

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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Withdrawn, Substituted, and Refiled November 2, 2022)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.

APPENDIX VOL. 2

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1 document says?

2 A. Yep.

3 Q. Okay. That's what you told your -- your doctor,
4 wasn't it?

5 A. Yeah.

6 Q. Okay. And this indicates your doctor diagnosed
7 you with low back pain that he says he discussed with
8 you that the likely problem was due to doing heavier
9 workload at your new job, which would have been
10 Michelin; that's what he indicated in his report, is
11 that what he advised you?

12 A. I don't know whether he told me that but if it's
13 in the report, yeah.

14 Q. Okay. And, again, you didn't report to Michelin
15 that your doctor had indicated that doing this heavier
16 workload at this new job was causing you low back
17 problems, did you; you didn't tell management that?

18 A. Not -- not higher management.

19 Q. Okay. Not any management?

20 A. Well, like I said, I'm going on what -- well,
21 anyway, not higher management I didn't say nothing to
22 --

23 Q. You didn't --

24 A. -- because we didn't have a high -- only -- we
25 didn't have -- we weren't assigned a management.

1 Q. -- you didn't tell anybody pursuant to the
2 PowerPoint you saw about the protocol and Workers'
3 Comp, you didn't report to any of the people you were
4 supposed to report to, did you? Nobody? You didn't
5 tell the Nurse. You didn't tell the Security folks.
6 You didn't tell a Bull. You didn't tell anybody what
7 was going on with your back, did you? That's my
8 question, that's real simple.

9 A. Okay. Now -- well, no; I didn't tell nobody.

10 Q. Okay. He then said that you apparently have some
11 sort of ongoing kidney problem and you needed to hold
12 off on taking certain kinds of medications for that; is
13 that correct? Do you know you've got some sort of
14 kidney problem?

15 A. Not -- not really.

16 Q. Okay.

17 A. But you said hold off on what medications?

18 Q. Hold off on taking, like, Nsaids, on, like,
19 Tylenol --

20 A. Oh.

21 Q. -- and those types of things.

22 A. Oh, okay. When I had a cold, yeah.

23 Q. Okay. Your lawyer also, for reasons I'm not sure
24 why but we'll talk about, he submitted some report from
25 your family doctor, at pages 1 through 6, Dr. Marom,

1 from January the 3rd of 2017. So, you had been to Dr.
2 Marom at the beginning of the year, 2017, correct?

3 A. I'd been to Dr. Marom when?

4 Q. January the 3rd --

5 A. I --

6 Q. -- 2017, at 3:10 P.M., according to the report
7 your lawyer submitted.

8 A. -- I -- I -- yeah.

9 Q. Okay. I assume you -- you admit that, again, that
10 Dr. Marom is your doctor?

11 A. Yeah.

12 Q. Okay. It says -- it talks about you used to be
13 seen by a Dr. Chad Millwood, is that a -- is that --
14 was that your family doctor in the past?

15 A. Right.

16 Q. Okay. It says you last saw him about a year ago.
17 Now seeing a cardiologist, Dr. Isbell; you were seeing
18 Dr. Isbell in January, correct?

19 A. Yeah.

20 Q. You didn't tell Michelin when you came to work for
21 them you were seeing a cardiologist, right?

22 A. Right.

23 Q. Okay. Then it says down here, he thinks he's had
24 two (2) periods of gout, has significant foot pains.
25 Right foot, could not walk on it; diagnosed at Doctor's

1 Care, pains near first toe. Did you tell Michelin when
2 you came to work for them that you'd had these recent
3 periods of gout, even though that kind of question was
4 on the form?

5 A. No, I didn't tell them.

6 Q. You didn't tell them, did you?

7 A. No, I didn't tell them.

8 Q. Okay. And that was just in January. So, I mean,
9 by the time you -- I mean, you just had applied for the
10 job and didn't tell them, did you?

11 A. I didn't have no -- well --

12 Q. Well, I mean, your doctor put it in there.

13 A. -- yeah. But I -- yeah.

14 Q. Do you think he made that up?

15 A. No, I didn't think he made it up but --

16 Q. Okay.

17 A. -- I didn't -- I didn't have no -- those things
18 was just checked out to make sure I wouldn't have it.

19 Q. It says you were also having, apparently, ongoing
20 erectile dysfunction that had been going on because of
21 all the medications you were taking and you were
22 concerned about that; is that true?

23 A. Some of that is true --

24 Q. Okay.

25 A. -- the blood pressure medicine.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SOUTH CAROLINA

Workers' Compensation Commission

Appellate Case No.: 2019-000556

RECEIVED
JAN 10 2020
SC Court of Appeals

Isaac D. Brailey, Claimant, Appellant,

v.

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

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- 1 Q. You didn't tell Michelin about any of that, did
2 you?
- 3 A. The erectile dysfunction?
- 4 Q. All the medications you were on.
- 5 A. Yeah, I told them about the --
- 6 Q. You told Michelin about all the medications --
- 7 A. -- I told Michelin --
- 8 Q. -- when you came to work for them?
- 9 A. -- yeah, high blood pressure and I wrote it down
10 to the Nurse when we had -- when a -- a thing there.
- 11 Q. So, you're just talking about only high blood
12 pressure?
- 13 A. Yeah, that's all --
- 14 Q. Okay.
- 15 A. -- high blood pressure.
- 16 Q. Then it says prior arthroscopy of your knee. It
17 says that on your doctor's report, procedure history,
18 prior arthroscopy of the knee; so -- and it says on the
19 right, it says remote. But my -- my question is, if
20 it's on Dr. Marom's report in January, why wasn't it on
21 this form that you filled out just a couple of months
22 later; why didn't you tell Michelin about it?
- 23 A. When was that knee thing?
- 24 Q. The report is January 3rd of 2017.
- 25 A. I don't have no knee problem.

- 1 Q. Well, you told the doctor you did --
2 A. I mean, when --
3 Q. -- because he wrote it down.
4 A. -- yeah. When I -- when I had -- I think when I
5 -- when I -- when I had the back injury I had -- he
6 wanted to know whether I had fluid on my right -- right
7 knee or -- and where the fluid was at, and the reason
8 why the fluid was on -- the reason why I had the back
9 -- I had that back injury and when I had the back
10 injury the fluid, he said can come from the other side
11 --
12 Q. I didn't ask you what he said.
13 A. -- to the -- okay.
14 Q. Again, we're --
15 A. Oh.
16 Q. -- we're talking about six (6) months before June;
17 we're talking about January of 2017. ,
18 A. January?
19 Q. Yes, sir.
20 A. I thought you was talking twenty (20) --
21 Q. No, 2017 --
22 A. -- I didn't have no --
23 Q. -- I just said that.
24 A. -- I didn't have no -- you said I had fluid on my
25 --

1 Q. You told the doctor that --

2 Commissioner Wilkerson: Right.

3 Q. -- you had a prior arthroscopy --

4 Commissioner Wilkerson: Prior.

5 Q. -- of your knee.

6 Commissioner Wilkerson: He didn't say
7 you had it that day.

8 Witness: Uh-huh.

9 Commissioner Wilkerson: You told him
10 you had it prior; that could be when you were
11 twenty-three (23), thirteen (13) or three (3)
12 years old.

13 Q. But you told the doctor?

14 Commissioner Wilkerson: I don't know.

15 A. Uh-huh.

16 Q. Why in the world if you told the doctor in January
17 couldn't you have told Michelin on the form you filled
18 out for them --

19 A. No.

20 Q. -- just a couple of months later?

21 A. I didn't tell them that.

22 Q. What?

23 A. No, I didn't tell them that.

24 Q. Okay. And the reason you didn't tell them any of
25 those prior problems: Right knee, the gout, the low

1 back, any of the doctor names; the reason you didn't do
2 that is because you knew or you were afraid that if you
3 told them all of that stuff you wouldn't get a job at
4 Michelin; isn't that true, that's why you didn't tell
5 them?

6 A. No, that's not true.

7 Q. Okay. But you can't explain why you didn't tell
8 them other than you just signed everything real fast?

9 A. I didn't --

10 Q. That's your excuse; that's what you're telling us
11 here today?

12 A. -- no, I didn't -- I didn't say I could just --

13 Q. You said --

14 A. -- the -- the gout --

15 Q. -- I just signed it real fast; that's exactly what
16 you said.

17 Mr. Samuels: Your Honor, I --

18 Q. True or false?

19 Mr. Samuels: -- object to counsel
20 interrupting the -- the answer.

21 Commissioner Wilkerson: We'll let him
22 answer. Go ahead and answer the question.

23 Mr. Beard: Okay.

24 Witness: Okay. Go back to the first
25 one where you -- what -- what was the first

1 one, you said something about the -- what --
2 what you were saying -- you threw so many
3 questions out there at one time I didn't --

4 Q. I threw one (1) question; I said the reason -- I
5 said you didn't them --

6 A. -- yeah.

7 Q. -- about the gout, you didn't tell them about the
8 knee, you didn't tell them about the low back because
9 you --

10 A. The gout --

11 Q. -- you didn't -- you didn't --

12 Commissioner Wilkerson: Let him finish.

13 Q. -- you didn't think they would hire you --

14 A. -- okay.

15 Q. -- isn't that true?

16 A. No, that's not true. I didn't -- I didn't -- as
17 far as not afraid of them not hiring me, because I
18 didn't have -- I -- I was checked -- I got checked out
19 because I wanted to be checked out myself, as far as
20 cardiologist, going to the cardiologist, making sure
21 everything is straight and, also, making sure I don't
22 have gout.

23 Q. Okay. It says at that time you were employed
24 doing quality control, according to this form, on June
25 3rd of 2017; you weren't doing quality control on June

- 1 3rd of '17, you weren't working at --
- 2 A. '17?
- 3 Q. -- Westinghouse anymore in January of '17, were
- 4 you?
- 5 A. Say what now?
- 6 Q. You weren't working at Westinghouse in January of
- 7 2017, were you?
- 8 A. January of 2017?
- 9 Q. Yes, sir. You weren't there anymore?
- 10 A. I think I -- yeah. I don't know. June of -- July
- 11 -- January you said?
- 12 Q. January of 2017, it says you were working in
- 13 Quality Control.
- 14 A. Yeah --
- 15 Q. You --
- 16 A. -- at Westinghouse.
- 17 Q. -- you were still there?
- 18 A. I think so, yeah. Yeah, if I remember.
- 19 Q. Do you remember filling out an employment
- 20 application when you came to work for Michelin?
- 21 A. That was, like -- it was way before we had gotten
- 22 -- we don't just -- it's several employment
- 23 applications; you just don't go in and fill out an
- 24 application and you get hired then, it's several
- 25 sequences you've got to go through.

- 1 Q. That's fine.
- 2 A. Yeah.
- 3 Q. I want to ask you, is --
- 4 A. Yeah.
- 5 Q. -- is this your employment applications that you
- 6 filled out on February 27th of '17, for Michelin?
- 7 Mr. Samuels: Can I be allowed to see
- 8 that, please?
- 9 Commissioner Wilkerson: Yes.
- 10 Mr. Beard: Sure.
- 11 Commissioner Wilkerson: Come on.
- 12 Mr. Beard: You've got it in the -- in
- 13 the subpoenaed documents that you got.
- 14 Commissioner Wilkerson: Do I have it or
- 15 no?
- 16 Mr. Beard: No.
- 17 A. You said January what now?
- 18 Mr. Beard: I didn't know this would be
- 19 an issue but it is, apparently, going to be
- 20 one.
- 21 Q. January 27th of '17.
- 22 A. Oh. No, that's February.
- 23 Q. I mean, February 27th of '17.
- 24 A. You said January.
- 25 Q. No. I said February the first time but I --

- 1 A. No, you didn't; you said January.
- 2 Q. -- all right. Is that your signature --
- 3 Commissioner Wilkerson: Answer the
- 4 question.
- 5 Q. -- at February 27th?
- 6 Commissioner Wilkerson: We're going --
- 7 do you want to get home --
- 8 Witness: Yeah.
- 9 Commissioner Wilkerson: -- tomorrow?
- 10 Answer the question. You're not -- you don't
- 11 argue, you just answer questions; that's your
- 12 job.
- 13 Witness: Yeah. But I was --
- 14 Commissioner Wilkerson: Just answer
- 15 them.
- 16 Witness: -- I'm correcting him what he
- 17 --
- 18 Commissioner Wilkerson: I --
- 19 Witness: -- okay.
- 20 Commissioner Wilkerson: -- just answer
- 21 the question.
- 22 A. February 27th? Yeah. I was --
- 23 Q. Is this your application?
- 24 A. -- that's my application --
- 25 Q. Okay.

1 A. -- yeah.

2 Q. All right. And on the application, when does it
3 say you stopped working at Michelin; does that say -- I
4 mean, Westinghouse; does that say December of 2016?

5 A. You said what now?

6 Commissioner Wilkerson: Read it --

7 A. This is --

8 A. -- yeah.

9 Commissioner Wilkerson: -- does it say
10 you stopped working at Westinghouse on -- in
11 December of 2016, was the question.

12 A. So, time employed from 8/07 to 2/12/16, yeah.

13 Q. Okay. So --

14 A. Yeah.

15 Q. -- on the application you filled out in February,
16 you said you were no longer at Westinghouse in
17 December, so you would not have been doing quality
18 control on January the 3rd of '17, because you didn't
19 work at Westinghouse anymore, correct?

20 A. Correct.

21 Q. Okay. Also, on this application, it goes back to
22 the year 19 -- it looks like '86 -- this is your
23 writing, correct; is that 1986?

24 A. Yeah.

25 Q. Okay. It's got a lot jobs on there. It's got UPS

1 from '86 to '89, Cooper Tools from '89 to '94, Inland
2 Container from '94 to '96 and from '96 to '01 it says
3 Dupont, correct?

4 A. Uh-huh.

5 Q. Okay. That's yes?

6 A. Yes.

7 Q. Where is Richtex Bricks?

8 A. Columbia.

9 Q. Where is it on this document?

10 A. 1997.

11 Q. 1997.

12 A. Yeah.

13 Q. Show me in 1997, where Richtex Bricks is on this
14 application. You remember where you had your Workers'
15 Comp injury and Workers' Comp claim; do you remember
16 that?

17 A. Yeah.

18 Q. Where -- where is that on that document?

19 A. It's not on that document.

20 Q. Okay. And the reason it's not on that document is
21 the same reason you didn't tell us about your back pain
22 on that questionnaire, you didn't want Westinghouse --
23 I mean, you didn't want Michelin to go and subpoena or
24 find out if there was something wrong with you; isn't
25 that correct?

- 1 A. No, that's not true.
- 2 Q. Okay. It just -- just happens to be --
- 3 A. Now --
- 4 Q. -- you conveniently didn't remember about your
5 workers' Comp back claim --
- 6 A. -- what happened --
- 7 Q. -- you conveniently don't remember about the --
8 the employer you used to work for?
- 9 A. -- well, I -- when we was filling out that
10 application they said you could -- you know, I told
11 them, hey, look, I'm not -- as far now '97 or either
12 you have -- I worked multiple jobs. So, filling out
13 multiple jobs where I couldn't fill out a lot of those
14 things. And they was, like, no, we just want to be --
15 they was only concerned with, you know, the recent
16 ones. So, that -- yeah, I couldn't --
- 17 Q. Well, you went back to '86 --
- 18 A. -- yeah.
- 19 Q. -- I assume you admit '97 would have been after
20 '86, correct; that would be more recent than '86?
- 21 A. Yeah, '97 was -- I didn't even do this --
- 22 Q. Am I correct?
- 23 A. -- yes.
- 24 Q. My question is, '97 is more recent than '86 --
- 25 A. Right.

1 Q. -- correct?

2 A. Right.

3 Q. So, Richtex should be on here; it's not though, is
4 it?

5 A. Right, it's not.

6 Q. Okay. That's a little suspicious isn't it, being
7 -- being what we're here for; isn't that a little
8 suspicious?

9 A. Well, I wouldn't -- I wouldn't -- I mean, it
10 depends on the situation but --

11 Mr. Beard: Commissioner, we would
12 request the -- the opportunity to provide you
13 with that application after the hearing.

14 Commissioner Wilkerson: Yes. And also
15 provide it to --

16 Mr. Beard: He's got a copy --

17 Commissioner Wilkerson: -- oh, does he?

18 Mr. Beard: -- in his --

19 Commissioner Wilkerson: I'm sorry; I
20 apologize.

21 Mr. Beard: -- pursuant to his subpoena
22 dated August 24th; it was provided to him in
23 that package.

24 Mr. Samuels: I assume it was; I have
25 just not been able to locate it.

1 Commissioner Wilkerson: No, that's
2 fine. Well, if not, he will provide it to
3 you as well?

4 Mr. Beard: Could we take a short break?

5 Commissioner Wilkerson: Yes. Now, I
6 told you --

7 Mr. Beard: I think our -- I think our
8 Court Reporter needs one too.

9 Commissioner Wilkerson: -- yes. I -- I
10 was going -- I was going to -- to --

11 Mr. Beard: I don't need one but I'm
12 going to take one if we get to take one.

13 Commissioner Wilkerson: -- yes, let's
14 take one.

15 Court Reporter: Are we going off --

16 Mr. Beard: Could -- would you instruct
17 the witness?

18 Commissioner Wilkerson: Please. You
19 can't speak to your attorney about the case,
20 okay?

21 Witness: Oh.

22 Commissioner Wilkerson: You can't --
23 right now. You can speak to him later but on
24 break you can't talk to him about anything.

25 Witness: Oh. Oh, okay.

1 Commissioner Wilkerson: That's the
2 rules.

3 Witness: All right. Where do -- what
4 do we do here now, just go?

5 Commissioner Wilkerson: We're just
6 going to take a break.

7 (Off The Record)

8 Commissioner Wilkerson: Madame Court
9 Reporter, let's go back on the record. Thank
10 you.

11 Mr. Beard: Thank you, Commissioner.

12 Commissioner Wilkerson: Please.

13 Mr. Beard: May I approach, again,
14 please?

15 Commissioner Wilkerson: Please.

16 Mr. Beard: Page 4 of the Claimant's
17 APA's, which would also be that January the
18 3rd --

19 Commissioner Wilkerson: Okay.

20 Mr. Beard: -- 2017, report.

21 Q. Your doctor reports -- you may want to put your
22 glasses on so you can read this too -- I highlighted it
23 here at the very top, your lawyer submitted this
24 document, it says, has a significant other -- I guess
25 you have a girlfriend -- one (1) adult daughter, lives

1 in Columbia, but it says you're on disability and you
2 were working at Westinghouse in Quality Control; what
3 were you on disability for?

4 A. High blood pressure.

5 Q. So, you got put on disability from Westinghouse?

6 A. Yeah. I was on disability for a year way before

7 --

8 Q. Did you tell --

9 A. -- oh.

10 Q. -- Michelin that you had been put on disability
11 for all that time?

12 A. While I was --

13 Q. Because of high blood pressure or whatever it was;
14 did you tell Michelin --

15 A. -- no, I didn't --

16 Q. -- about that?

17 A. -- no, I didn't tell them.

18 Q. Okay. So, that's why you weren't working at
19 Westinghouse anymore because you had been on disability
20 for so long they had to cut you loose?

21 A. No. No, I just -- no, I was on disability just --
22 they was trying to help me as far getting my blood
23 pressure under control, you know, that was where they
24 thought it was my heart thing but it was just -- just
25 medication they had to regulate.

- 1 Q. Why did you quit working at Westinghouse?
- 2 A. They had laid off.
- 3 Q. You got laid off?
- 4 A. Uh-huh.
- 5 Q. That's yes?
- 6 A. (Nodded head in an up-and-down motion).
- 7 Q. That's a yes?
- 8 A. Yes. Yes, I'm sorry.
- 9 Q. All right. Then you went to the hospital-- and
- 10 your lawyer pointed this out -- on June 24th, 2017,
- 11 which is the day that you claim you were injured on the
- 12 job, correct?
- 13 A. Correct.
- 14 Q. All right. Even though you had already been to
- 15 the doctor twice and said you were hurting from doing
- 16 your job for at least two (2) weeks up to that time you
- 17 had been to the doctor; so, now we're about three (3)
- 18 -- three and half (3 ½) weeks later from the time that
- 19 they all started, correct?
- 20 A. Correct.
- 21 Q. All right. So, on June 24th you go in and you
- 22 told the doctor, according to what it says in his
- 23 report, reports lower back pain to the left side, exact
- 24 same thing you told them on June the 11th and June the
- 25 20 -- I mean, June the 13th, correct, back pain on the

- 1 left side, right?
- 2 A. I don't --
- 3 Q. You don't remember just reading the two (2)
- 4 reports from June 11th and June 13th, both of them said
- 5 low back pain on the left side?
- 6 A. -- yeah.
- 7 Q. Okay.
- 8 A. Uh-huh.
- 9 Q. And it says, since he was working last night, is
- 10 what this says, it doesn't say since all the way back
- 11 like the other ones do, it says, he does a lot of
- 12 lifting and pulling and started hurting then; that's
- 13 basically what you had been doing the whole time,
- 14 right, lifting and pulling, correct?
- 15 A. At -- at Michelin?
- 16 Q. Yes.
- 17 A. I was --
- 18 Q. That's all you did on the -- that's all you ever
- 19 did out on the floor, wasn't it, lifting and pulling --
- 20 A. -- no.
- 21 Q. -- on the PAP?
- 22 A. No. On -- on the PAP sometimes you -- you
- 23 stretch.
- 24 Q. Okay.
- 25 A. I mean, stretching it, that's a whole different

1 thing.

