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S.C. SUPREME COURT

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Withdrawn, Substituted, and Refiled November 2, 2022)

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

v.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

In his Return to the Petition for Writ of Certiorari, Respondent Isaac D. Brailey ("Brailey") concedes "the decision below is not a perfect one" and that he believes the Court of Appeals' decision conflicts with a prior Supreme Court decision, warranting review by this Court under Rule 242(b)(3), SCACR. Thus, though Petitioners Michelin North America, Inc. (US7) and Safety National Casualty Corp. (collectively "Michelin") and Brailey offer different interpretations of the Court of Appeals' Opinion and the ultimate decision the Supreme Court should reach—one thing remains clear, the Parties seem to agree this Court should grant Michelin's Petition and review the Court of Appeals' decision.

Pursuant to Rule 242(g), SCACR, Michelin submits this Reply to Brailey's Return to the Petition for a Writ of Certiorari from this Court to review the Court of Appeals' decision. Because Brailey concedes a review of the Court of Appeals' decision is appropriate, Michelin writes only to clarify a few points that were either raised or glossed over in Brailey's Return to the Petition for a Writ of Certiorari. For the reasons set forth below and in Michelin's Petition for Writ of Certiorari, the Court should grant certiorari, reverse the Court of Appeals' decision, and affirm the decision of the Workers' Compensation Commission.

I. The Court of Appeals erred because (1) the Court misapplied the substantial evidence standard of review; (2) even under the preponderance of the evidence standard of review the Court should have affirmed the Full Commission on the Cooper issue; and (3) notwithstanding the Cooper issue, the substantial evidence standard still applied to the remaining issues on appeal.

The Court of Appeals decided to rely on the substantial evidence standard of review but erred in its application of that standard. As a result, this Court should reverse the Court of Appeals' decision and reinstate the decision of the Full Commission. See Morris v. BB&T Corporation, Op. No. 28131 (S.C. Sup. Ct. filed January 25, 2023) (Howard Adv. Sh. No. 4 at 11) (reversing

the Court of Appeals, finding the Court incorrectly applied the standard of review it relied upon in a workers compensation matter). Under the substantial evidence 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 of Appeals improperly weighed the evidence in its Opinion and ignored pertinent evidence that supports the Full Commission's decision, and those errors controlled the analysis which led to finding in favor of Brailey.

Brailey contends the Court of Appeals should have relied on the preponderance of the evidence standard, still reversing the Full Commission, but also finding Michelin failed to meet the first two elements of Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973). Brailey's arguments are untenable.[1] Even under the preponderance of the evidence standard, the Court of Appeals should have affirmed the Full Commission under Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009).

First, the final determination of witness credibility remains reserved with the Full Commission under the broad preponderance of the evidence standard. See Paschal v. Price, 392 S.C. 128, 133, 708 S.E.2d 771, 773 (2011) (stating "[a]lthough we may take our own view of the preponderance of the evidence . . . this broader scope of review does not require this Court to

[1] Michelin contends Brailey's arguments regarding which standard the Court of Appeals should have applied and whether the Court erred in finding Michelin met the first two prongs of Cooper are not preserved because Brailey failed to file his own Petition for Rehearing with the Court of Appeals. See Mazloom v. Mazloom, 392 S.C. 403, 403, 709 S.E.2d 661 (2011) (holding issue unpreserved for review because it was not raised in a petition for rehearing to the Court of Appeals). Although Brailey makes some of these arguments in his return to Michelin's Petition for Rehearing, Brailey points to no South Carolina law allowing a party to raise issues for the first time in a response to a Petition for Rehearing. Michelin offers this Reply on those issues in the event this Court finds the arguments are preserved. Michelin contends the Court of Appeals properly held Michelin met the first two prongs of the fraud in the application defense under Cooper.

ignore the findings of the Commission, which was in a superior position to evaluate witness credibility"); 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"); Houston v. Deloach & Deloach, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) (same). The Court of Appeals erroneously relied heavily on Brailey's credibility to reach its conclusions despite the Full Commission's credibility findings. There can be no dispute that the record is replete with false statements from Brailey.

