterization. When asked "is it still probable to state that his lower back problem was caused by an accident on June 24, 2017," Dr. Boyd testified "*I can't be certain about the date*, but something clearly caused him to have these problems with his back, these symptoms related to the problems with his back." On follow-up questions, he reiterated "I *can't be certain about the date.*

. . . I think I would say *uncertain about the date.*" [R. P. 328, line 7-page 329, line 4 (emphasis added)]. This testimony completely confirms the correctness of the Court's opinion where it states: "Dr. Boyd's deposition testimony shows that although he wavered on a specific date of injury he opined that Brailey's back problems were related solely to his work at Michelin, and the injury was aggravated on June 24." Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39 at 32).

Dr. Boyd became more certain about the date upon further questioning – and never wavered on causation. After going through the medical records page by page, he explained what he thought happened to Brailey:

> It sounds like he began having back problems with pain because of increased physical exertion with his new job at Michelin starting in April, got progressively worse to the point that he sought medical attention.
>
> And I think, at some point, somewhere around June 24th, something changed where he began having a slightly different set of symptoms with pain radiating down his left leg in a radicular pattern.
>
> * * *
>
> I will say reviewing these records and specifically the questionnaire he filled out on June 26, which I believe is the first evidence of radicular symptoms down the left leg, that he reports some event on June 24th. I believe that, more likely than not, he injured his lumbar spine at his employment including some episode on June 24th.

[R.P. 344, line 8-page 346, line 4].

Michelin's attempt to create an ambiguity where none exists should be rejected by the Court. The court's finding that Brailey proved he injured his back on June 24, 2017 should not be changed.

B. The Court of Appeals correctly applied *Crane* because "credibility . . . is not a reasonable and meaningful basis for the Commission's determination that [Brailey] did not suffer an accidental injury arising out of his employment at Michelin in 2017."

Michelin argues "like in *Rummage*, credibility was a substantial issue that was 'reasonably and meaningfully' related to whether Brailey actually suffered an injury at work on June 24, 2017, alleged or as to the causation of his alleged injuries." [Petition, page 23]. Conversely, the court held "Brailey's credibility as to his prior workers' compensation claim and prior back injury in 1997 is not a reasonable and meaningful basis for the Commission's determination that he did not suffer an accidental injury arising out of his employment at Michelin in 2017." Brailey v. Michelin North America, Inc., Op. No. 5906 (S.C. Ct. App. Filed November 2, 2022)(Howard Adv. Sh. No. 39).

The court got it right. To be clear, the Commission found as a fact that there was an "incident" on June 24, 2017 after which "the claimant was unable to return to work." [R.P. 44, Finding of Fact 10]. The Panel refused to call the *incident* an *accident* because using the term *accident* would essentially force them to find it compensable (thus vitiating their ruling on Capers). Semantics aside, the dispute is not over whether the *incident* happened – the fact it did happen has been established by the Commission. The issue is whether the *incident* – herniating a disc while pulling rubber – constitutes a compensable injury by accident arising out of the employment. Or whether, as the Commission effectively found, that "his lack of credibility" can be "used to disregard not just a party's testimony but their entire array of proof." Clark v. Philips Elecs./Shakespeare, 433 S.C. 186, 857 S.E.2d 378 (Ct.App. 2021)(rejecting Commission's "absolutist treatment of [employee's] credibility" under Crane).

The controlling case here is not Rummage; it is Clark. Both Rummage and Clark addressed

psychological injuries (Clark also included a back injury). In Rummage:

> credibility was a substantial issue because the deterioration in Claimant's psychological condition was not objectively measurable like the employee's hearing loss in Crane. 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.

Rummage v. BGF Industries, 434 S.C. 441, 459, 865 S.E.2d 380, 390 (Ct.App. 2021).

Clark reached an entirely different result on whether credibility was a meaningful basis for the Commission to conclude Clark's "current psychological condition, if any, is unrelated to his work injury." Clark at 195, 857 S.E.2d at 382. The court reasoned:

> the objective medical evidence of the existence, causation, and degree of Clark's depression and anxiety is uncontradicted. The record details the chronic pain, sleeplessness, and sense of helplessness and hopelessness Clark has experienced because of his 2011 injury. He has been examined or treated by at least ten medical doctors, several of whom are mental-health experts. Not one of them suggests Clark is malingering or faking. The Panel's conclusion that his concealment of a supposed pre-existing condition undermines this objective medical evidence is another misuse of the credibility metric.

Id.

The two cases can be distinguished from each other because, as explicated in Rummage, "[i]n some instances the medical evidence and credibility determination can be tidily separated." Rummage at 458, 865 S.E.2d at 389. In Rummage, there were multiple instances of conflicting reports to multiple mental health care providers. The Commission was compelled to resolve conflicts in the medical evidence with differing opinions rendered by each side's experts. Ultimately, the Rummage court concluded "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 unexaggerated presentation of symptoms." Id. Thus, even though the "single commissioner's unforgiving assessment of Claimant's credibility was unduly harsh and

unwarranted," the credibility determination '"reasonably and meaningfully" related to the weighing of conflicting evidence as to Rummage's psychological claim.

Clark is a case where, like Crane, the Court held "Clark's lack of candor did not corrupt the credibility of his MRI results or the physical examinations of his treating physician. Commissioner Taylor, the Single Commissioner understood this. She deemed Clark 'not credible at all,' yet still fairly and impartially weighed the medical evidence." Clark at 193, 857 S.E.2d at 381. Clark and Crane are cases where "the medical evidence and credibility determination can be tidily separated."

In the case *sub judice*, the Court of Appeals reversed the Commission's findings because Brailey proved his case with medical evidence. Dr. Boyd's medical opinion is not merely unrefuted; it is based on a solid foundation with an objective physical examination and MRI, along with a detailed review of other medical records under cross-examination by Michelin's attorney. Michelin contends "a crucial component of Dr. Boyd's opinion was his ability to trust the history Brailey provided to him . . ." [Petition, page 10]. However, as the court noted in Clark, doctors are trained to detect self-serving and unreliable reports from patients. Had Dr. Boyd been "duped into [his] opinions" he undoubtedly would have said so in his deposition.

The court recognized where the proof lies. It rejected the Commission's use of an arbitrary credibility finding "to disregard not just a party's testimony but their entire array of proof." Id. Michelin "could have offered contrary evidence; without any, the Panel had no basis to discount the objective medical evidence, and *Crane* tells us a vague nod to credibility cannot close the gap." Id.

Michelin goes on at length to list various instances where, it says, "Appellant's testimony was completely unreliable and lacked any credibility whatsoever . . ." [Petition, page 25]. Notwithstanding Michelin's histrionic and misleading characterization of these largely innocuous

instances, the fact is that even if Michelin was right – even if Brailey had lied or given inconsistent testimony – these instances are not meaningly related to whether or not he injured his back at Michelin on July 24, 2017. Michelin completely misses the point. Credibility cannot be used as a proxy for discounting objective medical evidence. The Commission must follow the evidence.

Michelin is asking this Court to repeat the same error the Commission committed in Clark. Michelin's argument is a thinly veiled reprise of the "false in one, false in all" maxim employed by the Commission in Crane, Clark and the instant case. The Court should reject this argument. As there was no misapprehension by the Court of Appeals, the Petition should be denied.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Should the Court issue the writ, it should be limited to correcting the portion of the opinion to apply the preponderance of the evidence standard to review of the Cooper defense. Brailey should be awarded medical treatment with Dr. Boyd and temporary total disability compensation from June 24, 2017 for his compensable back injury with radiculopathy.

Respectfully Submitted,

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January 23, 2023