2 Q. You didn't tell them you stretched; you just told
3 them about lifting and pulling?

4 A. No, I mean, I just -- they had just -- yeah, I
5 just --

6 Q. That's what you told them?

7 A. -- told them lifting -- lifting and pulling; I
8 guess that's what it is..

9 Q. And that's when you started hurting, is what it
10 said, correct?

11 A. Uh-huh. Yeah.

12 Q. Okay. Remember uh-huh -- you can't say uh-huh and
13 huh-uh and I'm --

14 A. Yes.

15 Q. -- I'm not trying -- I'm not being --

16 A. I understand.

17 Q. -- condescending --

18 A. I understand.

19 Q. -- I just want to make sure it's correct on the
20 record.

21 Commissioner Wilkerson: You've got to
22 say yes or no or I don't understand.

23 Witness: Okay..

24 Mr. Beard: Okay.

25 Q. And it says, you told the hospital doctor there --

1 at least they wrote down on this thing -- you had a lot
2 of questions about possible Workers' Comp then; is that
3 correct? You told the doctor you were having questions
4 about Workers' Comp?

5 A Say -- say that again now?

6 Q. It says, he has questions about possible workers'
7 Comp, is what the doctor wrote down on the consult
8 form.

9 A. Uh-huh.

10 Q. Did you tell the doctor you had questions about
11 possible workers' Comp?

12 A. On what day?

13 Q. June the 24th.

14 A. I don't --

15 Q. You don't remember that?

16 A. -- no, they asked -- they asked me about workman's
17 Comp.

18 Q. Okay.

19 A. Yeah.

20 Q. You don't remember telling the doctor and -- and
21 asking them questions about workers' Comp? It says,
22 you have questions about Workers' Comp.

23 A. No. I don't remember that.

24 Q. Okay.

25 Mr. Beard: Commissioner, that's at page

1 17 of the Claimant's APA's; it's over on the
2 right hand side, in two (2) locations it
3 talks about has questions about Workers'
4 Comp.

5 Commissioner Wilkerson: I've got you.

6 Q. It also says on page 18 --

7 Mr. Beard: -- Commissioner, may I
8 approach again, please?

9 Commissioner Wilkerson: Please.

10 Q. There's a question about radiating pain -- this is
11 on the 24th when you were at the hospital, page 18 --
12 it says radiates to -- can you -- can you read that or
13 do you need your glasses?

14 A. Radiate pain?

15 Q. Yes. The question says -- I mean, the --

16 A. Yeah.

17 Q. -- it says radiates to and then high bold, what
18 does it say?

19 A. Does not radiate.

20 Q. Okay. That's what the -- that's what you told the
21 doctor, right; you didn't have any radiating pain on
22 June 24th, correct?

23 A. I did though.

24 Q. In other words, you didn't have any pain going
25 into your legs?

- 1 A. You say radiate? I don't even know what -- I -- I
2 told them what my pain was on my leg, the left side of
3 my leg.
- 4 Q. You did tell them that?
- 5 A. Yeah.
- 6 Q. So, you don't --
- 7 A. On the 24th?
- 8 Q. -- yes, sir.
- 9 A. When I was in the emergency room?
- 10 Q. Yes, sir.
- 11 A. Yeah.
- 12 Q. So, you don't know why they wrote right there,
13 their -- their -- and I mean, it's dark bold writing --
- 14 A. Does not --
- 15 Q. -- does not radiate.
- 16 A. -- I mean --
- 17 Q. You don't know why?
- 18 A. -- yeah. What else does it say?
- 19 Q. Can you --
- 20 A. Okay.
- 21 Q. -- just answer that question?
- 22 A. Oh, okay.
- 23 Q. Do you know why?
- 24 A. Does not have -- yeah --
- 25 Q. Okay.

1 A. -- it says that but --

2 Q. It says -- says you're achy. It says you have
3 moderate severity of pain. So, with all due respect,
4 moderate pain is less than ten (10) out of ten (10).
5 So, you weren't even in as much pain on June the 24th
6 as you were when you were going to the emergency room
7 and your own doctor when you were ten (10) out of ten
8 (10) pain?

9 A. Okay. This is the --

10 Q. 24th.

11 A. -- oh, yeah. No. Yeah, I was -- well, what you
12 said, yeah, but from what it is --

13 Q. This is what -- your lawyer put a document into
14 evidence; this is the document.

15 A. -- oh, okay. Yeah.

16 Q. I'm asking you if all this is correct.

17 A. If it's there it's, I guess, correct.

18 Q. Okay. All right. At some point on June the 24th
19 you talked with -- you said, Troy Lowman, correct?

20 A. Uh-huh. Yes.

21 Q. Okay. And Mr. Lowman was in charge of all the
22 trainees; his job -- he was like the Bull or the boss
23 over all those folks, people who were in training or
24 people who were --

25 A. Right. Yes.

- 1 Q. -- still on probation?
- 2 A. Yes, sir.
- 3 Q. And you were on probation at this time, right?
- 4 A. Yes, sir.
- 5 Q. Okay. You had a like -- what, a ninety (90) day
- 6 or a hundred and twenty (12) days probation out at
- 7 Michelin? I don't know what --
- 8 A. Yeah, something -- I --
- 9 Q. -- I can't remember if it's ninety (90) or one
- 10 twenty (12).
- 11 A. -- I don't -- I can't remember neither.
- 12 Q. Okay. But you were still on probation?
- 13 A. I --
- 14 Q. You were still in that probationary period because
- 15 you only started at the end of April --
- 16 A. -- okay. Yes.
- 17 Q. -- correct?
- 18 A. Correct.
- 19 Q. All right. And so, that's who you called was Mr.
- 20 Lowman?
- 21 A. Yes.
- 22 Q. And eventually you said you got him?
- 23 A. Yes.
- 24 Q. And he instructed you with Workers' Comp you were
- 25 supposed to go to the Nurse, not to the hospital,

- 1 correct?
- 2 A. He -- he instructed me what?
- 3 Q. You should have gone to the Nurse, not to the
- 4 hospital --
- 5 A. Correct.
- 6 Q. -- correct?
- 7 A. Correct.
- 8 Q. Or you should have gone to Security if the Nurse
- 9 wasn't there; he told you that, correct?
- 10 A. No.
- 11 Q. He didn't tell you that?
- 12 A. No.
- 13 Q. Okay. All right. So, anyway, you go to -- you
- 14 get a hold of him and -- and eventually, you talked to
- 15 the Nurse the same day; we've gone through those
- 16 documents when Mr. Samuels showed you what the Nurse
- 17 called and said --
- 18 A. Yeah.
- 19 Q. -- correct?
- 20 A. She called me after I got home --
- 21 Q. Correct.
- 22 A. -- Saturday.
- 23 Q. And told you you needed to go see Dr. Izard. You
- 24 weren't supposed to go on your own to doctors --
- 25 A. No.

- 1 Q. -- under workers' Comp if that's what you were
2 claiming --
- 3 A. No.
- 4 Q. -- correct?
- 5 A. No.
- 6 Q. Okay.
- 7 A. She didn't say that. She said -- that's -- yeah.
8 She said -- all she said was, go to -- come -- come in
9 -- she said, hey, look, just come in on Monday, you
10 know, don't work, don't do this, don't do that, take
11 Aleve. Those -- those doctors exaggerate. And I told
12 her what the doctor -- the emergency doctor said; told
13 her all that information. I'm on Oxycodone, you know,
14 this doesn't -- and she said --
- 15 Q. Well, you were already on all that stuff except
16 for Oxycodone; you were already on all the other
17 medications but you didn't tell her about that, did
18 you?
- 19 A. -- no, I told her about --
- 20 Q. You didn't -- you still didn't tell her --
- 21 A. -- yeah.
- 22 Q. -- on the 24th --
- 23 A. Okay. I wasn't --
- 24 Q. -- listen to me. You still did not tell her on
25 the 24th that you had been to the doctor and the

1 hospital two (2) times before you went to the hospital
2 that day, did you; you didn't have that communication
3 yet?

4 A. -- well, let me finish --

5 Q. Am I --

6 A. -- answering the first question.

7 Q. -- okay.

8 A. I ain't finished the first question --

9 Q. Okay.

10 A. -- okay? The first question what you asked me
11 was, what the Nurse told me.

12 Q. Right.

13 A. I'm -- let me finish that. Okay. She told me
14 that, hey, go to Dr. Izard Monday morning --

15 Q. Okay.

16 A. -- there's no problem. Hey, she didn't say
17 nothing about -- we didn't mention nothing about no
18 Workman's Comp.

19 Q. Okay. So, that didn't even come up that day?

20 A. That didn't even come up.

21 Q. Okay.

22 A. We didn't even think -- nobody didn't say nothing
23 about no Workman's Comp --

24 Q. Okay.

25 A. -- we didn't even say nothing. She told -- Tyrone

1 called me, then Tyrone said he was going to get in
2 contract with the Nurse.

3 Q. Okay.

4 A. Nurses don't work on the weekend. So, he let the
5 Nurse call me back and said -- called me up and said,
6 look --

7 Q. She called you on the weekend?

8 A. -- she called me that Saturday --

9 Q. Okay.

10 A. -- and she said --

11 Q. -- on the weekend?

12 A. -- on the weekend. She --

13 Q. Okay.

14 A. -- okay. She called me that Saturday --

15 Q. Right.

16 A. -- she said she was out of town. She said, hey,
17 just come in on Monday morning and see Dr. Izard. And
18 I said, okay, I'll come in on Monday morning and see
19 Dr. Izard and that was that.

20 Q. Okay. And that's what --

21 A. She said --

22 Q. -- I'm sorry.

23 A. -- go ahead.

24 Q. That's what you did?

25 A. That's what I did.

1 Q. Okay. And you went to see him on June the 26th;
2 so, that would have been Monday, two (2) days later?

3 A. Right.

4 Q. Okay.

5 Mr. Beard: Commissioner, again,
6 permission to approach?

7 Commissioner Wilkerson: Sure.

8 Mr. Beard: All right.

9 Q. I'm looking at your medical records that have been
10 submitted, starting at pages 26, which would be
11 Healthworks; that's where Dr. Izard is, correct?

12 A. Yes.

13 Q. Okay. And you were shown this earlier and you
14 said the date of injury or problem was June 24th, you
15 said you were in severe pain and you were asked some
16 questions. There's a question on here that says, have
17 you ever injured this part of your body before, you
18 put, no, correct?

19 A. Correct.

20 Q. Okay. But you have, you've injured your back
21 before; you had a Workers' Comp claim, right?

22 A. Yeah.

23 Q. Okay. So, that was not true, was it?

24 A. No.

25 Q. Okay. There's also questions on the next page,

1 page 27. It says previous illnesses, back injuries or
2 problems; it says now, past or never. You put now you
3 were having it and you said as of June 24th, '17, and
4 you went to Lexington Emergency, correct?

5 A. Right.

6 Q. You didn't tell them about the past though, did
7 you?

8 A. No --

9 Q. Okay.

10 A. -- I didn't.

11 Q. It says, have you ever had surgery. Now, you've
12 never had back surgery but you have had right knee
13 surgery before; we've already looked and seen that
14 you've had an arthroscopy to your right knee before,
15 correct?

16 A. (Nodded head in an up-and-down motion).

17 Q. You didn't tell him about that either, did you?

18 A. No, I didn't tell him about my right knee as far
19 as -- because it was -- that was like when I was a -- I
20 can't even remember; that was like --

21 Q. Well, you --

22 A. -- when I was a teen.

23 Q. -- you remembered on January the 3rd, 2017, when
24 you told your family doctor that you'd had an
25 arthroscopy surgery on your right knee; why would you

- 1 not remember to tell that to Dr. Izard on his form --
- 2 A. Yeah --
- 3 Q. -- that's only five (5) --
- 4 A. -- yeah.
- 5 Q. -- months later?
- 6 A. Yeah. I -- I didn't remember that.
- 7 Q. Okay.
- 8 A. I -- I just didn't think of that.
- 9 Q. All right. That's the day you made that drawing
- 10 and showed Dr. Izard that you had fluid on your right
- 11 knee?
- 12 A. Was that -- you said January 3rd?
- 13 Q. No. Well, that's when you went to your doctor;
- 14 the -- the report your lawyer submitted --
- 15 A. Oh, okay.
- 16 Q. -- that I --
- 17 A. Okay.
- 18 Q. -- didn't understand why but it had a lot of
- 19 information in it.
- 20 A. Uh-huh.
- 21 Q. I'm asking about -- and in -- in that --
- 22 A. Yeah.
- 23 Q. -- in that information it said you had an
- 24 arthroscopic surgery on your right knee --
- 25 A. Yeah.

- 1 Q. -- which you've admitted --
- 2 A. Yeah.
- 3 Q. -- that you had.
- 4 A. Yeah.
- 5 Q. The only way --
- 6 A. I admitted that.
- 7 Q. -- that he could know that is if you told him --
- 8 A. You're right.
- 9 Q. -- when you were a kid, right?
- 10 A. Right. Right.
- 11 Q. So, you had to tell him?
- 12 A. Yeah. Yeah.
- 13 Q. If you could tell him, why couldn't you tell Dr.
- 14 Izard or why couldn't you tell Michelin or why couldn't
- 15 you tell Westinghouse all those answers when that was
- 16 even closer in time, at least Westinghouse; why
- 17 couldn't you tell all them that?
- 18 A. I -- it was on a questionnaire and I thought it
- 19 was relating to now. I --
- 20 Q. Okay.
- 21 A. -- you know, me and him probably was -- I don't
- 22 know, talking about something. I don't know.
- 23 Q. All right. But you told Dr. Izard that you were
- 24 having fluid on your right knee on June 26th and you
- 25 were claiming that was because of what was going on

- 1 with you, right?
- 2 A. This --
- 3 Q. You were claiming this was because of this June
- 4 24th stuff; isn't that right?
- 5 A. -- no, that's the left --
- 6 Q. No, sir. That's the right knee.
- 7 A. -- okay. I was perceiving it as the left.
- 8 Q. Oh, so you were having problems --
- 9 A. Yeah.
- 10 Q. -- in your left knee?
- 11 A. Yeah. So, I was perceiving it as the left. Hold
- 12 on now, let me see; I don't -- I'm trying to see
- 13 something here now. Yeah, I mean, I was doing the same
- 14 thing as -- let's see --
- 15 Q. And just to remind you, we've already gone through
- 16 this and you admitted that you said that was your right
- 17 knee --
- 18 A. -- yeah. Okay.
- 19 Q. -- and you admitted that you said you had fluid.
- 20 A. Okay. That's my right.
- 21 Q. Okay.
- 22 A. That's right, yeah.
- 23 Q. And --
- 24 A. I thought maybe I was -- something was --
- 25 Q. -- you were --

- 1 A. -- I had to look at that again.
- 2 Q. -- you were relating these right knee problems to
- 3 this workers' Comp incident you were claiming, right --
- 4 A. Yeah.
- 5 Q. -- you were saying that was part of that?
- 6 A. I didn't say it. I mean --
- 7 Q. Well, were you?
- 8 A. -- I said, they --
- 9 Q. Are you?
- 10 A. -- huh?
- 11 Q. Are you claiming your right knee fluid problems is
- 12 related to this workers' Comp claim you're making?
- 13 A. No. They say that it might can be related to
- 14 that.
- 15 Q. I'm asking you are you --
- 16 A. I mean --
- 17 Q. -- claiming that?
- 18 A. -- I don't know. I don't know.
- 19 Q. Well, on June 26th, two (2) days after you claimed
- 20 to have been injured, you told Dr. Izard on a form, at
- 21 least you drew it on there, were you claiming that to
- 22 be related? On June 26th you were making that claim,
- 23 two (2) days after this incident.
- 24 A. I mean, I don't -- as far as making a claim that
- 25 that's related to that?

1 Q. Yes.

2 A. I -- I don't know whether I was making that claim.
3 I just told them, you know, that was what's going on,
4 as happening now.

5 Q. Okay. And Dr. Izard instructed you to return to
6 work immediately under regular duty, correct?

7 A. Correct.

8 Q. And to come back and see him in two (2) days,
9 right? He gave you a two (2) day return to see him,
10 correct?

11 A. No. He just said go back to work and he'll get
12 back with me -- and go back to work and that's the last
13 I heard from Dr. Izard.

14 Q. Okay.

15 A. And -- and I -- and I -- and when I -- I got
16 another opinion and that's why I went out to the
17 emergency room.

18 Q. All right. You went to the emergency room, not
19 the same day as you got the opinion from Dr. Izard, but
20 you went to the emergency room the next day, on June
21 the 27th, correct?

22 A. Yes.

23 Q. You didn't tell Michelin you were going to get
24 another opinion, did you; you just went?

25 A. No. I did. I told --

1 Q. You did what?

2 A. -- I told -- I told Troy Lowman -- I told people
3 -- Troy Lowman and I told -- I forgot who else I told
4 but I told people that, hey, I'm not -- I can't come
5 back to work; no way I can come back to work. I wasn't
6 -- I wasn't just going to leave out of work. I always
7 told them -- I always kept -- I always told them what I
8 was doing prior -- after that 24th; I always told them
9 that.

10 Q. Okay. So, your testimony is, you told Troy Lowman
11 before you went to the hospital on the --

12 A. I know I told --

13 Q. -- let me -- let me finish my question.

14 A. -- go ahead.

15 Q. Before you went to the hospital on June 27th, your
16 testimony is you told Troy Lowman you were going to the
17 hospital on the 27th, even though you weren't working
18 that day?

19 A. I told -- I -- I'm trying to remember who I talked
20 to on the 27th. I talked to some higher up; I think it
21 was Troy Lowman or Kathy, one (1) out the two (2), I
22 was keeping informed on what was going on with me
23 because I was out of work. Because they didn't -- you
24 know, they didn't -- I mean, I had excuses for all
25 those days. So, I can't exactly -- I -- I know I

1 called Troy and told him -- I left a message; we'd been
2 going back-and-forth and also Kathy. I don't -- I
3 can't exactly say which one I was talking to, verbatim,
4 but it was one (1) out the two (2), you know?

5 Q. Okay. During all this time you were -- you were
6 having a -- you had a pretty bad -- you have bad
7 coughing issues. You have -- you were going to the
8 doctors for coughing all that time, as well, weren't
9 you?

10 A. Yeah. I was -- I had a -- I think I had a cold.

11 Q. And -- and, I mean, you were coughing a lot?

12 A. Yeah.

13 Q. Coughing hard?

14 A. Yeah. Cough -- I had a cold.

15 Q. Okay.

16 A. Uh-huh.

17 Q. And that was causing problems with your back,
18 wasn't it?

19 A. Cause -- causing problems? No.

20 Q. Well, it says here, he also states when he coughs
21 it hurts his back; did you tell the doctor that or not?

22 A. Yeah.

23 Q. I mean --

24 A. Yeah.

25 Q. -- what --

- 1 A. Yeah. Yeah. Yeah. Yeah.
- 2 Q. -- okay.
- 3 A. Yeah. Yeah.
- 4 Q. You don't think that's important?
- 5 A. Well, they --
- 6 Q. You don't think that's important?
- 7 A. -- I was telling -- what I was saying was that I
- 8 was coughing so hard that -- that thing hurt my back;
- 9 it was just -- I was just --
- 10 Q. Coughing --
- 11 A. -- I mean, I --
- 12 Q. -- coughing so hard it could have even herniated
- 13 your back, couldn't it?
- 14 A. -- you know what I'm saying, it -- I just coughed
- 15 hard; you know what I'm saying?
- 16 Q. It could have herniated your back you were
- 17 coughing so much and coughing so hard during that
- 18 period of time; isn't that right?
- 19 A. Herniate?
- 20 Q. Yes.
- 21 A. What's -- what -- explain what you're saying. I
- 22 mean --
- 23 Q. You could have herniated your back. You could
- 24 have blown out a disk you were coughing so hard.
- 25 A. -- I mean, not -- not -- no. Okay. If that's --

1 if that's what you say.