Next, in Brayboy, this Court held a claimant's fraudulent responses on his employment application vitiated his employment relationship and barred workers compensation benefits. Brayboy v. WorkForce, 383 S.C. 463, 467, 681 S.E.2d 567, 569 (2009). Brailey's attempts to distinguish the instant case from Brayboy are nonstarters. As detailed in Michelin's Petition for Rehearing and Petition for Writ of Certiorari, the facts of this case are almost identical to the facts outlined in Brayboy. Here, as in Brayboy, Brailey admitted that he lied on Michelin's application and the "willful nature of [his] false responses pervades the record." Id. 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.

Furthermore, notwithstanding the fraud in the application defense ruling, the Court of Appeals' other rulings required the substantial evidence standard, which the Court failed to properly apply. The substantial evidence standard of review still controls for example the Court of Appeals' ruling on whether Brailey met his burden of proof under section 42-1-160 to show he suffered a compensable injury by accident arising out of and in the course of his employment with

Michelin on June 24, 2017. Houston v. Deloach & Deloach, 378 S.C. 543, 553, 663 S.E.2d 85, 90 (Ct. App. 2008). The substantial evidence standard still controls the Court of Appeals ruling regarding Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) and the Court's other rulings. Landry v. Carolinas Healthcare Sys., 396 S.C. 149, 156, 719 S.E.2d 288, 292 (Ct. App. 2011). Interestingly, Brailey does not contend the Court of Appeals improperly applied the substantial evidence standard of review. Stated another way, Brailey asks this Court to look to another (more generous) standard in order to reverse the Full Commission, recognizing as he must that under the substantial evidence standard, the Court must affirm the Full Commission's decisions because substantial evidence in the record supports each of the Full Commission's rulings.

In short, the Court of Appeals misapplied the substantial evidence standard of review and even if this Court concludes the preponderance of the evidence standard is required for the fraud in the application defense under Cooper, the Court of Appeals' decision must still be reversed because it (1) applied the incorrect standard of review and should have affirmed the Full Commission under Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009); and (2) improperly applied the substantial evidence standard to the remaining issues on appeal and should have affirmed because the substantial evidence in the record supports the Full Commission's decisions on those issues. See Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (reversing the Court of Appeals for applying incorrect standard of review); id. at 322, 815 S.E.2d at 441 ("While the court of appeals articulated the correct standard of review, its analysis is proof it did not apply the correct standard of review . . . ." (J. James concurring)).

II. The Court of Appeals' decision conflicts with Supreme Court cases as well as the Court of Appeals' own opinions on the same issues.

The Court of Appeals decision conflicts with this Court's ruling in Jones v. Georgia-Pacific

Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) as to the requirements for an employer to prove the causal connection prong of Cooper. Brailey appears to misunderstand Michelin's argument regarding Jones. (Ret. to Pet. p. 15). The fact remains that Jones ruled on the causal connection prong of Cooper: "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." Here, Brailey falsely completed the application at Michelin denying prior back problems, claims he injured his back at Michelin, and Michelin discovered he had documented back problems prior to working for Michelin. In its decision, the Court of Appeals required more of Michelin to show a causal connection to satisfy the fraud in the application defense. The decision therefore conflicts with this Court's holding in Jones.[2]

Further, there is no dissent in the Court of Appeals' opinion; however, within the year before its decision, under a similar set of facts, the Court of Appeals issued an opinion that conflicts with its Opinion in this matter on the credibility issue. Michelin provided a detailed outline of the

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[2] In this same vein, the Court of Appeals erroneously relied upon and weighed Brailey's employment at Westinghouse in reaching its conclusions. The Court of Appeals relied solely on Brailey's testimony regarding his work at Westinghouse. Yet, 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. Brailey acknowledged this fact in his oral arguments to the Court of Appeals, conceding that Brailey's work at Westinghouse was "maybe not as heavy as Michelin and maybe not as heavy as lifting bricks at a brick plant [Richtex Brick]." (Oral argument recording). Despite this, the Court of Appeals somehow determined that Brailey's employment at Westinghouse supported the conclusion that there was no causal connection between Brailey's false representation and the alleged injury. The record reflects that Brailey was on disability after he left Westinghouse and before starting at Michelin. Brailey again asks this Court to rely on Brailey's own self-serving statements (which were shown to be false on many occasions) as to why he was on disability to reach the conclusion that the Court of Appeals reached. (Ret. to Pet. p. 15 n.4). This is another example among many of how the Court of Appeals developed a narrative that was inconsistent with the facts to reach its conclusion.