2 Q. Okay.

3 A. Yeah.

4 Q. This says you told the doctor you were having
5 numbness into your right leg at the hospital, not your
6 left leg but your right leg; is that correct?

7 A. The doctor --

8 Q. It's what it says. You told him that?

9 A. -- the doctor?

10 Q. The doctor says you told him, patient states he
11 has numbness in his right leg --

12 A. Oh, yeah.

13 Q. -- and also states when he coughs it hurts his
14 back.

15 A. And that's the -- the 27th?

16 Q. Yes, sir.

17 A. Yeah. They might have gotten that wrong, you
18 know, because --

19 Q. Or maybe that's what you told them.

20 A. -- they got that wrong, probably, yeah.

21 Q. Well, then why did you submit this document into
22 evidence if it was wrong?

23 Mr. Samuels: Objection, Your --

24 Q. Do you know why your lawyer would have submitted
25 it?

1 Mr. Samuels: -- objection, Your Honor,
2 argumentative.

3 Commissioner Wilkerson: Yes. He
4 doesn't know why.

5 Mr. Beard: Okay.

6 Q. Did you know your lawyer submitted a document into
7 evidence that says -- that you submitted into evidence,
8 that says that you had numbness in your right leg on
9 June the 27th, 2017; did you know that?

10 A. No.

11 Q. Okay.

12 A. Because it should have -- can I -- oh.

13 Mr. Samuels: Your Honor, I think he is
14 allowed to answer the question.

15 Commissioner Wilkerson: Yes.

16 Witness: Yes. Can I say?

17 A. Because that's -- I mean, that's the -- they --
18 they got the -- that's the -- that's the same emergency
19 room doctor that I went to the 24th. So, everything
20 that was -- all the docs -- all the documents that --
21 like I said, that might have been a -- that's a type
22 error right there --

23 Q. Okay.

24 A. -- you know.

25 Q. It says on the 27th you had no problem with your

1 gait; in other words, you weren't limping. You were
2 walking normally according to -- the patient reports
3 ambulates with a normal gait; that's on page 35 of your
4 medical records. So, you weren't limping on that -- at
5 that time, correct?

6 A. The 27th?

7 Q. Yes.

8 A. Not limping but I was kind of --

9 Q. You were walking normally?

10 A. -- no, I wasn't walking normally.

11 Q. Okay. So -- so, when your doctor puts big old
12 bold writing on that page, patient ambulates, meaning
13 walks, with a normal gait, meaning you're not limping,
14 you --

15 A. Uh-huh.

16 Q. -- you dispute that?

17 A. No, I wouldn't dispute that. I -- I wasn't -- I
18 wouldn't say I would be limping.

19 Q. You were walking normal --

20 A. Oh.

21 Q. -- according to the doctor.

22 A. He said -- what he said was --

23 Q. You were walking normal.

24 A. -- what he said -- say that again; repeat what he
25 said.

1 Q. Patient ambulates with a normal gait; that means.
2 you walk normal.

3 A. Oh, well, that's -- that's -- that's what he said.

4 Q. Okay. When you went to the hospital on the 27th,
5 it says you told them -- or it says, patient states he
6 was seen here three (3) days ago, that would have been
7 on the 24th, you didn't tell the hospital that you had
8 been to Dr. Izard the day before, did you; you didn't
9 relay that information to them, did you?

10 A. I don't remember --

11 Q. Okay.

12 A. -- but I -- I know they -- they referred me to
13 Lexington Brain and -- and I'd been -- I got a shot.

14 Q. That wasn't what I asked you.

15 A. Oh, okay.

16 Q. I said, you didn't tell the hospital that you had
17 been to Dr. Izard the day before, correct; you didn't
18 tell them that?

19 A. I -- I think I did mention it to them because --

20 Q. You don't know why it's not in your medical
21 records?

22 A. -- I don't know why but I think I did mention
23 that, hey, I -- because I've been -- I told them what
24 all the doctors I'd been to as far as the emergency
25 room, the first time I came there --

1 Q. Okay.

2 A. -- and also my --

3 Q. Urgent Care?

4 A. -- no. Dr. Izard, what he --

5 Q. Okay.

6 A. -- what he told me but -- but I think I did
7 mention that to him; I can't recall. I can't remember
8 but I think I did mention because I always -- you -- I
9 think I usually mentioned that I -- I go there and tell
10 them everything.

11 Q. You can't explain why they only mention that you
12 had been to the hospital three (3) days before --

13 A. well, I --

14 Q. -- but they didn't mention the day before you had
15 been to Dr. Izard?

16 A. -- I can't explain it. The same reason why I
17 can't explain that -- that they said the right leg
18 fluid.

19 Q. It's kind of strange how all the things that are
20 hurtful to your case are not in any of these records
21 every time I ask you something; have you noticed that?

22 Mr. Samuels: Objection, Your Honor,
23 argumentative.

24 Commissioner Wilkerson: It doesn't
25 matter; if I've noticed it that's what

1 counts.

2 Mr. Beard: Okay.

3 Q. The hospital put you on restrictions for three (3)
4 days from June the 27th; is that correct?

5 A. Yeah.

6 Q. Okay. All right. So, three (3) days later, on
7 June the 30th, did you go back to work when the
8 restrictions ended?

9 A. No.

10 Q. Okay. Instead you started going somewhere else.
11 You went to Doctor's Care on your own, correct?

12 A. Right.

13 Q. Okay.

14 A. I went to Doctor's Care, yeah.

15 Q. So, you picked a whole another doctor to go
16 through and then I look --

17 Mr. Beard: -- and those records,
18 Commissioner, start at page 43 of Claimant's
19 APA's.

20 Q. At page 44, on June 30th, 2017 --

21 Mr. Beard: -- can I approach,
22 Commissioner?

23 Commissioner Wilkerson: Please.

24 Q. Page 44 there's a big box at the top that says,
25 Workers' Compensation; do you see that box?

- 1 A. Uh-huh.
- 2 Q. That's yes?
- 3 A. Yes.
- 4 Q. Is this a Workers' Compensation Claim? Did you
5 check yes on that box?
- 6 A. I didn't check nothing on it.
- 7 Q. Correct. You didn't check yes, though, did you?
- 8 A. I didn't check nothing.
- 9 Q. You didn't tell that doctor it was a Workers' Comp
10 claim, did you?
- 11 A. What, you're talking about Doctor's Care?
- 12 Q. Yes, sir.
- 13 A. It wasn't a Workman's Comp claim.
- 14 Q. Okay. And that is your signature on June 30th,
15 correct?
- 16 A. Yeah.
- 17 Q. Okay. It says, interestingly, you told them on
18 your report at page 45, it says, fifty (50) year old
19 with work-related, left sided, low back pain, he has
20 been seen four (4) times since June 11th, 2017; is that
21 what it says?
- 22 A. Yeah.
- 23 Q. All right. And then it's got right under it, the
24 four (4) times: June 11th, that would have been the
25 hospital, correct?

1 A. Uh-huh.

2 Q. That's yes?

3 A. Yes. I'm sorry.

4 Q. June 16th, I assume you've got the date wrong and
5 it was June 13th, it would have been to your personal
6 doctor, correct --

7 A. Correct.

8 Q. -- or did you go somewhere on June 16th that we
9 don't know about?

10 A. I -- I don't -- I don't know what he did.

11 Q. Okay.

12 A. I don't know.

13 Q. June 24th would have been the hospital on June
14 24th the first day, right?

15 A. Uh-huh.

16 Q. That's yes?

17 A. Yes.

18 Q. June 27th would have been the hospital three (3)
19 days before this when they told you to go back to work
20 three (3) days later, right?

21 A. Right.

22 Q. Where's doctor --

23 A. Yes, sir.

24 Q. -- where's -- where's Dr. Izard's? You didn't
25 tell them about Dr. Izard either, did you?

- 1 A. (Shook head in a side-to-side motion).
- 2 Q. That's amazing. Dr. Izard is not there either, is
- 3 he?
- 4 A. I -- like I said, I did -- I think I did tell
- 5 Doctor's Care.
- 6 Q. So -- so, they go and make a point of writing down
- 7 every single time you said you went to the doctor and
- 8 the only one that's missing, the only one, is Dr.
- 9 Izard?
- 10 A. No. What they can do is pull up what he did -- he
- 11 did before I set up -- let me -- let me --
- 12 Q. Go ahead. I'm listening.
- 13 A. -- okay.
- 14 Q. I'm -- I'm not --
- 15 A. Don't interrupt me now.
- 16 Q. -- go ahead.
- 17 A. What he did -- what he told me what he did before
- 18 I even saw him --
- 19 Q. I didn't ask you what he told you.
- 20 A. -- oh.
- 21 Q. You can't tell me that.
- 22 A. Okay. Okay. Well -- well, I can't say nothing.
- 23 Q. Is Dr. Izard's --
- 24 A. No, it's not on that.
- 25 Q. -- office visit on the report?

1 A. No.

2 Q. Okay. And, again, this was a doctor you went to,
3 again, on your own, without Michelin's authority or not
4 under Workers' Comp, correct?

5 A. Correct.

6 Q. Okay.

7 Commissioner Wilkerson: And didn't I
8 hear you testify to earlier that the reason
9 you went to Doctor's Care -- it wasn't work
10 related, right?

11 Witness: Say what?

12 Mr. Samuels: If I may, Your Honor, I
13 think he said it wasn't --

14 Commissioner Wilkerson: I thought he
15 said --

16 Mr. Samuels: -- wasn't work --

17 Commissioner Wilkerson: -- it was not
18 under --

19 Mr. Samuels: -- wasn't under Workers'
20 Comp.

21 Witness: Yeah.

22 Commissioner Wilkerson: -- I'm sorry?

23 Witness: No, it wasn't -- it wasn't
24 under Workman's Comp.

25 Commissioner Wilkerson: Is why he went

1 to Doctor's Care?

2 Witness: No. I went to Doctor's Care
3 to -- to see about my back. I just went to
4 Doctor's Care but it wasn't on no Workman's
5 Comp.

6 Commissioner Wilkerson: It wasn't on
7 Workers' Comp, is what he said.

8 Witness: No. I didn't -- I didn't even
9 have Workman's Comp; I didn't have nothing.

10 Commissioner Wilkerson: That's what he
11 said, it wasn't on Workers' Comp?

12 Witness: Right.

13 Commissioner Wilkerson: Okay. That's
14 what -- I mean, I thought that's what he
15 said.

16 Mr. Samuels: Well, that goes to the --
17 the -- the payment; it's not --

18 Commissioner Wilkerson: Oh, I --

19 Mr. Samuels: -- the reason for going
20 there. The record --

21 Commissioner Wilkerson: -- don't have a
22 clue what it goes to.

23 Mr. Samuels: -- the record speaks for
24 itself as to --

25 Mr. Beard: You have no idea --

1 Mr. Samuels: -- if he's there for an
2 injury.

3 Mr. Beard: -- that that's what it goes
4 to.

5 Commissioner Wilkerson: I -- I don't
6 have --

7 Mr. Beard: You can't testify, Stephen.

8 Commissioner Wilkerson: -- because he
9 doesn't check the Workers' Comp box; that's
10 why I'm confused. If -- if he --

11 Witness: Yeah. I didn't check the
12 Workers' Comp because I never had workman's
13 Comp. I never -- I didn't -- I was never had
14 it.

15 Commissioner Wilkerson: -- it doesn't
16 ask you have you ever had it; that's where my
17 concern is with the whole process.

18 Mr. Samuels: But, Your Honor, he hasn't
19 checked anything.

20 Witness: Yeah.

21 Commissioner Wilkerson: I agree.

22 Witness: Yeah.

23 Commissioner Wilkerson: It's just his
24 name and signed the form; I agree.

25 Witness: Yeah.

1 Commissioner Wilkerson: I don't think
2 there's any dispute, yeah.

3 Mr. Samuels: Yeah.

4 Q. Page 45 of the report says, he -- that the doctor
5 told you and your wife that you needed to see an
6 orthopedic. Now, I thought you were separated from
7 your wife?

8 A. Yeah.

9 Q. Was your wife with you at this visit?

10 A. No.

11 Q. Well, who is your wife?

12 A. The -- Larissa.

13 Q. Who?

14 A. Larissa.

15 Q. So, it wasn't your wife?

16 A. No. It was --

17 Q. It was somebody else?

18 A. -- yes.

19 Q. Girlfriend?

20 A. Friend.

21 Q. Okay. All right. It said, your wife -- I guess
22 that would be the friend -- had already called Midlands
23 Black and Blue Clinic but they do not see backs there;
24 is that correct?

25 A. The Black and Blue Clinic?

- 1 Q. I'm just telling you what the report says.
2 Apparently your wife, Larissa, told them that she had
3 already called Midlands Black and Blue Clinic but they
4 do not see backs there. I'm just reading the --
- 5 A. Oh.
- 6 Q. -- report --
- 7 A. Yeah.
- 8 Q. -- your lawyer put into evidence.
- 9 A. The Midlands Ortho -- we -- we called them from
10 there and they didn't see people that -- we just had --
11 we had to wait until -- because we couldn't get in
12 Lexington Brain -- we had to try to get in Lexington
13 Brain and Spine.
- 14 Q. It says he gave you a list of orthopedic doctors
15 to go to; did -- you didn't go to any of those
16 orthopedic doctors either, did you --
- 17 A. Couldn't get --
- 18 Q. -- on the list that he gave you?
- 19 A. -- couldn't get into them.
- 20 Q. Okay. All right. And that's the only time you
21 went to Doctor's Care, correct, June the 30th? You
22 didn't go again to Doctor's Care, did you?
- 23 A. Not after June 30th, no.
- 24 Q. Okay. And it says, their plan was you were going
25 to be out of work on Friday, Saturday and Sunday; so,

1 it looks like that would have been three (3) days,
2 correct?

3 A. Correct.

4 Q. Did you go to -- go back to work three (3) days
5 later?

6 A. No. That was -- that was the -- no. And the 4th
7 of July came up -- the --

8 Q. Well, this says return --

9 A. -- the -- the vacation.

10 Q. -- this says return to work on July 3rd, the --

11 A. Yeah. It was --

12 Q. -- this is page 49. Did you go back to work on
13 July 3rd?

14 A. -- no.

15 Q. And you didn't go back to work ever again after
16 that, all the way up till ever; you've never gone back
17 to work, right?

18 A. Right. Because -- right.

19 Q. Okay. And you didn't see any doctors at all
20 between June the 30th and July the 24th when you went
21 to doctor -- or to Lexington Brain and Spine, correct;
22 you didn't see any doctors between there?

23 A. June 30th till what?

24 Q. July 24th.

25 A. June 30th till July --

- 1 Q. Yes.
- 2 A. -- 24th?
- 3 Q. Yes.
- 4 A. I -- I can't remember when I seen Dr. Boyd. We
- 5 had a --
- 6 Q. Well, you --
- 7 A. -- we had a --
- 8 Q. -- you saw Dr. Boyd's --
- 9 A. -- not Dr. Boyd but doctor -- the first --
- 10 Q. -- you saw Mr. Valdes --
- 11 A. -- the -- the -- the -- the first --
- 12 Q. -- the PA on July the 24th --
- 13 A. -- okay.
- 14 Q. -- that the first time --
- 15 A. Right.
- 16 Q. -- according to the records you submitted. My
- 17 question is, am I correct --
- 18 A. Right.
- 19 Q. -- you did not go to or see a doctor between June
- 20 the 30th and July the 24th, '17?
- 21 A. Right.
- 22 Q. Okay. what is Valtrex?
- 23 A. That's like if you have a bump on your lip, a cold
- 24 sore.
- 25 Q. Were you seeing Doctor's Care for that too?

- 1 A. Not -- not really.
- 2 Q. Well, why --
- 3 A. I mean, it --
- 4 Q. -- did your lawyer submit two (2) pieces of paper
5 at pages 50 and 51 saying you were calling in the
6 doctor's office for Valtrex --
- 7 A. -- yeah. I don't know.
- 8 Q. -- on both dates and they were apparently calling
9 in prescriptions for you for those; why --
- 10 A. Yeah.
- 11 Q. -- why is that in the record?
- 12 A. I don't know. Well, as far as the doctors were --
13 I mean, it was like a -- what you could take for cold
14 sores. I don't take that ever -- every day or nothing
15 like that.
- 16 Q. Then you got to Mr. Valdes on July the 24th of
17 '17, correct?
- 18 A. Correct.
- 19 Q. All right. And according to his history it says,
20 you told him you were injured while at work at the
21 Michelin plant on June 24th, stated he was lifting some
22 heavy materials when he felt a sharp pain in his lower
23 back; is that what you told him?
- 24 A. Yes.
- 25 Q. Okay. He had visits to primary care and Urgent

- 1 Care and eventually ended up in our emergency
2 department; is that what you told him?
- 3 A. Yeah.
- 4 Q. Okay. You didn't tell them about Dr. Izard, did
5 you?
- 6 A. I think I did tell them about -- I told them about
7 -- ever when I went there I told them that.
- 8 Q. Okay.
- 9 A. I think I did. I told them every doctor I went
10 to.
- 11 Q. All right. And it looks like he put you on -- the
12 only prescription he gave you was Flexeril; is that
13 correct?
- 14 A. Correct.
- 15 Q. Low back pain, it says Flexeril underneath it?
- 16 A. Uh-huh.
- 17 Q. Yes?
- 18 A. Yeah. Yes, sir.
- 19 Q. And you had already been put on Flexeril as far
20 back as June the 11th, correct; two (2) weeks before --
- 21 A. Yes.
- 22 Q. -- more than two (2) weeks --
- 23 A. Yes, sir.
- 24 Q. -- before June 24th --
- 25 A. Yes, sir.

1 Q. -- or actually two (2) weeks before June 24th?

2 A. Yes, sir.

3 Q. Okay. And had been on Flexeril all that time,
4 correct?

5 A. Yes, sir.

6 Q. Then you saw Dr. Boyd, himself, for the first time
7 on August the 7th, correct?

8 A. Correct. Yes, sir.

9 Q. And for the first time in any medical report you
10 indicate that you injured yourself pulling rubber at
11 the Michelin plant as opposed to doing heavy lifting
12 and those other things; is that correct? Is that the
13 first time you told anybody specifically about pulling
14 on rubber?

15 A. I -- I told everybody that but -- well, everybody,
16 they just -- yeah, I told everybody -- anybody that I
17 seen what had happened.

18 Q. Would you agree that's the first medical report
19 that said you were pulling rubber?

20 A. Yeah, that's the first medical report --

21 Q. Would you agree all the other ones said you were
22 doing heavy lifting?

23 A. -- yeah, I'll agree to -- if they said it, yeah; I
24 agree with it if that's what they're saying.

25 Q. And somehow you remembered -- even though you

1 couldn't remember when you filled out the forms and you
2 said it was over twenty-one (21) years ago and those
3 kind of things -- you told Dr. Boyd that you'd had
4 previous back problems maybe -- it says maybe
5 twenty-five (25) years ago he had an episode that
6 resolved without any treatment; did you tell Dr. Boyd
7 that?

8 A. Twenty-five (25) years? I -- I don't --

9 Q. That's what you said --

10 A. -- yeah.

11 Q. -- that's what he said you told him.

12 A. Okay. If it's --

13 Mr. Beard: I'm looking at page 58,
14 Commissioner, of the Claimant's APA's --

15 Witness: -- okay.

16 Mr. Beard: -- on August the 7th.

17 Commissioner Wilkerson: Okay.

18 Q. It says, he states that he really --

19 A. Yeah.

20 Q. -- hasn't had previous back problems except maybe
21 twenty-five (25) years ago he had an episode that
22 resolved without any treatment --

23 A. Yeah.

24 Q. -- area of this pain --

25 A. Yeah.

- 1 Q. -- is made worse by bending over or picking
2 anything up.
- 3 A. I guess that's -- that's -- tell him that -- I did
4 tell him.
- 5 Q. So -- so, you remembered when you saw Dr. Boyd you
6 had a prior back problem but you didn't remember
7 anybody -- any other time when you had the opportunity
8 to answer that question; is that correct?
- 9 A. That's correct.
- 10 Q. Okay. And apparently you were going through
11 physical therapy -- I think your lawyer asked you all
12 this -- and physical therapy was actually helping you
13 and making you better; isn't that right?
- 14 A. Correct.
- 15 Q. And I think you said something about -- I think
16 you said you -- you -- you never finished physical
17 therapy --
- 18 A. Right.
- 19 Q. -- is that what you told him?
- 20 A. Right.
- 21 Q. Okay. The whole time you were going to Dr. Boyd
22 your pain level, according to him, was always around
23 three (3) out of ten (10); does that sound right?
- 24 A. Yeah. Whatever he put -- yeah.
- 25 Q. So --

- 1 A. whatever he put.
- 2 Q. -- the whole time you're seeing Dr. Boyd you're
- 3 three (3) out of ten (10); you would agree that's a
- 4 whole heck of a lot better than ten (10) out of ten
- 5 (10), isn't it?
- 6 A. Uh-huh.
- 7 Q. That's yes?
- 8 A. Yes. Yes, sir.
- 9 Q. And yet, when you were ten (10) out of ten (10)
- 10 you were still working at Michelin and when you're
- 11 three (3) out of ten (10) you're not working anywhere;
- 12 isn't that correct?
- 13 A. Correct.
- 14 Q. So -- so, you could work in ten (10) out of ten
- 15 (10) pain but you can't work in three (3) out of ten
- 16 (10) pain; that's your -- that's what you're telling
- 17 us?
- 18 A. No, I'm not telling you that.
- 19 Q. Okay. This also says that you have pain that
- 20 radiates down from -- to your right leg on August --
- 21 oh, excuse me -- September 14th, page 63. You don't
- 22 have radiating pain into your right leg, do you?
- 23 A. No.
- 24 Q. Okay.
- 25 A. That was from who?

1 Q. Dr. Boyd. Then you went to -- or you started
2 going to the Physical Therapist; Dr. Boyd sent you over
3 there, correct?

4 A. Correct.

5 Q. All right.

6 Mr. Beard: Commissioner, permission to
7 approach?

8 Commissioner Wilkerson: Please.

9 Mr. Beard: Claimant's page 73, I
10 believe, start -- or at least that's part of
11 the physical therapy; it actually looks like
12 it starts on page 72.

13 Commissioner Wilkerson: Okay.

14 Q. You went to Lexington Physical Therapy; is that
15 where you were going?

16 A. Yeah.

17 Q. Okay. Is that all your handwriting on page 73?

18 A. Uh-huh. Yeah.

19 Q. Okay. There's a question that says, if injury is
20 due to an accident, when was the date of accident; did
21 you answer that question?

22 A. Yeah. I didn't -- I didn't even see that, yeah.
23 No, I didn't answer that question.

24 Q. Okay. You answered every other question on there
25 but you just didn't answer that question?

1 A. Yeah. They knew what the date was -- they -- they
2 knew what the date was when I had the accident, it was
3 the 24th.

4 Q. You filled the form out?

5 A. Yes.

6 Q. Did you write on there the date of the accident?

7 A. No.

8 Q. Okay. And you started going to physical therapy;
9 it looks like -- the first time you went it looks like
10 was July 27th at page 76. It says -- they made sure to
11 put in there that you had a lawyer at that time
12 representing you; so, you had a lawyer on July 27th,
13 correct? It wasn't Mr. Samuels; you had another lawyer
14 before him, correct?

15 A. Correct.

16 Q. Okay. And you were going -- there's the report
17 update on August 25th. We've got all kind of dates
18 here that always say you're getting better; you were
19 getting better continuously, right?

20 A. Yes.

21 Q. That's a yes?

22 A. Yes.

23 Q. Okay. 9/7/17, it says --

24 Mr. Beard: -- page 79, Commissioner,
25 the very last entry.

1 Q. Patient no-showed, tried calling patient but
2 number is disconnected. So, you just quit going; is
3 that correct?

4 A. No. I mean, I -- I -- that -- that's the time
5 when my phone was off --

6 Q. Okay.

7 A. -- and I -- I told the instructor, the lady, that
8 I -- I wouldn't be coming back because I -- I could
9 have -- I couldn't afford it.

10 Q. Okay. Well, this says that you actually got
11 discharged on October 13th of 2017. It says condition
12 upon discharge -- this is page 80 of your medical
13 records -- you were significantly improved at the time
14 you were discharged. It says, potential for further
15 improvement is excellent. You were discharged to a
16 home exercise program; that means you weren't going to
17 be coming to physical therapy, they gave you exercises
18 to do at home --

19 A. No.

20 Q. -- and you were going to self-manage with your
21 home exercise program. And just so you understand
22 before you say no, you submitted this document into
23 evidence; you understand that?

24 A. Did I?

25 Q. Your lawyer did.

- 1 A. Oh, okay.
- 2 Q. You understand and --
- 3 A. Right.
- 4 Q. -- and that means you did.
- 5 A. Okay. Well, they got that -- I didn't never -- I
- 6 didn't -- all I -- I told the lady up front that I
- 7 couldn't come back.
- 8 Q. Okay.
- 9 A. So, they did them -- the other things as far as
- 10 discharging me or what may have -- because I've got a
- 11 bill now for them.
- 12 Q. You agree --
- 13 A. So, I couldn't --
- 14 Q. -- you agree this record says you were discharged
- 15 to a home exercise program --
- 16 A. -- no, I don't --
- 17 Q. -- is that what it says?
- 18 A. -- I don't agree on that.
- 19 Q. Is that what the document says?
- 20 A. That's what the document says.
- 21 Q. That's all I'm asking.
- 22 A. Okay. Yeah --
- 23 Q. Okay.
- 24 A. -- that's what the document says.
- 25 Mr. Beard: Stephen, just for the

1 record, earlier when you, I think were
2 questioning the application, you actually
3 have that in your evidence at pages 85, 86 of
4 the APA's; the application that I read from,
5 Commissioner.

6 Commissioner Wilkerson: The one -- the
7 employment application?

8 Mr. Beard: Correct, for Michelin. Mr.
9 Samuels --

10 Commissioner Wilkerson: Hold on.

11 Mr. Samuels: Right.

12 Mr. Beard: -- actually submitted that
13 at page 85 and 86 of the APA's and there is
14 -- it's the identical application that I
15 showed him. No indication of Richtex --

16 Commissioner Wilkerson: Oh, I see it,
17 yes.

18 Mr. Beard: -- from '97 --

19 Commissioner Wilkerson: Okay.

20 Mr. Beard: -- those kinds of things.

21 Commissioner Wilkerson: I've got you.

22 Mr. Samuels: Yes. Thanks -- thanks for
23 pointing that out because that was why I
24 couldn't find it.

25 Mr. Beard: Okay. Yes.

- 1 Q. Your attorney, again, submitted another record at
2 page 88 that is a Michelin chart that indicates who you
3 talked to, in which I talked about; he showed you that
4 a little earlier, remember, it talked about Nurse
5 Sirois?
- 6 A. No, sir.
- 7 Q. Or Sirois how he -- I think he pronounced it Nurse
8 Sirois; remember when we talked about that, the -- the
9 company Nurse and he showed you the form and said did
10 you call her and what did you all talk about; do you
11 remember all that?
- 12 A. Today?
- 13 Q. Today, yes, sir.
- 14 A. Okay.
- 15 Q. When -- when Mr. Samuel's asked you questions about
16 it; you don't remember that?
- 17 A. About Nurses calling --
- 18 Q. Yes. About the Nurse --
- 19 A. -- okay.
- 20 Q. -- about Mr. Lowman, about all those --
- 21 A. Yeah. Yeah.
- 22 Q. -- kinds of things?
- 23 A. Uh-huh. Yeah.
- 24 Q. Okay.
- 25 A. Yeah. Uh-huh.

1 Q. All right. And he showed you some forms and he
2 asked you if you talked to her on the phone. And on
3 June the 24th this is what she said, it says, employee
4 stated on June 24th, around 5:30 A.M., that he was
5 working on PAP when his back started to ache; is that
6 what you told her?

7 A. Uh-huh.

8 Q. That's yes?

9 A. Yeah.

10 Q. Okay. It says, he said he continued to work and
11 the back pain got worse; is that what you told her?

12 A. Yes, sir.

13 Q. How -- how much longer did you continue to work if
14 you got off at six o'clock and you were at the hospital
15 by 6:00 something in the morning?

16 A. Well, I wasn't at the hospital at 6:00 something.

17 Q. How quick did you go to the hospital?

18 A. At first I went to the Nurse and then I went to
19 the family health center.

20 Q. They were closed.

21 A. I didn't -- I didn't get to the hospital until --
22 I can't remember what it is right now, 9:00 or 8:00 or
23 9:00 or something like that.

24 Q. How did you get there?

25 A. Drove.

- 1 Q. Yourself or did somebody take you?
2 A. I drove.
3 Q. Okay. All right. So -- all right, so you got to
4 the hospital several hours later, correct?
5 A. Uh-huh. Yeah.
6 Q. Okay.
7 A. Yes, sir.
8 Q. But you admit that you quit working at 6:00 A.M.
9 because you said that's when your shift ended, correct?
10 A. Yeah.
11 Q. Okay.
12 A. I'm thinking 6:00 A.M. or 7:00 I don't --
13 Q. Okay.
14 A. -- I can't remember. Go ahead.
15 Q. You told her you went to the Lexington Medical
16 Center ER, you said you -- this is what it says,
17 employee stated he left work and went to the Michelin
18 family health but they were closed, correct?
19 A. Correct.
20 Q. All right. He then went to Lexington Medical
21 Center ER, correct?
22 A. Correct.
23 Q. Employee did not report injury to anyone until
24 being released from Lexington Medical Center ER; that's
25 what the Nurse said that your lawyer submitted into

- 1 evidence.
- 2 A. Oh.
- 3 Q. So -- so, you didn't report it until you were
4 released by the Lexington Medical Center Hospital,
5 correct?
- 6 A. Well --
- 7 Q. And that's when you called Mr. Lowman?
- 8 A. -- no, sir.
- 9 Q. Okay. So -- okay. You were diagnosed with a
10 lumbar strain and given prescriptions for Percocet and
11 Flexeril; is that correct?
- 12 A. Correct.
- 13 Q. Okay. On that same report she indicates that you
14 denied anything specific starting the pain at work and
15 you denied anything personal outside of work during
16 your telephone conversation with her as causing your
17 low back problems; is that true?
- 18 A. It said I denied?
- 19 Q. You denied anything specific that started the pain
20 at work and you denied anything outside of work or
21 personal that caused your back pain; is that what you
22 told her?
- 23 A. No. I told her -- I told her what had happened --
- 24 Q. So -- so, you didn't --
- 25 A. -- so, I told her --

- 1 Q. -- go ahead.
- 2 A. -- let me finish.
- 3 Q. I'm sorry.
- 4 A. I told her that -- you know, she said, what
- 5 happened and I told her that I was stretching rubber --
- 6 Q. Okay.
- 7 A. -- you know --
- 8 Q. So, when she writes --
- 9 A. -- I told her several times when I did that.
- 10 Q. -- so, you deny what she wrote in the report, that
- 11 you didn't tell her that?
- 12 A. I -- I mean, I don't know what she wrote but I
- 13 know --
- 14 Q. I just told you what she wrote.
- 15 A. -- but I know what I told her.
- 16 Q. I just read it to you.
- 17 A. Yeah. I don't know. I -- no, I -- I deny what --
- 18 Q. Okay.
- 19 A. -- what she said, yeah.
- 20 Q. That's fine.
- 21 A. But I -- I -- I told her what had happened.
- 22 Q. All right. And she told you she was scheduling
- 23 you an appointment with Dr. Izard on -- on June the
- 24 26th or on Monday, correct?
- 25 A. Correct.

- 1 Q. All right.
- 2 A. Yes, sir.
- 3 Q. All right. She went with you to the appointment
4 with Dr. Izard; is that correct, on June 26th?
- 5 A. She met me there.
- 6 Q. Okay. Well, that's what I mean; she was there.
- 7 A. Okay.
- 8 Q. She was at the appointment, correct?
- 9 A. Correct.
- 10 Q. Okay.
- 11 A. Yeah.
- 12 Q. And then she reports on June the 28th -- it says,
13 she received a call from you on June 28th at 9:11 A.M.
14 Do you remember calling her two (2) days after you saw
15 Dr. Izard?
- 16 A. I -- I think so. I think I remember --
- 17 Q. It says you told her --
- 18 A. -- talking with her.
- 19 Q. -- you went to Lexington Medical Center the day
20 before and got an injection in your lower back --
- 21 A. Yeah.
- 22 Q. -- and you had been written out of work for three
23 (3) days?
- 24 A. Yes.
- 25 Q. He told me that he could not come to see Dr. Izard

1 today because he did not have a ride; that's what you
2 told her, right?

3 A. I don't know about that part.

4 Q. You -- did you tell her that or not?

5 A. I don't -- I can't remember what I told her.

6 Q. Okay. Well, why -- why did you tell her you
7 couldn't come to Dr. Izard?

8 A. You're saying --

9 Q. You can't remember what you told her?

10 A. -- no, I told -- what I --

11 Q. Well, you just told me you can't remember what you
12 told her.

13 A. -- okay. Well, let me -- let me say this. Now,
14 the last you said on the -- I'm trying to remember
15 verbatim what you be asking. So, I'm trying to --

16 Q. Well, she, verbatim, said that you told her you
17 could not come to doctor -- to see Dr. Izard today
18 because you did not have a ride; that's what you told
19 her?

20 A. -- yeah. I told her more things as well, too.
21 Because I was --

22 Q. But did you tell her that?

23 A. -- yeah.

24 Q. That's all I asked you.

25 A. Yeah.

1 Q. okay.

2 A. I think so, yeah.

3 Q. It says, she asked you if you were treating this
4 personally and you said, no, that it was work-related;
5 is that correct?

6 A. She -- no, she didn't ask me that.

7 Q. okay.

8 A. Personally and work-related, she didn't --

9 Q. All right.

10 A. -- she didn't really ask me about that.

11 Q. It says, she explained to you the Workers' Comp
12 process and you told her you had never been notified --

13 A. Correct.

14 Q. -- is that correct?

15 A. Correct.

16 Q. Okay. Even though you've already admitted you
17 went through the PowerPoint that told you about the
18 workers' Comp process and all the safety rules that
19 you're supposed to go through; you've already admitted
20 that, correct?

21 Mr. Samuels: Your Honor, I -- I have to
22 object; that's facts not in evidence in the
23 --

24 Commissioner Wilkerson: That isn't
25 going to win the case.

1 Mr. Samuels: -- all right. I'll --
2 fine.

3 Commissioner Wilkerson: I promise you.
4 We're so -- we're at three (3) plus hours in
5 of witness one (1) with seven (7) more
6 waiting. We're not going to finish today;
7 you all know that. You all can just come
8 back Monday; I'm okay with that too.

9 Q. It says --

10 Commissioner Wilkerson: I don't think
11 we're going to finish are we, today?

12 Mr. Beard: -- we probably will. I
13 think we will. I hope we will.

14 Commissioner Wilkerson: I don't know.

15 Mr. Beard: I would hope so.

16 Commissioner Wilkerson: I don't believe
17 it.

18 Mr. Beard: I'm -- I'm a lot quicker
19 with my witnesses but we'll see. I haven't
20 gotten to mine yet.

21 Commissioner Wilkerson: And summer is
22 coming.

23 Q. She told you, you needed to talk to your
24 supervisor immediately, correct?

25 A. Correct.

- 1 Q. And --
- 2 A. I think --
- 3 Q. -- and --
- 4 A. -- yeah, she --
- 5 Q. -- and, in fact --
- 6 A. -- no.
- 7 Q. -- you really wouldn't even let her talk to you
- 8 and you hung up on her; isn't that right?
- 9 A. I hung up on her?
- 10 Q. Yes, sir.
- 11 A. No.
- 12 Q. You deny that?
- 13 A. Yeah, I deny it.
- 14 Q. Okay.
- 15 A. I didn't hang up on her.
- 16 Q. You did not show up for the appointment with Dr.
- 17 Izard at 2:30 that afternoon, did you?
- 18 A. No, sir.
- 19 Q. Okay. Now, you had been contacted, you said by
- 20 somebody you thought named Mark, that would be Mark
- 21 Gross. You were contacted by the safety person in
- 22 charge at Michelin in US 7, Mark Gross, and he told you
- 23 he would send a taxi to take you to Dr. Izard, he would
- 24 send somebody else to take you to Dr. Izard, he would
- 25 get you to Dr. Izard; isn't that correct?

1 A. Correct.

2 Q. And you refused that; isn't that correct?

3 A. I will -- can I answer it fully?

4 Q. Did you --

5 A. Oh.

6 Q. -- refuse it --

7 A. Yeah. Uh-huh.

8 Q. -- yes or no, and then you can answer it.

9 A. Yes, I refused it.

10 Q. Okay.

11 A. Okay.

12 Q. Go ahead --

13 Commissioner Wilkerson: Now, you can
14 answer it.

15 Q. -- if you've got something else you need to say.

16 Commissioner Wilkerson: Go ahead.

17 A. Yeah. I was under Oxycodone and I didn't feel
18 comfortable going out. I was very highly medicated and
19 I didn't feel comfortable going out by myself to --
20 with a -- yeah, I couldn't -- I couldn't barely -- you
21 -- you don't understand what I've been through. It --
22 I couldn't barely walk and I didn't feel comfortable
23 with that. And I was told, hey, look, you know, I -- I
24 mean, I didn't feel comfortable with that.

25 Q. You didn't feel comfortable going to a doctor for

1 medical problems?

2 A. No. Not the doctor who told me I would come to
3 work.

4 Q. Okay. That's -- that's the truth right there --

5 A. Yeah.

6 Q. -- isn't it?

7 A. Yeah.

8 Q. The reason you didn't go is because it was Dr.
9 Izard and you just didn't want to go to Dr. Izard --

10 A. Yeah.

11 Q. -- even though the company authorized and was
12 paying for you to do that; isn't that true?

13 A. To go to Dr. Izard?

14 Q. Yes.

15 A. Dr. Izard -- well, for what my instruction was,
16 Dr. Izard wanted me to come to work. He wanted me to
17 come to work. So, I got mis-confliction information
18 from when the doctors -- the Nurse told me on -- Troy
19 told me come back to work and then --

20 Q. Mr. Brailey, that's a whole different story than
21 --

22 A. -- and -- and --

23 Q. -- than what you just answered to.

24 A. -- okay. But --

25 Q. You just said --

- 1 A. -- let me --
- 2 Q. -- you didn't go --
- 3 A. -- let me show you how it ties in --
- 4 Q. -- because you were on Oxycodone --
- 5 A. -- can I finish all of that?
- 6 Q. -- go ahead.
- 7 A. Okay. But when Dr. Izard told me to go back to
- 8 work, that's the last I heard of Dr. Izard. The other
- 9 folks told me --
- 10 Q. I didn't ask you what other folks told you.
- 11 A. -- oh, okay.
- 12 Mr. Samuels: Your Honor --
- 13 Mr. Beard: In fact, I object to
- 14 anything --
- 15 Mr. Samuels: -- Your Honor --
- 16 Mr. Beard: -- other folks told him.
- 17 Commissioner Wilkerson: He asked him
- 18 why he didn't come see Dr. Izard. His
- 19 justification is, he didn't see Dr. Izard
- 20 because he thought he was going back to work,
- 21 right?
- 22 Witness: Huh-uh.
- 23 Mr. Samuels: -- he's not --
- 24 Witness: Yeah. Uh-huh.
- 25 Mr. Samuels: -- he needs to be able to

1 answer the question.

2 Mr. Beard: Not by telling me what other
3 people who aren't here --

4 Commissioner Wilkerson: We can't hear
5 what other people said --

6 Mr. Beard: -- to testify to.

7 Witness: Yeah.

8 Commissioner Wilkerson: -- it's when --
9 it's a -- we're --

10 Witness: Right.

11 Commissioner Wilkerson: -- we're --
12 concentrating on the phone call from Mark,
13 who was going to send a taxi, who told him
14 they would send a taxi to get him there to
15 see Dr. Izard. He said he didn't want to go
16 because he was on Oxycodone, boom, boom,
17 whatever, okay?

18 Witness: Uh-huh.

19 Commissioner Wilkerson: And then he
20 said that Dr. Izard had already indicated
21 that he was putting him back to work -- and
22 correct me if I'm wrong -- and you believe if
23 you went back to the plant that Dr. Izard was
24 going to put you back to work; is that
25 correct?