case, Rummage v. BGF Industries, 434 S.C. 441, 865 S.E.2d 380 (Ct. App. 2021), in Michelin's Petition for Writ of Certiorari and briefs with the Court of Appeals. In Rummage, the Court of Appeals affirmed the Workers Compensation Commission's decision denying "Claimant's claim, by and large based on her assessment of Claimant's credibility." Id. at 452, 865 S.E.2d at 386. The Court of Appeals also affirmed the Commission's decision to give 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 Court of Appeals 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." The Court of Appeals in Rummage recognized this Court's holding in Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020), 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." Here, however, the Court of Appeals effectively holds the exact opposite, reversing the Full Commission's decision for the same reasons.[3] The record reflects credibility was a substantial issue and that Brailey was untruthful to the treating physicians.

In addition, in the most recent case citing Brayboy and noting that appellate courts have applied the preponderance of the evidence standard, the Court of Appeals applied the substantial evidence standard of review in a case involving the fraud in the application defense under Cooper.

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[3] Brailey asks this Court to rely upon Clark v. Philips Elecs./Shakespeare, 433 S.C. 186. 857 S.E.2d 378 (Ct. App. 2021) to find otherwise. Yet, the Court of Appeals decided Clark on April 21, 2021. The Court of Appeals changed course and decided Rummage on September 22, 2021. Further, this case is distinquishable from Clark for the ways already stated and because here the trier of fact weighed and measured each piece of evidence and explained how the credibility determination was important to making the particular factual findings.

In Osmanski v. Watkins & Shepard Trucking, Inc., No. 2013-UP-127 (S.C. Ct. App. filed March 27, 2013), the Court stated

> As to Osmanski's argument that the Appellate Panel erred in barring Osmanski's claim due to fraud in the application, we find no error. *Substantial evidence* supported the Appellate Panel's finding that (1) Osmanski made a material misrepresentation . . . ; (2) [the employer] relied upon this misrepresentation when hiring Osmanski; and (3) Osmanski's injury . . . was causally related to his misrepresentation. See S.C. Code Ann. § 1-23-380 (Supp. 2012) (providing that an appellate court 'may not substitute its judgment for the judgment of the [Appellate Panel] as to the weight of the evidence on questions of fact' and *must affirm the decision of the Appellate Panel if it is supported by substantial evidence*). Specifically, *we find substantial evidence indicated that* . . . . Accordingly, the Appellate Panel did not err in applying the fraud in the application defense to bar Osmanski's claim. See Brayboy, 383 S.C. at 467, 681 S.E.2d at 569 . . . ; see also Cooper v. McDevitt, & St. Co., 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973) . . . .

(emphases added).

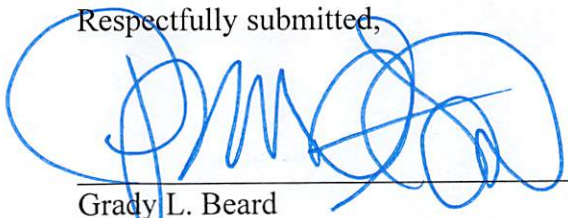
Even more recently following the Court of Appeals' decision in the instant case, as recently as October 26, 2022, the Court of Appeals applied the substantial evidence standard to the determination of an existence of an employee-employer relationship in a published opinion. See Padgett v. Cast & Crew Ent. Servs., Inc., Op. No. 5948 (S.C. Ct. App. filed October 26, 2022) (Howard Adv. Sh. No. 38 at 16) ("the substantial evidence in the record supports the Appellate Panel's finding that an employer-employee relationship existed"). Consequently, conflicting Court of Appeals decisions exist in this state regarding the application of credibility findings in workers compensation and the standard of review for the fraud in the application defense. Further, the Court of Appeals decision conflicts with Supreme Court precedent.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for a Writ of Certiorari,

Michelin respectfully requests that the Court grant Certiorari to review the decision of the Court of Appeals, reverse the Court of Appeals, and affirm and reinstate the decision of the Full Commission of the Workers Compensation Commission.

Respectfully submitted,



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February 2, 2023