1 Witness: Yeah. That's sort of what --

2 Commissioner Wilkerson: That's what he
3 said.

4 Witness: -- that's -- I mean, that's --
5 that's sort of --

6 Commissioner Wilkerson: Not -- not that
7 -- I --

8 Witness: -- I'm not -- I'm not -- I'm
9 not -- I'm -- I'm saying that --

10 Commissioner Wilkerson: -- I --

11 Witness: -- Dr. Izard -- when -- when I
12 got too many conflicted things when they --
13 everybody was -- I mean --

14 Commissioner Wilkerson: -- this whole
15 thing is conflicted.

16 Witness: -- yeah.

17 Commissioner Wilkerson: Let me tell
18 you, this is a mess.

19 Witness: Yeah. You know, yeah -- yeah,
20 it is a mess. It is a mess and they made --
21 but anyway, I didn't -- I didn't want to be
22 no -- I wasn't even thinking about no
23 workman's Comp. The Nurse indicated to me
24 about Workman's Comp.

25 Commissioner Wilkerson: We're not --

1 wait a minute. Wait --

2 witness: well, anyway --

3 Commissioner Wilkerson: -- we're not
4 here --

5 witness: -- okay.

6 Commissioner Wilkerson: -- to give a
7 speech.

8 witness: Okay.

9 Commissioner Wilkerson: Your job, again
10 --

11 witness: Okay.

12 Commissioner Wilkerson: -- is to answer
13 the questions --

14 witness: Okay.

15 Commissioner Wilkerson: -- not give a
16 speech about --

17 witness: Okay.

18 Commissioner Wilkerson: -- what you
19 believe to be right --

20 witness: All right.

21 Commissioner Wilkerson: -- what you
22 don't believe to be right.

23 witness: Okay. All right. I've got
24 you.

25 Mr. Samuels: But he is entitled, Your

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Honor --

Witness: Oh.

Mr. Samuels: -- to explain his reasons

--

Commissioner Wilkerson: On that --

Mr. Samuels: -- thoroughly.

Commissioner Wilkerson: -- I agree, on
that issue, not -- not on issues that
happened in 1492, not -- not on issues that
happened in 2014; only on that specific issue
has he got the right to explain.

Mr. Beard: Can I --

Mr. Samuels: But he did and Mr. Beard
interrupted him --

Mr. Beard: -- because he --

Mr. Samuels: -- and would not let him
answer the question.

Mr. Beard: -- because he tried to do it
through hearsay and he can't do that.

Commissioner Wilkerson: That's right.
He can't say somebody --

Mr. Beard: It doesn't matter. He can't

--

Commissioner Wilkerson: -- I don't who
somebody is.

1 Mr. Beard: -- that door was not opened,
2 no hearsay -- no question that would ask for
3 -- that would open hearsay was -- was ever
4 asked in this case --

5 Mr. Samuels: And -- and, Your Honor,
6 that's the --

7 Mr. Beard: -- other than by Mr.
8 Samuels.

9 Commissioner Wilkerson: Right.

10 Mr. Samuels: -- that's the distinction
11 with hearsay. He is not offering it to -- to
12 prove --

13 Commissioner Wilkerson: I don't know
14 what he's offering it for.

15 Mr. Samuels: -- to prove --

16 Commissioner Wilkerson: That's your
17 opinion.

18 Mr. Samuels: -- to prove --

19 Commissioner Wilkerson: I don't -- your
20 opinion is he is not offering for that; I
21 don't know what he's offering it for.

22 Mr. Samuels: -- he's not offering it to
23 prove whether Dr. Izard was right or whether
24 the other doctors were right.

25 Commissioner Wilkerson: Okay.

1 Mr. Samuels: He's offering it to
2 explain what he is about to explain.

3 Mr. Beard: Which would be an excuse for
4 you to say it's reasonable, which is a legal
5 issue in the case --

6 Commissioner Wilkerson: It's not --

7 Mr. Beard: -- and that's improper.

8 Commissioner Wilkerson: -- yes. He
9 just needs to answer the question.

10 Mr. Beard: Nice try but improper.

11 Commissioner Wilkerson: Yes.

12 A. No, I didn't go see Dr. Izard.

13 Q. All right.

14 Commissioner Wilkerson: I'm fine with
15 that.

16 Q. And you were offered a ride to do so, correct?

17 A. Right.

18 Q. And you turned it down?

19 A. Right.

20 Q. And you told Mark Gross you weren't going,
21 correct? You told him don't send --

22 A. Right.

23 Q. -- don't send anybody; I'm not going?

24 A. No. Right.

25 Q. Okay.

- 1 A. Right.
- 2 Q. All right. Now, 1997, working at Richtex, didn't
- 3 tell us about it but you did work at Richtex, correct?
- 4 A. Correct.
- 5 Q. You had a Workers' Comp claim with Richtex,
- 6 correct?
- 7 A. Correct.
- 8 Q. You got injured on the job lifting bricks,
- 9 literally, right after you started working there,
- 10 correct?
- 11 A. Correct.
- 12 Q. Okay. Sound pretty similar? It sounds exactly
- 13 like what we're doing here, doesn't it? You started
- 14 working for Michelin and right after you started
- 15 working, I mean, within weeks, the exact thing that
- 16 happened to you then is what's going on now; isn't that
- 17 correct?
- 18 A. Can I answer?
- 19 Q. True or false?
- 20 A. Oh, no.
- 21 Q. Yes or no?
- 22 A. No, it's not correct.
- 23 Q. Okay. It's not correct.
- 24 Mr. Beard: All right. Permission to
- 25 approach?

1 Commissioner Wilkerson: Sure.

2 Mr. Beard: I'm looking at pages 1 and 2
3 of Defendant's APA's.

4 Commissioner Wilkerson: Defendants.
5 Well, it wouldn't be 1 or 2, would it or is
6 it?

7 Mr. Beard: Yes, sir. My -- I --

8 Commissioner Wilkerson: You all marked
9 them same?

10 Mr. Beard: -- I think I submitted them
11 before I got Stephen's.

12 Commissioner Wilkerson: Oh, I'm sorry.

13 Mr. Beard: I may have -- or at least I
14 had not seen them yet.

15 Commissioner Wilkerson: I'm sorry.

16 Okay. 1 and 2, I've got you. Okay.

17 Q. All right. December 4th, 1997, so -- so, you saw
18 a Dr. Thomas Norris at Springwood Lake Family Practice;
19 is that correct?

20 A. Correct.

21 Q. You remember seeing him?

22 A. I think --

23 Q. You remember the doctor?

24 A. -- I don't remember.

25 Q. Okay. He says, you had been working for Richtex

1 for three (3) weeks and of note he had back pain for
2 three (3) weeks, meaning, from the first day you
3 started you had back pain; is that correct?

4 A. That -- they -- they writing it different than
5 what it's -- we -- we talked about.

6 Q. Well, that's exactly what --

7 A. Yeah.

8 Q. -- what you told the Lexington Medical Center
9 folks and what you told --

10 A. well --

11 Q. -- Dr. Marom about working at Michelin.

12 A. -- no.

13 Q. As soon as you started doing physical work --

14 A. Uh-huh.

15 Q. -- immediately you had back pain; that's what you
16 told them.

17 A. Huh-uh. No, I -- it ain't like that, so.

18 Q. It's exactly like that in the record you
19 submitted; isn't that correct? I showed them to you;
20 we went through them.

21 A. Well, yeah, you showed them to me but it's --
22 things can be kind of -- things can be kind of iffy on
23 that but I just don't agree on how it is but if that's
24 what it says but it's a lot of variables in there that
25 needs to be connected and --

1 Q. Well, the only variables that seem to be getting
2 connected, Mr. Brailey, are when you need a --

3 A. -- yeah, I --

4 Q. -- when you need to create an explanation because
5 something doesn't sound right, that's the only time
6 we've had any variables; isn't that correct?

7 Mr. Samuels: Objection, argumentative.

8 Commissioner Wilkerson: Yes, that's
9 argumentative.

10 Mr. Beard: Okay.

11 Q. Well, the records speak for themselves. The
12 doctors aren't here to say anything.

13 A. Uh-huh.

14 Q. That's what we've got. Your lawyer submitted --

15 A. Uh-huh.

16 Q. -- a bunch of records.

17 A. Okay.

18 Q. I have only submitted two (2) medical records,
19 just two (2) --

20 A. Okay.

21 Q. -- correct? And -- and got lucky that I found
22 them.

23 A. Uh-huh.

24 Q. This has been worsening over the past couple of
25 days since a possible injury while lifting some bricks

- 1 on Tuesday of this week.
- 2 A. Okay.
- 3 Q. You lifted some bricks and hurt your back,
- 4 correct?
- 5 A. Right.
- 6 Q. You filed a workers' Comp claim; they accepted
- 7 your workers' Comp claim, I think. They sent you to
- 8 the doctor?
- 9 A. Well, yeah, they -- they offered that to me.
- 10 Q. Okay. You also told them that you were having
- 11 some right hand and arm tingling and, in fact, you were
- 12 diagnosed with carpal tunnel syndrome at some point in
- 13 your lifetime; you treated with Dr. Ugino out at
- 14 Midlands Orthopaedics, didn't you?
- 15 A. I didn't have it.
- 16 Q. Did you treat with Dr. Ugino at Midlands
- 17 Orthopaedics for carpal tunnel syndrome?
- 18 A. Not treated, he looked at me.
- 19 Q. Doctor -- Dr. Ugino?
- 20 A. I -- I don't know. I can't remember who it is; I
- 21 mean, that's over --
- 22 Q. Midlands Orthopaedics?
- 23 A. -- twenty-one (21) years ago.
- 24 Q. Midlands -- Midlands Orthopaedics?
- 25 A. I -- I can't -- maybe so. Yeah, I know I've been

- 1 to Midlands Orthopaedics, yeah.
- 2 Q. But you remember --
- 3 A. When -- when I --
- 4 Q. -- going out there to --
- 5 A. -- I went to a series of doctors when I was under
- 6 them.
- 7 Q. -- okay.
- 8 A. Yeah.
- 9 Q. And you remember going to --
- 10 A. Yeah.
- 11 Q. -- to Midlands --
- 12 A. Yeah.
- 13 Q. -- for carpal tunnel syndrome?
- 14 A. No, I don't remember carpal tunnel syndrome.
- 15 Q. Well --
- 16 A. I think it was something -- I thought it was
- 17 everything related to the -- what I was doing with
- 18 bricks.
- 19 Q. -- right hand and arm you think --
- 20 A. Yeah.
- 21 Q. -- well, you thought your right hand and arm were
- 22 being hurt by the bricks too, correct?
- 23 A. Yeah. Because I was just simultaneously --
- 24 Q. Right.
- 25 A. -- doing this a lot (demonstrating) but --

1 Q. You didn't tell Michelin when you came to work for
2 them that you had problems with your right hand and arm
3 and carpal tunnel syndrome back in the '90's either,
4 did you?

5 A. -- no.

6 Q. You didn't tell them about that?

7 A. Because I don't have it now. I mean, I never had
8 it.

9 Q. I didn't ask you about now.

10 A. Yeah. Yeah.

11 Q. You complained about it back then?

12 A. No. I didn't really complain. They -- they did
13 all that assessment on what -- what was going on with
14 me lifting bricks.

15 Q. Okay.

16 A. Okay. So, they tested for that and I don't have
17 no -- no carpal tunnel, you know. All that stuff
18 you're saying about cardiologist and stuff, that's -- I
19 don't have --

20 Q. It says you had an x-ray on 1997 -- well, wait a
21 minute. Are you testifying that Dr. Isbell is not a
22 cardiologist?

23 A. -- no, I ain't testifying he's not a cardiologist.
24 He is a cardiologist.

25 Q. Well, you just said --

- 1 A. No, I was just saying that we had -- with the high
2 blood pressure thing earlier --
- 3 Q. -- yes.
- 4 A. -- they checked me out to see whether it was a
5 heart thing.
- 6 Q. I understand.
- 7 A. Okay. It wasn't that --
- 8 Q. I understand.
- 9 A. -- but now --
- 10 Q. okay.
- 11 A. -- this with the carpel tunnel and you're saying
12 about the carpel tunnel.
- 13 Q. Yes.
- 14 A. I -- I don't have no carpel tunnel.
- 15 Q. okay.
- 16 A. They checked that out because I was doing -- I
17 told them my motions was like this (demonstrating) and
18 I was doing it so much and it was new to me --
- 19 Q. okay.
- 20 A. -- you know what I'm saying? So, they checked
21 that out and they also had Richtex -- okay. I'm sorry.
22 Go ahead, finish what you're saying.
- 23 Q. It says -- your lawyer made some point about you
24 were having pain at L2,3 at a different part of your
25 back but then at the x-rays on this same page it says,

1 L -- LS spine films are obtained and show no
2 significant abnormalities, except for some questionable
3 abnormal posterior wedging at L5; do you know that L5
4 is what you're claiming is wrong with you now?

5 A. I -- I guess -- I know it's lower back left, 5, 6
6 or something like that.

7 Q. Yes.

8 A. Yeah. Uh-huh.

9 Q. And they found some wedging at L5 back in 1997, on
10 an x-ray; you didn't tell Dr. Boyd, you didn't tell any
11 doctor about that, did you?

12 A. No, because I -- I didn't have no -- no -- no
13 issues.

14 Q. Okay. It says you have a lumbar strain and then
15 here's what is important to me, Mr. Brailey, he says --
16 and this is the doctor telling you -- correct me if I'm
17 wrong --

18 A. Uh-huh.

19 Q. -- he is instructed on no heavy lifting times one
20 (1) week; did the doctor tell you that?

21 A. Uh-huh.

22 Q. Do you remember that?

23 A. Uh-huh.

24 Q. That's yes?

25 A. Yes.

1 Q. Okay.

2 A. I'm sorry. Yes.

3 Q. So, you do remember that?

4 A. Yes, sir.

5 Q. All right. I also discussed with this gentleman
6 in no uncertain terms, if he has been having back pain
7 for three (3) weeks, the entire time he has been
8 working for Richtex, if he does not respond very well
9 and very fast to some conservative treatment, it might
10 be in his and Richtex's best interest for him to find
11 new employment; now that's pretty specific information
12 from a doctor, isn't it? He told you you couldn't do
13 heavy duty work, based on your complaints; isn't that
14 what he told you?

15 A. Well, he -- verbally, he didn't tell me --
16 verbally, he didn't tell me that. So, verbally, he was
17 just saying -- you know, because he said that maybe you
18 can get -- you know, everybody, you know, it's -- it's
19 -- it can be recovered if you need time off or what may
20 have you. It wasn't like what -- I didn't -- this is
21 the first time I'm hearing this -- well, after my loss
22 -- well, this is the first time I'm hearing this --

23 Q. Okay.

24 A. -- on how he wrote it.

25 Q. And if you would have been truthful when you went

1 to Michelin and if you had told them the truth about
2 your back pain and you had a Workers' Comp claim and
3 you'd been injured in 1997, we might have all seen this
4 report before you ever started work doing any kind of
5 heavy manual work or any lifting or any of those things
6 at Michelin. If you'd have just been truthful on that
7 form; isn't that right? They could have investigated
8 and seen if you were okay to do the job; isn't that
9 right?

10 A. You're saying that --

11 Q. If you'd have told the truth they could -- they
12 might have found this medical record before you started
13 working; isn't that true?

14 A. -- I -- I don't know; maybe it is.

15 Q. Okay.

16 A. Yeah.

17 Q. And if they would have found this record and had
18 read that to you, you would have then been able to say
19 to them, that's the first time I've ever heard that.
20 You know, I guess, maybe I can't do heavy duty work
21 because that's what the doctor told you, right, right
22 here in this report?

23 A. I've been working heavy duty work for twenty (20)
24 something years.

25 Q. Okay. Well, we'll get to that in a minute. But

- 1 that's what the doctor told you in the report --
- 2 A. Uh-huh.
- 3 Q. -- correct?
- 4 A. Uh-huh.
- 5 Q. Yes?
- 6 A. What? The doctor didn't tell me -- I mean --
- 7 Q. That's what he said in the report. That's what
- 8 the report says?
- 9 A. -- that's what's in the report.
- 10 Q. Okay.
- 11 A. I -- I haven't heard that.
- 12 Q. I understand.
- 13 A. This is the --
- 14 Q. I understand --
- 15 A. -- okay.
- 16 Q. -- that's what you're claiming.
- 17 A. Uh-huh.
- 18 Q. On December 11th you went back to Dr. Norris for
- 19 the second time; is that correct?
- 20 A. Right.
- 21 Q. All right. And it says, had been working for
- 22 Richtex for three (3) weeks; he had noted back pain and
- 23 soreness for three (3) weeks. Then he reported this
- 24 vague episode of lifting some bricks -- man, that
- 25 sounds exactly like our case, doesn't it? You went to

1 work for Michelin, within three (3) weeks you were
2 having back pain, going to the hospital, going to your
3 personal doctor and then all of a sudden you came up
4 with some vague accident exactly like this case right
5 here, isn't it? I'm it couldn't be any closer.

6 A. But let me just say this --

7 Mr. Samuels: Objection, Your Honor,
8 argumentative.

9 A. -- can I --

10 Witness: -- okay.

11 Commissioner Wilkerson: Yes.

12 Mr. Beard: Okay.

13 Commissioner Wilkerson: I understand.

14 Q. It says --

15 Commissioner Wilkerson: I'm already
16 bluing the report.

17 Mr. Beard: -- all right.

18 Q. And he felt that he may have injured himself at
19 that time, although he denied any significant change at
20 the time of this incident. Of note, three (3) days
21 after he saw me he was at Doctor's Care wanting a
22 second opinion. Wow. So -- so, you went to Dr. Izard;
23 you didn't like what he said so, you ran off to another
24 doctor. That's exactly what you did in 1997, wasn't
25 it? You didn't like --

1 A. I wanted to get a --

2 Q. -- what that doctor said, so you wanted another
3 opinion?

4 A. -- I wanted a second opinion --

5 Q. Okay.

6 A. -- on what it is --

7 Q. All right.

8 A. -- you know.

9 Mr. Beard: I do not have the record --
10 let's see --

11 Q. It says you weren't following that doctor's -- Dr.
12 Norris' instructions; is that true, you weren't
13 following his instructions at that time?

14 A. I don't remember. What you -- what -- what are
15 you --

16 Q. I don't know what his instructions were --

17 A. -- I --

18 Q. -- I'm just telling you what it says.

19 A. -- I follow all the instructions.

20 Q. Okay.

21 A. We -- I was at physical therapy.

22 Q. Okay.

23 A. I did physical therapy -- okay.

24 Q. Okay. It states he is having difficulty sleeping
25 at times, although, at the same time he tells me that

1 the Flexeril knocks him out at night; is that what you
2 told the doctor?

3 A. Yeah, I had a difficult time sleeping and the
4 Flexeril will knock me out sometimes.

5 Q. Okay. Is the Flexeril you've been taking from all
6 the doctors you've seen in this case, does that knock
7 you out?

8 A. If I take it enough. I mean, if I take it for --

9 Q. Did you take any before you came here today?

10 A. -- no.

11 Q. Are you still under it; are you still under a
12 prescription for Flexeril?

13 A. He can't give me none of that; Dr. Boyd can't
14 prescribe no more medicine to me because I don't -- I
15 mean, I've seen the --

16 Q. Okay.

17 A. -- I haven't been to him.

18 Q. I've got you. I do not have the records from the
19 Doctor's Care and he is unsure exactly what the
20 diagnosis was or what he was told. He mentions that he
21 knows something is wrong with his back and he wants to
22 go to a back specialist. So, you told Dr. Norris in
23 1997, you knew something bad was wrong with your back,
24 didn't you, and you wanted to see a specialist because
25 you were having bad problems in your back in 1997?

1 A. Not bad -- I don't know what it was, I just wanted
2 to make sure I didn't hurt me long term. So, the -- as
3 far as telling him I wanted to see a back specialist, I
4 don't remember saying that but that sounds -- you know,
5 I will -- you know, I -- I would definitely want to see
6 a back specialist to make sure that I'm not being --
7 won't hurt myself if I did.

8 Q. Okay. He then says, it seems today that Mr.
9 Brailey and I have a very difficult time communicating
10 and I certainly feel that with him having only been an
11 employee three (3) weeks at Richtex and mentioning a
12 back specialist after he had been improving on the
13 therapy I had recommended, he may very well be in a
14 litigation thought process; do you know what that
15 means?

16 A. No.

17 Q. It means he thinks that you're doing -- doing that
18 because you were going to file a lawsuit and try to get
19 some money.

20 A. No.

21 Q. That's what I think. That's what I think you're
22 doing here.

23 A. Well, you're wrong.

24 Q. Okay.

25 A. I didn't even want to be in no --

1 Q. Okay.

2 A. -- I wanted to be told about my back.

3 Q. Okay.

4 A. I didn't even want to be in no Workman's Comp.

5 Chris -- I mean, what's the Nurse -- came to me with
6 that. I didn't say, oh, I want Workman's Comp. No.

7 Q. Okay.

8 A. I just went to the doctor to -- I went to Dr.
9 Izard -- if they would have had a doctor open on
10 Saturday and Sunday I'd have went to them.

11 Q. Well, it's --

12 A. But Dr. Izard told me -- hold -- let me -- look --
13 look, Dr. Izard told me go.--

14 Q. -- I didn't ask you want Dr. Izard told you.

15 A. -- okay.

16 Q. Nobody asked you --

17 A. well, I --

18 Q. -- anything about what anybody told you.

19 A. -- he told -- okay.

20 Commissioner Wilkerson: That's the
21 part, Stephen, that we can't get through.

22 Witness: Okay.

23 Commissioner Wilkerson: We keep --

24 Witness: Yeah.

25 Commissioner Wilkerson: -- recreating

1 what happened in 1492.

2 Witness: Well, not for --

3 Commissioner Wilkerson: He's not
4 answering the questions. He's rambling all
5 over the place. He answered them pretty
6 clearly when you asked them; he clicked them
7 off. These questions are close but not exact
8 --

9 Witness: -- uh-huh.

10 Commissioner Wilkerson: -- and we jump
11 all over the point with them. I don't know
12 where we're coming from. I think we've gone
13 from playing a football game to tennis. I
14 don't know what we're doing. We've been on
15 it three and a half (3 ½) hours but --

16 Q. You keep saying --

17 Commissioner Wilkerson: -- and have
18 shed no more light than before we started,
19 so.

20 Q. -- you keep saying you didn't bring up the
21 workers' Comp process but the Commissioner has already
22 read the records from the hospital and I showed them to
23 you where you, at the very first consult on June the
24 24th, had questions of the doctor about the workers'
25 Comp process, that was you that asked those questions,

1 not the Nurse, not anybody from Michelin; that was
2 Isaac Brailey asking the consult Nurse at Lexington
3 Medical Center. So, don't act like it was my people;
4 it was you, wasn't it?

5 A. No.

6 Q. You brought up this Workers' Comp, you wanted
7 Workers' Comp; you hired a lawyer to file a Workers'
8 Comp before Mr. Samuels.

9 A. I did not want -- again, like I said, I didn't
10 want -- that's not -- that's not what I wanted.

11 Q. He then says I believe it certainly would be
12 prudent for both myself and Richtex Bricks to send him
13 to an orthopedic surgeon. Did you go to an orthopedic
14 surgeon in 1997?

15 A. I don't remember whether I went to an orthopedic
16 surgeon in 1997.

17 Q. All right. At the bottom here he goes -- at the
18 -- at -- still under the -- the S portion it says, he
19 reports the pain is in the middle of his back, hurts
20 sometimes when he is sitting and when he bends forward;
21 is that what you told him or do you remember?

22 A. Sitting and bending forward?

23 Q. Yes, hurt your back.

24 A. Yeah. I mean, as far as what I went to the doctor
25 for? Yeah.

1 Q. All right. He says he did not perform a physical
2 examination that day because he felt that you were
3 being very hostile with him in his office; is that
4 true?

5 A. No.

6 Q. Were you being hostile with the doctor?

7 A. No.

8 Q. Okay. He diagnosed you with both a lumbar and a
9 thoracic strain. He says, it seems he wants to be
10 evaluated by a back specialist. I feel like Dr. Bethea
11 at Moore Clinic would certainly put this to rest most
12 expediently; however, as stated above, I don't feel
13 that Richtex nor myself need to undertake any liability
14 with this young man who in my opinion is unable to
15 perform the job required at Richtex and he was even
16 told this the very first day. Do you remember having
17 that conversation with the doctor?

18 A. No, I don't remember having that conversation with
19 him.

20 Q. I restated that today and I placed him on no heavy
21 lifting until he sees the surgeon. Now, correct me if
22 I'm wrong, the only surgeon you have seen since 1997,
23 for your low back would be Dr. Scott Boyd at Lexington
24 Brain and Spine; is that correct?

25 A. Correct.

1 Q. So, from 1997, you've been under restrictions of
2 no heavy lifting and didn't tell anybody about that
3 when you were going to -- going to work at new jobs did
4 you; you didn't tell anybody about it?

5 A. When I was doing --

6 Q. Answer --

7 Commissioner Wilkerson: Answer the
8 question.

9 Q. -- answer my question.

10 A. -- no.

11 Q. I'm correct? You didn't tell anybody --

12 A. No, I didn't tell anybody.

13 Q. -- that you went to work for --

14 A. I didn't tell nobody.

15 Q. -- that you were under heavy duty lifting
16 restrictions?

17 A. No, I didn't tell nobody.

18 Q. Okay. Now, if you want to explain, go ahead.

19 A. Twenty (20) -- it -- it's -- well, the -- the
20 heavy lifting, I went -- went through physical therapy.

21 Q. Okay.

22 A. When I finished physical therapy with the doctor,
23 he -- they released me. It -- I got my back better; it
24 was no problem when I went to physical therapy, I --
25 twenty (20) something years ago.

1 Q. All right. You just read the report. He said
2 until you go to a surgeon you're under no -- you're
3 under heavy lifting restrictions, correct? That's what
4 it said.

5 A. Uh-huh. Okay. Yeah.

6 Q. And you just admitted you haven't been to a
7 surgeon since then, until you went to Dr. Scott Boyd,
8 correct?

9 A. Correct.

10 Q. And you did not tell Dr. Scott Boyd that in 1997,
11 you were placed under restrictions until you were seen
12 by a surgeon, did you; you didn't tell Dr. Boyd that?

13 A. No.

14 Q. He had no idea that you were injured --

15 A. No.

16 Q. -- in 1997, correct?

17 A. Well, I -- I -- I don't know whether he -- no, I
18 don't --

19 Q. Well, you didn't tell him?

20 A. -- no. No, I didn't tell him. Huh-uh.

21 Q. Okay. So, unless -- unless he is a genie or
22 unless he is some magical person and just knows
23 everything, there is no way he could possibly know that
24 unless you told him, correct?

25 A. Okay. Correct.

1 Q. Okay. All right. Now, earlier you were
2 describing your job at Westinghouse and you said -- I
3 think you said that it was actually heavy duty, you
4 said something about that was heavy work; is that
5 correct?

6 A. Yes. Some parts of it is heavy work --

7 Q. Were you --

8 A. -- when you start on certain areas.

9 Q. -- okay. Well, do you recall in your deposition
10 testifying that -- you were asked about the physical --
11 the -- a little bit about the physical demands of that
12 job and this is what you said, well, it really wasn't
13 no -- you know, it was basically only physical -- it
14 was not too much physical demand on that job; it was
15 just basic. We had rods we would pull on the table but
16 it just -- it was really light, you know, two (2) rods,
17 three (3) rods at a time to inspect them; do you
18 remember saying that?

19 A. Right.

20 Q. Well, where did -- where did you put heavy duty,
21 manual, hard; all those kind of things?

22 A. Well, I'm -- I was talking about in the beginning
23 where I started from different sections of
24 Westinghouse.

25 Q. Okay.

1 Mr. Beard: Page 16, Commissioner, of
2 Defendant's APA's, again.

3 Q. This is the questionnaire you filled out at
4 Michelin, correct?

5 A. Correct.

6 Q. That's your signature, correct?

7 A. Correct.

8 Q. It looks like March 21st of '17, correct?

9 A. Correct.

10 Q. All right. And you said they stuck the form in --
11 in front of you and you just, real quickly, just check,
12 check, check and turned it in, right; is that what you
13 said?

14 A. Yeah. Basically --

15 Q. But you did --

16 A. -- that's correct.

17 Q. -- you did take time to write high blood pressure

18 --

19 A. Uh-huh.

20 Q. -- on there, correct, or whatever that word is;
21 what is that word (indicating)?

22 A. High blood pressure.

23 Q. Okay. What's the last part of that word; what's
24 that other word that you wrote on there?

25 A. High -- I don't know. That's high blood -- I

1 don't know what that is. High -- controlled.

2 Q. Okay. All right. So -- so, you took the time to
3 tell them that you had high blood pressure that was
4 controlled but you didn't take the time to tell them
5 the truth about all these other things that Mr. Samuel's
6 has already had you admit were not truthful, correct,
7 because you just -- said you just quickly filled in the
8 form because they stuck it in front of you?

9 A. What other things are you saying about?

10 Q. Well, your -- the lawyer actually asked you a
11 bunch of questions on here, he said --

12 A. Yeah.

13 Q. -- there's a question about back injury, back ache
14 or pain.

15 A. Okay.

16 Q. Do you have -- in fact, he went back and read it
17 really slowly.

18 A. Uh-huh.

19 Q. Do you have problems with or have you ever had
20 medical attention for any of the following. You
21 claimed that you stopped reading it when it said do you
22 have problems with; that's what you said --

23 A. Yeah.

24 Q. -- correct?

25 A. Correct.

- 1 Q. All right. And even though that's what the rest
2 of the statement says is --
- 3 A. Right.
- 4 Q. -- is have you ever had those problems because he
5 asked you, have you ever in your whole life ever had
6 that and you said, yeah, that wasn't true when I
7 answered the way I did; do you remember all that?
- 8 A. Yeah.
- 9 Q. Okay.
- 10 A. Uh-huh.
- 11 Q. And so, you just checked the boxes, no, no, no,
12 no, no, all the way down --
- 13 A. Uh-huh.
- 14 Q. -- correct?
- 15 A. Correct.
- 16 Q. And you did that because you were afraid if you
17 didn't do that you weren't going to get a job; isn't
18 that right?
- 19 A. No.
- 20 Q. Okay. You have had prior cervical -- surgical
21 procedures to your knee; we know that's true, correct?
- 22 A. Yeah.
- 23 Q. You didn't put that on the form, even though it
24 asked you, right?
- 25 A. Right.

- 1 Q. You have had prior back aches, prior back
2 injuries, prior back pain. In fact, you were on
3 restrictions for heavy duty, basically, since 1997; you
4 didn't put anything about that on the form, did you?
- 5 A. No.
- 6 Q. Okay. Have you ever experienced a -- he didn't
7 ask you this question, page -- number 21 -- have you
8 ever experienced a medical problem that affected your
9 ability to perform your work; you put no, didn't you?
- 10 A. Right.
- 11 Q. But you had to quit a job because you couldn't
12 perform the job at Richtex, correct? You physically
13 couldn't do it.
- 14 A. No. I quit that job but, you know, no, that's not
15 -- I quit that job because I didn't want to go through
16 more physical where they was really -- he -- they
17 didn't tell you, oh, I -- well, we -- we was lifting
18 bricks every day.
- 19 Q. Okay.
- 20 A. We was lifting --
- 21 Q. Because you had a medical problem that --
- 22 A. -- no.
- 23 Q. -- prevented you from being able to perform your
24 work?
- 25 A. No. Lifting bricks, that -- they knew that it was

1 -- that it was harmful to everybody; so, they -- they
2 -- and I didn't want to go back there and risk my back
3 getting really hurt bad, so.

4 Q. Okay.

5 A. You know, I didn't know and -- and it was only --
6 I'd only been there -- I haven't -- it -- it -- it --
7 it was where -- when I started Richtex it was like I
8 was working a machine and then they threw us on a
9 monorail --

10 Q. Okay.

11 A. -- so.

12 Q. When you went to Westinghouse it was apparently on
13 May the 16th of 2001, when you had to fill out their
14 medical history form --

15 A. Uh-huh.

16 Q. -- and examination; is that correct?

17 A. Correct.

18 Q. Is that --

19 A. Yeah.

20 Q. -- all that stuff is properly you; is that
21 correct?

22 A. Correct.

23 Q. Okay.

24 A. Yes, sir.

25 Q. Mr. Samuels asked you about this question, it

1 says, do you have or have you -- or are you troubled by
2 -- and it said recurrent low back pains, you said you
3 didn't have any back pains at that time; that's why you
4 said that?

5 A. Correct.

6 Q. Okay. And then, for some reason he went to page
7 20 and 21 but he skipped over page 19 and page 19 has
8 got some pretty good things on there, and this was in
9 2001, so this was a whole lot closer to 1997, than
10 twenty-one (21) years later; this was less than four
11 (4) years later, correct?

12 A. Uh-huh.

13 Q. About three and a half (3 ½) years later?

14 A. Uh-huh.

15 Q. Is that a yes?

16 A. Yes. Yes, sir.

17 Q. All right. Have you ever -- it doesn't say -- it
18 doesn't start off with have you -- do you have a
19 problem now or have you ever had, the only question is,
20 have you ever.

21 A. Uh-huh.

22 Q. Now, ever means your whole life, correct; you
23 understand that?

24 A. Right.

25 Q. Okay. Question mark, any of the following:

1 Undergone a surgical procedure or operation, you put
2 no; that's not true is it because you had a surgical
3 operation, you said, from a young person, to your right
4 knee; so, you lied on that, correct?

5 A. Well, I didn't know-- well, I didn't really
6 understand a surgical but I took it as now. I -- I
7 never -- I couldn't even remember my --

8 Q. Have you ever, I mean --

9 A. -- yeah.

10 Q. -- I mean, you --

11 A. I -- I know what you're saying, it's ever -- when
12 you said that it's ever but that -- I took it as now
13 but I never -- I couldn't remember the surgical thing.

14 Commissioner Wilkerson: Well, help me
15 understand what forever means when it's typed
16 on the form.

17 Witness: Yeah. Well, I can't remember
18 all the back thirty (30) years ago.

19 Mr. Beard: Okay. Well --

20 Commissioner Wilkerson: So, you can't
21 remember, is the answer now?

22 Witness: No, I'm saying -- you're
23 saying now. Yeah, it's -- it's just --

24 Q. -- read for me, if you would, before I ask --
25 well, let me -- let me finish this. There's another

1 question that says, have you ever had a work-related
2 injury or illness; what did you check on that box?

3 A. -- no.

4 Q. Is that true?

5 A. Work-related injury?

6 Q. Injury or --

7 A. Illness?

8 Q. -- illness. Have you ever had a Workers' Comp
9 claim? Yes, you just got --

10 A. Yeah.

11 Q. -- paid for one in -- from a -- from a 1997
12 Workers' Comp claim.

13 A. Correct.

14 Q. Okay. So, you lied on that, correct?

15 A. I -- I -- if that's what you want to say, yeah.

16 Q. Well, how -- I mean, you can -- you can say all
17 this forever and make that excuse --

18 A. Yeah.

19 Q. -- but you can't make that excuse for that
20 question.

21 A. No. I can't make that excuse for that question.

22 Q. And you said no, correct?

23 A. I said no.

24 Q. Okay.

25 A. Uh-huh.

1 Q. Have you ever been restricted, medically, from
2 doing any part of your job? Now, we just read Dr.
3 Norris' 1997 report that said you couldn't do any heavy
4 work until you went to a surgeon. So, you put no
5 there; that's was also incorrect and not truthful,
6 right?

7 A. From what I understand, yes, that's -- well, on
8 paper, yes, that's what it says --

9 Q. All right.

10 A. -- so, I put that.

11 Q. Now, what I'd like for you to read is --

12 Commissioner Wilkerson: Are we still on
13 page 19?

14 Mr. Beard: -- yes, sir.

15 Q. There's a box, see this -- see this little --

16 Commissioner Wilkerson: I've got the
17 rest of it.

18 Q. -- black writing right above your signature and
19 your --

20 A. Uh-huh.

21 Q. -- what does the very first sentence of that say?

22 A. I certify that the above answers are true and
23 complete.

24 Q. Okay. Did you read that before you signed it; did
25 you read your certification? That's pretty big --

1 that's a pretty important statement that they put on a
2 piece of paper, isn't it?

3 A. Right.

4 Q. Did you read it?

5 A. Yeah.

6 Q. Okay.

7 A. I mean, as far as did I read the statement?

8 Q. So --

9 A. No.

10 Q. -- so, you certified and, in fact, you lied
11 because you knew what these questions were and you
12 certified them and you knew when you signed that
13 document going to work for Westinghouse that you were
14 putting them at risk if they found out about it and you
15 were afraid to tell the truth because you didn't think
16 they would hire you if you told the truth; isn't that
17 right?

18 A. No. I -- I didn't -- wouldn't say that, no.

19 Q. You were asked about something that happened --
20 apparently, you had another questionnaire and a
21 physical in -- in 2013, it looks like it was also done
22 at HealthWorks, which is where Dr. Izard is; isn't that
23 right?

24 A. Correct.

25 Q. Okay. And on that form, while you were still

1 working at Westinghouse, there's a question that says,
2 do you have or have you ever had the following. It
3 went through all these things --

4 A. Right.

5 Q. -- and you said you just check marked them really
6 fast. Well, that's not true because you actually took
7 time to check mark some of these things under now,
8 correct; so you did read them, correct?

9 A. Correct.

10 Q. All right.

11 A. Uh-huh.

12 Q. So, you said you do have hypertension or high
13 blood pressure now; you told -- you told the truth
14 there, correct?

15 A. Correct.

16 Q. It says do you have any pain, numbness, limited
17 motion, injury or surgery of the -- check mark, knee
18 pain, with weather; is that what you said?

19 A. Right.

20 Q. So, you were having knee pain back then, you put
21 it on their form; why didn't you put it on Michelin's
22 form?

23 A. Because it was -- it was not -- it was -- it
24 wasn't a -- it's nothing steady and it wasn't nothing
25 -- it's something like I hit my knee; it was nothing --

1 it was not no -- no -- no, what you call it? It wasn't
2 no -- whatever. It wasn't --

3 Q. okay.

4 A. -- serious in my opinion. It wasn't nothing. I
5 just said knee pain, whatever. It wasn't nothing where
6 I had a -- I can't -- go ahead.

7 Q. Do you have any pain, numbness, limited motion,
8 injury or surgery of -- again, you checked, yes, now,
9 and put knee pain.

10 A. Yeah.

11 Q. There's a specific question about back or neck
12 pain; what did you put?

13 A. No, I think. Well, what is it?

14 Q. You put no? Yes, straight across there would be
15 no.

16 A. Yeah. Uh-huh.

17 Q. All right. There's also one about hip, knee, leg,
18 ankle, foot; you put no on that, correct?

19 A. No. I put the -- yeah, now. It says now.

20 Q. I mean, now; I'm sorry.

21 A. Now.

22 Q. Then you wrote over here what that was, knee pain
23 with weather, correct?

24 A. Yeah.

25 Q. So, you knew enough to tell the truth about knee

1 pain.

2 A. No, no, no, no, no. This says, hip, knees -- then
3 -- and it says now.

4 Q. Correct.

5 A. And then, over here, it's on the other line over
6 here, shoulder, head, arm, hand and wrist, finger.

7 Q. That's a no; that's correct.

8 A. Okay.

9 Q. What I said was, you -- you took --

10 A. Yeah.

11 Q. -- you actually wrote on this thing --

12 A. Yeah.

13 Q. -- knee pain -- is that pain with weather?

14 A. Yeah, pain with weather.

15 Q. Okay.

16 A. Yeah.

17 Q. But then, they have a question and it doesn't say
18 do you have now or have you ever had -- question number
19 28, explicit, have you ever had a work injury, Workers'
20 Compensation claim, been given an impairment rating or
21 disability rating, applied for or received any type of
22 disability or pension including military VA, received
23 an award or a settlement for any injury, accident,
24 disease or other disorder; what did you say?

25 A. Never.

- 1 Q. That's a lie, isn't it?
- 2 A. It's a --
- 3 Q. You just had settled a Workers' Compensation
- 4 claim.
- 5 A. -- no, I just now have; that's twenty-one (21)
- 6 years ago.
- 7 Q. No, sir. This -- this is not twenty-one (21)
- 8 years ago.
- 9 A. No, you're talking about this -- you say you -- I
- 10 just have settled.
- 11 Q. I'm talking about --
- 12 A. Yeah.
- 13 Q. -- when you filled out this form.
- 14 A. When I filled out that form?
- 15 Q. It just --
- 16 Commissioner Wilkerson: Stephen?
- 17 Q. -- it wasn't twenty-one (21) years ago?
- 18 A. Uh-huh. Yeah.
- 19 Mr. Samuels: Your Honor --
- 20 Commissioner Wilkerson: Can I meet with
- 21 the attorneys for a minute?
- 22 Mr. Samuels: -- the form he's asking
- 23 him about --
- 24 Commissioner Wilkerson: Let -- let me
- 25 --

1 Mr. Samuels: -- is from 2013.

2 Commissioner Wilkerson: -- fine, let's
3 go -- let's go in here a minute.

4 Court Reporter: Off the record?

5 Commissioner Wilkerson: Off the record.

6 Court Reporter: Thank you.

7 (Off The Record)

8 Commissioner Wilkerson: All right.
9 Let's go back on the record. The last notes
10 I have is, we're on -- we were on page 19.

11 Mr. Beard: Yes, sir. And I had -- I
12 had just finished with that, Commissioner.

13 Commissioner Wilkerson: Okay. That's
14 fine. That's the last notes I've got. All
15 right. We're back on the record. I think we
16 also covered page 20, as well.

17 Mr. Beard: We did. I was about to say
18 I think --

19 Commissioner Wilkerson: Yes.

20 Mr. Beard: -- I covered 20, as well.

21 Commissioner Wilkerson: We do. I've
22 got it right here; I had to flip one more
23 paper.

24 Q. All right. Mr. Brailey, I think you stated
25 earlier, you at least started college at South Carolina

1 State, correct?

2 A. Correct.

3 Q. So, you know how to read and write, correct?

4 A. Correct.

5 Q. All these documents that we've shown you today,
6 you can read them?

7 A. Correct.

8 Q. You understand the difference between forever and
9 now --

10 A. Correct.

11 Q. -- now versus ever; you understand the difference
12 between all those words --

13 A. Correct.

14 Q. -- correct? Okay. It's my understanding you also
15 have training or have been trained -- you -- you've got
16 forklift training, safety training, counseling
17 training, first aid, CPR; all those kind of things
18 you've learned throughout your career and your life,
19 correct?

20 A. Correct.

21 Q. Okay. So, those are things that you can do if
22 need be, correct? Those are jobs you could go work at
23 --

24 A. Correct.

25 Q. -- potentially, correct?

- 1 A. Correct.
- 2 Q. Okay. We had looked at that application when you
3 came to work for Michelin that your lawyer put into
4 evidence; I think it was at pages 85 and 86. And you
5 said something about working at DJJ before you came --
- 6 A. Right.
- 7 Q. -- to Westinghouse and my client, correct?
- 8 A. Correct.
- 9 Q. Why is that not on the application?
- 10 A. I just -- I was --
- 11 Q. I don't see anything about DJJ.
- 12 A. -- no, I didn't put it on there.
- 13 Q. Okay.
- 14 A. I didn't.
- 15 Q. So -- okay. You don't know why you didn't put it
16 on there? It was the most recent job you had and you
17 didn't put it on there?
- 18 A. That was -- after that -- I'm trying to remember
19 because I filled out several applications for Michelin.
- 20 Q. Right.
- 21 A. So, the first one we had to fill out -- because I
22 just got that job at DJJ.
- 23 Q. Okay.
- 24 A. So, yeah, that's how I think I missed that one.
- 25 Q. All right. And when you had this workers'

1 Compensation claim back in '97, you claimed that you
2 had had an MRI scan but you could not remember where
3 you had that done when I asked you, correct?

4 A. No.

5 Q. And you couldn't --

6 A. Correct.

7 Q. -- and you --

8 A. Correct.

9 Q. -- and you couldn't remember if you ever went to a
10 specialist, correct?

11 A. Correct.

12 Q. You don't remember --

13 A. Correct.

14 Q. -- going to a specialist?

15 A. Correct.

16 Q. Okay. Now, I want to just make sure I am correct,
17 that I understood your testimony, because I had some
18 confusion. When you went to the hospital on June the
19 11th and told them that working -- you had been doing
20 hard work at Michelin for a couple of weeks and had
21 been having back pain for a couple of weeks, you never
22 told the folks at Michelin that you went to the
23 emergency room on that date, correct?

24 A. Correct.

25 Q. All right. At some point while you were in

1 training and before you went out onto the PAP machine
2 and doing that work, Mr. Brailey, you specifically
3 asked the folks at Michelin if you could do an x-ray
4 job out there because you had some training in that;
5 isn't that correct?

6 A. Yeah.

7 Q. And the reason you asked them to do the x-ray job
8 is because that's a -- pretty much a sedentary job, it
9 doesn't really require any manual work or any labor or
10 anything like that; isn't that true? It's like a
11 quality control job; isn't that true?

12 A. No.

13 Q. It's not true?

14 A. No. I -- I -- I did ask them but I -- I -- I had
15 some experience in x-ray. I didn't know what --

16 Q. Well, my question was --

17 A. -- I didn't know what their x-ray was there; I
18 just know --

19 Q. -- your experience in x-ray was at Westinghouse?

20 A. -- we did a lot of -- like I was saying, we did a
21 lot of things.

22 Q. Okay. X-ray is like quality control x-ray; is
23 that what you're talking about?

24 A. It could be in another area, as well, too.

25 Q. Okay. And that does --

1 A. Yeah.

2 Q. -- that's a sedentary type of job, correct? It's
3 not a manual job; it's --

4 A. No.

5 Q. -- it's a sedentary job. It's a light duty kind
6 of job, right?

7 A. Right.

8 Q. And you wanted --

9 A. You have to --

10 Q. -- and you wanted to do that at Michelin and you
11 asked to do that at Michelin because you knew you
12 couldn't do the physical job that you were about to go
13 try to do; isn't that correct?

14 A. -- no. I was just, basically, trying to find out
15 all the jobs there and since I had experience in that
16 job, I was like, hey, I could try that, whatever. I
17 didn't know -- we didn't know which job we was going
18 to.

19 Q. Okay.

20 A. We didn't.

21 Q. You --

22 A. I didn't tell nobody. I just -- they told us to
23 ask questions and, you know, what -- when we go to
24 these different areas ask questions about the job and
25 this, that and the other.

1 Q. -- okay.

2 A. So, that's what.

3 Q. You have not been to a doctor, at least from the
4 records or from what I can tell, to an actual doctor,
5 about your back since October of 2017, correct, almost
6 six (6) months; is that right?

7 A. Correct.

8 Q. Okay. You haven't been doing anything else in the
9 meantime to make yourself better physically; is that
10 correct?

11 A. Correct.

12 Q. You've made no efforts, whatsoever, to get a job
13 in any of those areas that I described earlier that you
14 were capable of doing; you haven't tried to get a job,
15 have you?

16 A. Not at -- I was -- are you talking about after I'd
17 done --

18 Q. I'm talking about right now --

19 A. -- no. I haven't --

20 Q. -- you haven't tried any of these other --

21 A. -- no, I couldn't -- no, I couldn't. I'm out of
22 work, no.

23 Q. -- well, you're out of work but -- but you haven't
24 tried to get a job doing anything, have you? Even the
25 jobs that are sedentary you haven't tried to do; is

1 that correct?

2 A. I've been looking. I haven't -- I haven't found
3 -- I haven't had no luck.

4 Q. Have you applied?

5 A. I applied at Verizon.

6 Q. Okay. So, you do -- well, you do believe that
7 there are jobs you can perform that are lighter duty
8 types of jobs?

9 A. Yeah.

10 Q. Okay. And you're trying to find those jobs?

11 A. Yeah.

12 Q. And you just haven't been successful at getting
13 any yet -- as of this time?

14 A. No.

15 Q. Okay.

16 A. Right.

17 Q. Did you file for unemployment after you were
18 terminated at Michelin?

19 A. No, sir.

20 Q. Okay. You testified earlier that on June 13th
21 when you went to the doctor, your personal doctor, that
22 -- and I'm quoting -- I put in quotes what you said,
23 you said you went to see him about some minor back pain
24 on that day, correct?

25 A. Correct.

1 Q. And you saw the report where it said the pain that
2 you had that day was a ten (10) out of ten (10) pain,
3 correct?

4 A. Correct.

5 Q. You would agree ten (10) out of ten (10) pain is
6 not minor back pain, wouldn't you?

7 A. I -- I agree.

8 Q. In fact, it's the worst pain you can have,
9 according to the very chart that was on your doctor's
10 report?

11 A. Correct.

12 Q. Okay. And on June the 24th, whenever you've said
13 that you were having the problems that you were having
14 that particular day, you didn't tell anyone in
15 management before you left that day that you had any
16 problems, did you? You just left and went --
17 eventually went to the hospital, correct? You tried
18 the medical facility, it wasn't open and then you went
19 to the hospital but you didn't tell anybody at Michelin
20 you were going to go do that, did you?

21 A. Right.

22 Q. You didn't even tell anybody you had hurt
23 yourself, did you, before you left?

24 A. I told -- like I say -- I mean, I was -- no, I
25 didn't tell nobody.

1 Q. okay.

2 Mr. Beard: Commissioner, I believe
3 that's all the questions I have.

4 Commissioner Wilkerson: Mr. Samuels.

5 Mr. Samuels: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 By Mr. Samuels:

8 Q. Isaac, what's your work status with Dr. Boyd?

9 A. My work status with who?

10 Q. Has Dr. Boyd written you out of work?

11 A. Yes.

12 Q. Okay. Even with that, are you still trying to
13 find a job?

14 A. Exactly.

15 Q. When you were -- were you given a physical exam at
16 Michelin --

17 A. Yes.

18 Q. -- before they -- before you started working?

19 A. Yes, sir.

20 Q. Okay. Was it a thorough physical exam?

21 A. Yeah, pretty much, I mean, pretty much so.

22 Q. What was examined?

23 A. I -- where was it?

24 Q. What did -- what did the doctor examine?

25 A. Eyes, bending down; just as you do as on -- well,

1 just, you know, check your -- your reflexes, when you
2 can turn, bend or, you know, lifting; stuff like that.

3 Q. Turn, bend and lift with your back?

4 A. Lift -- I think it's lifting, I think; I can't
5 remember.

6 Q. Okay.

7 A. Lifting or something -- I think he was turning me
8 or whatever.

9 Q. And did you suffer any pain during that
10 examination?

11 A. No.

12 Q. Did you have to squat?

13 A. Yes. Squat, yeah, different things you done with
14 your upper body and lower body, he did.

15 Q. What doctor was it that gave you this physical
16 examination; do you remember?

17 A. No, I sure don't. I -- I don't know -- the Nurses
18 gave me one, then they did the eyesight and the doctor
19 came in and did some things.

20 Q. Okay.

21 A. Yeah.

22 Q. And -- and then, you were cleared to work full
23 duty for Michelin?

24 A. Yes.

25 Q. No -- no restrictions?

1 A. No restrictions.

2 Q. When you went to the doctor the first time you
3 were having back pain at work, Lexington Medical
4 Center, June 11th, 2017, did the doctor put you under
5 any work restrictions?

6 A. No.

7 Q. You were cleared to work full duty?

8 A. Cleared to work full duty.

9 Q. Now, when you went to Dr. Marom on June 13th, did
10 he put you on any restrictions?

11 A. No. No, sir.

12 Q. I'm looking at page 11; I will just read this.
13 From what we see on page 11 of Dr. Marom's medical
14 records: Exercise to lose weight, a need for
15 strengthening up of core muscles and proper lifting
16 techniques; was that discussed with you?

17 A. Yes.

18 Q. But no restrictions?

19 A. No restrictions.

20 Q. Okay. Now, the -- the first time you saw Dr.
21 Marom was even before you had applied at Michelin; is
22 that right?

23 A. Excuse me?

24 Q. The first time you saw Dr. Marom was before you'd
25 applied at Michelin?

1 A. Correct.

2 Q. And we have a record at page 1 of the APA
3 submissions dated January 3rd, 2007, oh, excuse me,
4 2017. Did you go there to establish care with Dr.
5 Marom?

6 A. Yes.

7 Q. He was going to be your family doctor?

8 A. Yes, sir.

9 Q. And did he ask you to discuss all of your medical
10 conditions?

11 A. Yeah, he did go over that with me. Yes, sir.

12 Q. Were you having any problem with your back when
13 you saw him?

14 A. No.

15 Mr. Samuels: And, Your Honor, simply
16 for the record, there is no mention of back
17 pain in that record.

18 Mr. Beard: In fact, there's not mention
19 of an examination of the back or any mention
20 of the back whatsoever; so, I'm not real sure
21 what Stephen's point of telling you that was.

22 Mr. Samuels: Well, the -- the point is,
23 he's gone to his family doctor, talking about
24 his current problems and his history and back
25 pain is not one of them.

1 Commissioner Wilkerson: In January?

2 Mr. Samuels: In January.

3 Commissioner Wilkerson: Yes.

4 Mr. Samuels: Before he went to work at
5 Michelin.

6 Commissioner Wilkerson: But in July,
7 major back problems. He goes from nothing to
8 ten (10) out of ten (10) in June; in less --
9 in less -- in about six (6) months.

10 Mr. Samuels: Right.

11 Commissioner Wilkerson: Less than six
12 (6) months.

13 Mr. Samuels: Because he's doing heavy
14 work and it's hurting him.

15 Commissioner Wilkerson: But no Workers'
16 Comp case filed until June the 24th?

17 Mr. Samuels: Correct.

18 Commissioner Wilkerson: And that's the
19 day the accident happened --

20 Mr. Samuels: Correct.

21 Commissioner Wilkerson: -- June 24th,
22 not June 11th or the 13th or May?

23 Mr. Samuels: Yes, sir. I mean, we're

24 --

25 Commissioner Wilkerson: Okay.

1 Mr. Samuels: -- we're not -- we're not
2 disputing what the medical records say --

3 Commissioner Wilkerson: Okay.

4 Mr. Samuels: -- that he was having back
5 pain or whether it had ripened into a true
6 injury --

7 Commissioner Wilkerson: Okay.

8 Mr. Samuels: -- and he hadn't had any
9 radiculopathy up to that point.

10 Commissioner Wilkerson: Okay. I'm
11 fine. I just wanted to make sure I didn't
12 miss it.

13 Q. From both June 11th and June -- June -- June 11th,
14 2017 and June 13th, 2017, those doctors released you at
15 full duty?

16 A. Correct.

17 Q. Okay. Isaac, how long was the probation period at
18 Michelin?

19 Mr. Beard: Commissioner, I believe
20 that's asked and answered and he said he
21 didn't know the answer to the question when I
22 asked him earlier. I asked him was it ninety
23 (90) or a hundred and twenty (120) days and
24 he said he didn't know.

25 Mr. Samuels: Between those two (2).

1 Commissioner Wilkerson: Yes. So, do
2 you know how many -- what's the probationary
3 period?

4 Witness: I can't remember but I'm
5 thinking it's -- you know, acceptable, like,
6 ninety (90) days, you know. I can't
7 remember.

8 Commissioner Wilkerson: You said
9 earlier it wasn't.

10 Witness: No, I said I don't -- I can't
11 remember. I don't know.

12 Commissioner Wilkerson: Well, either
13 you remember or you don't.

14 Witness: Yeah.

15 Commissioner Wilkerson: You can't -- if
16 you can't remember --

17 Witness: Yeah.

18 Commissioner Wilkerson: -- do you
19 understand that means you don't have any --

20 Witness: Yeah.

21 Commissioner Wilkerson: -- idea?

22 Witness: Yeah. I can't remember.

23 Commissioner Wilkerson: Okay.

24 Witness: Okay.

25 Commissioner Wilkerson: And if you do

1 remember, then that's the answer I want.

2 Witness: Okay.

3 Commissioner Wilkerson: So --

4 Witness: Yes, sir.

5 Commissioner Wilkerson: -- do you
6 remember or don't you remember or are you
7 just making up an answer?

8 Witness: I don't -- I don't remember.

9 Commissioner Wilkerson: So, when you
10 said I thought it was ninety (90) days, you
11 just made that up?

12 Witness: I just assumed everybody would
13 be ninety (90) days, sir.

14 Commissioner Wilkerson: Well, we can't
15 assume --

16 Witness: Yeah.

17 Commissioner Wilkerson: -- you know
18 what that problem with that is. We can't
19 assume; we --

20 Witness: Okay.

21 Commissioner Wilkerson: -- we've got to
22 have -- I want correct answers; I don't want
23 what somebody else told you or what we assume
24 to be the answer.

25 Witness: Okay.

1 Commissioner Wilkerson: So, you don't
2 know; is that fair?

3 Witness: I don't know.

4 Commissioner Wilkerson: Okay..

5 Q. Isaac, did you delay filing your workers' Comp
6 claim till you were outside the probationary period?

7 A. Did I delay?

8 Q. Yes, sir. Did you delay filing your workers' Comp
9 claim or telling Michelin that you got hurt at work
10 until after you were outside the probationary period?

11 Commissioner Wilkerson: He doesn't know
12 what the probationary period is. So, how
13 would he know if he did or didn't?

14 Mr. Samuels: That's part of the point,
15 Your Honor.

16 Commissioner Wilkerson: I agree. So,
17 if he doesn't know what it is --

18 Witness: Yeah.

19 Commissioner Wilkerson: -- if he says
20 yes, he's wrong; if he says no he's wrong.

21 Mr. Samuels: It's -- it's been
22 suggested by Mr. Beard that he delayed --

23 Mr. Beard: Stephen, you're not --
24 you're not allowed to tell your client -- I
25 mean, you're basically telling your client

1 what he needs to answer a question; you can't
2 do that. With all due respect, you get to
3 ask questions; you don't get to just stand up
4 there and talk. You're testifying.
5 Objection.

6 Commissioner Wilkerson: He doesn't know
7 what it is. How do you ask him a question if
8 he doesn't know what the probationary period
9 is? A proper question would be, why did you
10 file a Workers' Compensation claim on the
11 24th day of June and not the 11th day of
12 June; that would be a proper question.

13 Q. Answer that question, Isaac.

14 A. I -- I didn't -- was not -- I -- I didn't -- my
15 pain wasn't that severe and I wasn't thinking about
16 Workman's Comp, you know, from on June 11th, June 13th;
17 I -- I wasn't even thinking about Workman's Comp no
18 time.

19 Commissioner Wilkerson: So -- so, let
20 me ask you a question. You would only file a
21 claim if you thought about Workers' Comp,
22 right?

23 Witness: Excuse --

24 Commissioner Wilkerson: Tell me what --
25 what -- tell me what you mean by, if you

1 think about Workers' Comp.

2 witness: -- if I thought about
3 Workman's -- I mean --

4 Commissioner Wilkerson: what do you
5 mean by when you say, if I thought about
6 Workers' Comp?

7 witness: -- it's just, like, if I
8 thought about -- I wasn't even thinking about
9 Workman's Comp. I just --

10 Commissioner Wilkerson: Tell me what
11 you mean by, if you were thinking about
12 Workers' -- I don't know what that means.

13 witness: -- well --

14 Commissioner Wilkerson: I mean, I don't
15 come to work every day and say --

16 witness: -- yeah.

17 Commissioner Wilkerson: -- I think I'm
18 thinking about Workers' Comp --

19 witness: Yeah. I was just referring to
20 your answer --

21 Commissioner Wilkerson: -- or I think
22 I'm thinking --

23 witness: -- I was just referring to
24 your --

25 Commissioner Wilkerson: -- I don't have

1 an answer.

2 Witness: -- I mean, I'm just referring
3 to --

4 Commissioner Wilkerson: I asked you
5 what --

6 Witness: -- I'm just referring to what
7 everybody was saying. I -- I --

8 Commissioner Wilkerson: -- it doesn't
9 matter what -- I'm asking you. I don't care
10 what Mr. Samuels thinks. I don't care --

11 Witness: -- yeah.

12 Commissioner Wilkerson: -- what Mr.
13 Beard thinks.

14 Witness: Well, okay.

15 Commissioner Wilkerson: I want to know
16 what you think.

17 Witness: About Workman's Comp? About
18 filing a Workman's Comp claim?

19 Commissioner Wilkerson: Yes, sir.
20 That's all I -- that's all I'm asking, what
21 you think.

22 Witness: How I think it's done or how I
23 think it -- why -- why should I file it or
24 what -- that's what you're asking me?

25 Commissioner Wilkerson: No. I'm asking

1 you what your answer was; what do you mean by
2 that.

3 Witness: That it -- it just -- there's
4 no reason for it. I mean, I just didn't
5 think of it. I mean, you know, just replying
6 to your answer. I mean, I -- I'm -- make
7 sure --

8 Commissioner Wilkerson: I don't have
9 any answers.

10 Witness: -- I'm just trying to make
11 sure I understand what you're saying. You
12 said that why would I answer --

13 Commissioner Wilkerson: I asked you,
14 what do you mean by what you stated; that was
15 the question --

16 Witness: -- okay.

17 Commissioner Wilkerson: -- about --
18 you're the one that said I wasn't thinking
19 about Workers' Comp; I didn't say that.

20 Witness: Right. Right.

21 Commissioner Wilkerson: I don't know
22 what you mean by, I wasn't --

23 Witness: Well, I was referring to --

24 Commissioner Wilkerson: -- thinking
25 about Workers' Comp.

1 Witness: -- because they meant --
2 because you all said that -- the previous
3 question was June 11th.

4 Commissioner Wilkerson: You're not
5 listening. You're not -- this has been
6 fairly consistent for five (5) hours that --
7 I don't know what you've been saying. I
8 don't know what -- tell me what you mean by
9 that statement. Nothing or --

10 Witness: Nothing, it's --

11 Commissioner Wilkerson: -- tell me what
12 that statement means.

13 Witness: -- it's telling -- it don't
14 mean nothing.

15 Commissioner Wilkerson: I -- I don't
16 know.

17 Witness: I don't mean nothing to me.
18 It don't mean nothing, sir.

19 Commissioner Wilkerson: Well, when you
20 say I --

21 Mr. Samuels: Respectfully, Your Honor
22 --

23 Commissioner Wilkerson: -- never mind.
24 Go ahead.

25 Mr. Samuels: -- okay.

- 1 Q. All right, Isaac, your back was hurting at work
2 and you went to the doctor on June 11th, 2017?
- 3 A. Correct.
- 4 Q. Did you tell anybody at Michelin about it?
- 5 A. No.
- 6 Q. Did you discuss any pain you'd been having at work
7 with anybody at Michelin?
- 8 A. Yes.
- 9 Q. Did you discuss in the context of an injury or an
10 accident?
- 11 A. No.
- 12 Q. All right. So, June 11th, you didn't tell anybody
13 at Michelin you were going to the doctor?
- 14 A. No.
- 15 Q. Okay. June 13th, did you tell anybody at Michelin
16 you were going to the doctor?
- 17 A. No.
- 18 Q. Who paid for those first two (2) visits?
- 19 A. I did.
- 20 Q. Did you ask Michelin to pay for it?
- 21 A. No.
- 22 Q. If you had pain at work, and that's what you told
23 the doctors, June 11th of 2013 -- June 11th of -- June
24 13th, why didn't you tell the doctors that it was --
25 let me rephrase that. why didn't you tell Michelin and

1 ask them to send you to the doctor or for them to pay
2 for your doctor visit?

3 A. Because I wasn't -- it was no -- it was no back
4 pain that was -- it was no severe back pain and I
5 didn't think nothing of it because they were -- they
6 said just give -- do some muscle relaxers --

7 Mr. Beard: Commissioner, object to what
8 they said, again.

9 Commissioner Wilkerson: I don't know
10 who they are.

11 Witness: -- oh. No --

12 Commissioner Wilkerson: I don't know if
13 it's --

14 Witness: -- well --

15 Commissioner Wilkerson: -- Jermaine or
16 the --

17 Witness: -- okay.

18 Commissioner Wilkerson: -- plant Nurse
19 or the Receptionist.

20 Witness: Oh.

21 Mr. Beard: I think he's talking about
22 the hospital or the doctor.

23 Witness: Yeah, that's what I'm talking
24 about --

25 Mr. Beard: That's the reason I object

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Witness: -- the doctors.

Mr. Beard: -- I object to that.

Witness: Okay.

Mr. Samuels: You won't be able to say
what the doctor said.

Witness: Okay.

Q. To pre-imp Mr. Beard, because I know he's going to
ask, you said it was no severe pain but you also told
one of the doctors that it was pain of ten (10) out of
ten (10)?

A Correct.

Q. Okay. Is that -- since he's going to ask you --

A. Yeah.

Q. -- if I don't.

A. Yeah.

Q. Would you agree that's --

A. Yeah.

Q. -- that's pretty severe?

A. Correct. Yeah, I agree.

Q. Okay. Why didn't you go to Michelin and tell them
you were having pain that bad at that time?

A. I didn't do it because the doctors -- well, I
can't say the doctor. Well, I just didn't do it.

Q. Okay. Were you given any restrictions at that

1 time?

2 A. No.

3 Q. Okay. Did you continue working?

4 A. Yes.

5 Q. Did you miss any time from work?

6 A. No.

7 Q. On June 24th, what happened at 5:30 the -- in the
8 morning that was different from what had been happening
9 in the weeks before?

10 Mr. Beard: Commissioner, just, with all
11 due respect, this has already been covered on
12 regular direct; I don't know that he can just
13 go --

14 Commissioner Wilkerson: Yes.

15 Mr. Beard: -- redirect and say the same
16 thing over again. He's -- he has asked that
17 exact question, I think, on direct
18 examination.

19 Commissioner Wilkerson: I -- I mean, I
20 don't disagree.

21 Mr. Beard: I mean, he can only go into
22 new matter and this is -- that's not new
23 matter --

24 Mr. Samuels: Well --

25 Mr. Beard: -- and it has to be new

1 matter pursuant to my cross-examination.

2 Commissioner Wilkerson:

3 Cross-examination, yes.

4 Q. -- what was different on the 24th that made you
5 actually talk to Michelin about a work accident?

6 A. Okay. Well, it was very severe pain on June 24th.

7 Q. Now, you already had pain of ten (10) of ten (10).

8 A. Okay. Yeah.

9 Q. So, what was different?

10 A. It made a -- it just really -- I couldn't -- it
11 was hard to -- to bend down and it was -- it was just a
12 -- a sharp pain that was very different from the last.

13 Q. All right. And I'm going to show you page -- I
14 believe this is 16. So, see here on the left it's got
15 dates and time?

16 A. Uh-huh.

17 Q. June 24th looks like the first entry, patient
18 arriving in ED is 9:07 A.M.?

19 A. Right. Yes, sir.

20 Q. And is that about the time you arrived?

21 A. Yes, sir.

22 Q. And then, before you got examined you called
23 somebody at Michelin?

24 A. Yes, sir.

25 Q. And that's when you had the various discussions

1 with the Nurse, the supervisors and so forth; is that
2 right?

3 A. With Troy Lowman and Derrick Gibson.

4 Q. And then later, Christy --

5 A. Later on called my house.

6 Q. -- okay. After you had already left?

7 A. Exactly.

8 Q. And part of my question is, Mr. Beard asked you
9 about questions about possible workman's Comp. I'm
10 going to show you page 17, June 24th, 2017, that seems
11 to be at 11:02; so, that's after you've already been
12 there an hour and a half.

13 A. Correct.

14 Q. Had you spoken to --

15 Commissioner Wilkerson: How is 9:07 to
16 11:02 an hour --

17 Mr. Samuels: -- I'm sorry.

18 Commissioner Wilkerson: -- two (2)
19 hours and a half?

20 Mr. Samuels: Almost two (2) hours.

21 Thank you.

22 Commissioner Wilkerson: Okay.

23 Q. You'd already -- you'd been there almost two (2)
24 hours --

25 A. Uh-huh. Yes.

1 Q. -- in that two (2) hours had you already spoken to
2 Troy and Derrick?

3 A. Yes.

4 Q. To follow up on something Mr. Beard had asked you
5 about in Dr. Marom's record of June 13th, 2017, when
6 you'd had back pain in 1997, where was it?

7 A. In the middle.

8 Q. Middle --

9 A. Middle..

10 Q. -- at your ribs and just below?

11 A. Yeah, at my ribs and just below.

12 Q. Okay. And where was your back pain on June 13th,
13 2017, when you went to see Dr. Marom?

14 A. On the lower left side.

15 Q. Okay. And you've never had pain there in the
16 past?

17 A. Correct.

18 Q. Okay. Is that something you told Dr. Marom?

19 A. Correct.

20 Commissioner Wilkerson: Even though
21 there's a prior medical report that says L5?

22 Mr. Samuels: Well, Your Honor, I
23 disagree with that. The prior medical report
24 that you're talking about from 1997, says
25 x-ray shows a wedge on L5.

1 Commissioner Wilkerson: Okay. And it's

2 --

3 Mr. Samuels: It -- in the context --

4 Commissioner Wilkerson: -- and it's
5 different -- it's different than a wedge and
6 pain is what you're saying; is that fair?

7 Mr. Samuels: -- right. He's --

8 Commissioner Wilkerson: Okay.

9 Mr. Samuels: -- right.

10 Commissioner Wilkerson: That's fair.

11 Mr. Samuels: What I'm saying is --

12 Commissioner Wilkerson: That's fair.

13 Mr. Samuels: -- that record says
14 symptomatic at L2, L3.

15 Commissioner Wilkerson: That's fair.

16 Mr. Samuels: Forgive me for my pace
17 here, Your Honor.

18 Commissioner Wilkerson: No, no, no, no,
19 I -- no. Not a problem.

20 Q. And, Isaac, when you were terminated -- I'm going
21 to show you your record from Michelin.

22 Commissioner Wilkerson: Just give me
23 the page, Stephen; that'll help me.

24 Mr. Samuels: 83, Your Honor.

25 Commissioner Wilkerson: I mean, I don't

1 know where it is, just so I can document my
2 stuff here.

3 Mr. Samuels: Yes, sir.

4 Commissioner Wilkerson: Thanks.

5 Q. Apparently, this was signed by somebody at
6 Michelin, 7/6/17, 7/9/17 --

7 A. Uh-huh.

8 Q. -- and they told you, Isaac, you are being
9 terminated for not being a good fit during your
10 probationary period.

11 A. Uh-huh.

12 Q. Okay?

13 A. Yeah. Yes, sir.

14 Q. And then right after that, did you -- did you
15 receive a letter advising you that your Workers' Comp
16 case -- case was denied?

17 A. Yeah, I received a letter. Yes, sir; I received a
18 letter.

19 Commissioner Wilkerson: 7/13?

20 Mr. Samuels: Yes, Your Honor, page 83.

21 Q. Are Derrick and Troy people that you are supposed
22 to report a Workers' Comp injury to?

23 A. No. I don't think.

24 Q. Who are you supposed --

25 A. I don't -- I don't know.

1 Q. -- well, you had a question about the bosses --

2 A. Yeah.

3 Q. -- okay?

4 A. Uh-huh.

5 Q. Mr. Beard asked you about the bosses; who are the
6 bosses?

7 A. Troy Lowman is the person we -- that's our point
8 of contact, Troy Lowman.

9 Q. Okay.

10 A. Derrick is -- he was a -- we was working beside
11 them -- working with some of Derrick's team but he's
12 not the person that -- he said don't -- you can't call
13 me for any absentees or anything; you need to touch
14 base with Troy. But I get -- do the trainers that
15 we'll be training under -- training with. You'll be
16 training with some of my trainers, I mean, his
17 trainers.

18 Q. Who did you report your accident to originally on
19 June 24th?

20 A. Troy. Troy Lowman, I gave a call to him, I got a
21 answer machine. I called Derrick. Derrick said, don't
22 -- he'll keep -- put it out there too and Troy Lowman
23 called me back.

24 Q. Okay.

25 A. I wanted somebody to know.

1 Q. All right. Thank you.

2 Mr. Samuels: No further questions.

3 RE CROSS-EXAMINATION

4 By Mr. Beard:

5 Q. You were asked, Mr. Brailey, about page 69 of the
6 medical records from Dr. Boyd and were you written out
7 of work was the way the question was asked; is that
8 correct?

9 A. Correct.

10 Q. Let's actually read what it says. It says --

11 Commissioner Wilkerson: Hold on. Let
12 me get to that one --

13 Mr. Beard: -- page --

14 Commissioner Wilkerson: -- I don't
15 remember that one. Okay.

16 Mr. Beard: -- page 69 of Claimant's
17 APA's.

18 Commissioner Wilkerson: Oh, we haven't
19 looked at that one yet. Okay.

20 Mr. Beard: Yes, I think he -- Stephen
21 just asked him about it on redirect.

22 Commissioner Wilkerson: Sure.

23 Q. Does this not say, I do not believe he can work at
24 his former occupation in his current condition so I'll
25 keep him out of work until next follow up. He -- he

1 said you can't work at your former occupation, correct?

2 A. Correct. That's what he said --

3 Q. Okay.

4 A. -- right there, yes.

5 Q. Okay. But you can certainly do other jobs because
6 you're applying for jobs that you think you can
7 physically do, correct?

8 A. Correct.

9 Q. And, in fact, you went from ten (10) out of ten
10 (10) pain before you filed a Workers' Compensation
11 claim, about two (2) weeks before, and now only three
12 (3) out of ten (10) the whole time you've been treating
13 with Dr. Boyd and these other folks you've never been
14 ten (10) out of ten (10) --

15 A. Correct.

16 Q. -- according to their records; isn't that correct?

17 A. Correct.

18 Q. So, then, why did you file a Workers' Comp claim
19 when you were only three (3) out of ten (10) and you
20 don't file a Workers' Comp claim when you're ten (10)
21 out of ten (10); it makes no sense, does it?

22 A. It doesn't make any sense.

23 Q. Okay.

24 A. Yeah.

25 Q. You had a ten (10) out of ten (10) pain, told two

1 (2) doctors that you thought it was related to doing
2 your job at Michelin, you had a duty to tell your
3 employer that that was going on, didn't you? You had a
4 duty to tell your employer that you physically could
5 not be doing their job because it was killing your back
6 to a ten (10) out of ten (10) pain and you chose not to
7 do that; isn't that true?

8 A. I chose not to do that?

9 Q. Sure. You twice went to the doctor --

10 A. Uh-huh. Yeah.

11 Q. -- and twice didn't say a word to my client --

12 A. Correct.

13 Q. -- when you were telling them that you had been
14 having the problem for weeks; isn't that true?

15 A. Correct.

16 Q. You had a duty to tell them that so that you
17 wouldn't hurt yourself or some other co-employee,
18 didn't you?

19 A. I didn't look -- I didn't see it that way.

20 Q. Okay. What if you had been working with a
21 co-employee, Mr. Brailey, and suddenly your back went
22 out because you hadn't told my clients you couldn't do
23 this and that person got injured; would you feel bad
24 about that?

25 A. Yes, I would feel bad about that.

1 Q. You claim you told somebody -- you said Troy and
2 Derrick -- before you actually had any medical
3 treatment on June the 24th, correct?

4 A. Say that again now.

5 Q. You claim you told Troy and Derrick you were going
6 to have medical treatment at the hospital --

7 A. Not --

8 Q. -- before you had the treatment; that's what you
9 claim?

10 A. -- correct.

11 Q. You disagree with what Nurse Sirois said you told
12 her; is that correct? Because she said you didn't --
13 you didn't tell anybody until you got released from the
14 Lexington Medical Center emergency room?

15 A. Yeah, I disagree with what she said.

16 Q. Okay. And my last question or series of questions
17 is about your prior Workers' Compensation claim.

18 Mr. Beard: Commissioner, again, page 1
19 of Defendant's APA's.

20 Q. Your attorney said your back problems were all at
21 L2,L3, correct; isn't that what he said?

22 A. Yes.

23 Q. That's not what this report says, though, is it?
24 This report says your back exam shows tenderness to
25 palpation at space at L2,3 but then it also goes on and

1 says, also there is pain with forward flexion. There
2 is tenderness and muscle spasm in the bilateral lumbar
3 region. It doesn't say your problems were restricted
4 to L2,L3, that just says that's one of the places,
5 doesn't it?

6 A. Yeah, that's what it said..

7 Q. Okay. And it also says you've got a problem at L5
8 on your x-ray and it also diagnosed you with a lumbar
9 strain, correct?

10 A. Correct.

11 Q. And then the next day or -- or the next report at
12 page 2, it's not only a lumbar strain but now we've
13 gone to the thoracic strain; you've got two (2) strains
14 going on at that time, correct?

15 A. Correct.

16 Mr. Beard: That's all the questions I
17 have.

18 Commissioner Wilkerson: Anything else
19 in the redirect questions?

20 Mr. Samuels: No, Your Honor.

21 Commissioner Wilkerson: Okay.

22 Mr. Samuels: That completes this
23 witness.

24 Commissioner Wilkerson: Can he be --

25 Mr. Samuels: I -- yes, he can come back

1 and sit down and --

2 Commissioner Wilkerson: -- yes, sit
3 with you. Yes, that's what I was going to
4 say.

5 Mr. Samuels: -- yes, sir. Isaac --

6 Mr. Brailey: Huh?

7 Commissioner Wilkerson: Okay. Thanks.
8 Sir, you may step down.

9 Mr. Brailey: Oh.

10 Commissioner Wilkerson: I just wanted
11 to make sure. I guess we're going to call
12 Jermaine next?

13 Mr. Samuels: -- yes, sir.

14 Commissioner Wilkerson: Well, I --

15 Mr. Samuels: We said we'd call Jermaine

16 --

17 Commissioner Wilkerson: -- well, I know

18 --

19 Mr. Samuels: -- so, we'll call

20 Jermaine.

21 Commissioner Wilkerson: -- well, that's
22 why -- that's why I asked. We need to get
23 Jermaine.

24 (Off The Record)

25 Commissioner Wilkerson: Jermaine,

1 what's your last name?

2 Mr. Lemon: Lemon, like the fruit --

3 Commissioner Wilkerson: Oh.

4 Mr. Lemon: -- L-E-M-O-N.

5 Commissioner Wilkerson: Well, I can
6 actually spell that one. Some of these names
7 that come in here I don't have a clue how to
8 spell them. Thank you.

9 Mr. Lemon: All right.

10 Court Reporter: I've been saying Lowman
11 all this time.

12 Commissioner Wilkerson: Lowman, I have
13 too; that's okay. Sir, I'm going to get you
14 to raise your right hand; the Court Reporter
15 is going to swear you in and we'll take a
16 little testimony from you. Thank you.

17 Whereupon;

18 Jermaine Ante Lemon, being duly sworn and cautioned to
19 speak the truth, the whole truth and nothing but the truth,
20 testified as follows:

21 Court Reporter: Now, I'm going to ask
22 you to state your full name for the record,
23 one more time, please.

24 Witness: All right. Jermaine --

25 Court Reporter: You -- you don't need

1 to do that.

2 Commissioner Wilkerson: It'll get you.
3 It -- it -- you don't even have to touch it.
4 It will --

5 Court Reporter: That just goes to my
6 ears.

7 Witness: -- okay.

8 Commissioner Wilkerson: -- believe it
9 or not, she may have heard what you said
10 outside --

11 Witness: All right.

12 Commissioner Wilkerson: -- because
13 that's how sensitive it is, all right?

14 Witness: All right. I'm sorry.

15 Commissioner Wilkerson: I'm not joking.

16 Court Reporter: Okay. It's Jermaine?

17 Witness: Jermaine Ante Lemon.

18 Court Reporter: All right. Spell Ante
19 for me.

20 Witness: A-N-T-E--

21 Court Reporter: A-N-T --

22 Witness: -- E.

23 Court Reporter: -- E.

24 Commissioner Wilkerson: I like that.

25 Court Reporter: Thank you, sir.

1 Commissioner Wilkerson: I like that.

2 Court Reporter: All right.

3 Commissioner Wilkerson: Thank you, Mr.
4 Lemon.

5 Witness: All right.

6 Commissioner Wilkerson: Please.

7 Mr. Samuels: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 By Mr. Samuels:

10 Q. Mr. Lemon, my name is Stephen Samuels; I'm Isaac
11 Brailey's attorney.

12 A. How you doing, Steve?

13 Q. I'm doing fine; how about you?

14 A. I'm doing all right.

15 Q. Good. Nice to meet you; sorry for keeping you
16 having to wait here.

17 A. All right.

18 Commissioner Wilkerson: Just remember,
19 it's their fault, not mine; I'm just here to
20 listen, okay?

21 Witness: All right.

22 Mr. Beard: He was warned it was going
23 to be a while. I warned him long -- I warned
24 him, I mean; he was warned.

25 Commissioner Wilkerson: Okay.

1 Q. Mr. Lemon, where do you work?

2 A. Michelin.

3 Q. How long have you worked there?

4 A. Ten (10) years in September.

5 Q. What area do you work in?

6 A. Confin. I used to run the PAP; I'm on the PNS
7 right now.

8 Q. Okay. Where were you working in --

9 Court Reporter: Wait a minute, what was
10 that first thing you said?

11 Commissioner Wilkerson: Where you're
12 working now.

13 Witness: Confin on the --

14 Court Reporter: Confin?

15 Commissioner Wilkerson: Confin.

16 Witness: -- right, confin.

17 Court Reporter: C-O-N-F-I-N?

18 Witness: Yes, that's the area.

19 Court Reporter: Thank you.

20 Commissioner Wilkerson: Thank you.

21 She's just got to get it down for the record.

22 Witness: Okay.

23 Q. -- when did you leave PAP?

24 A. In -- on December 1st of last year.

25 Q. December 1st of 2017?

1 A. Yes.

2 Q. So, in March, April, May, June of 2017, you were
3 working at PAP?

4 A. Yes, sir.

5 Q. Okay. What is PAP?

6 A. It's basically where you make a -- the carcass,
7 that actual -- that's actually ends up being blown up
8 and made into the tire but you have to make it on the
9 PAP before it can move to what they a BNS to be made.

10 Q. Does that apply to all tires, small to big?

11 A. Yes.

12 Q. What's the largest tire Michelin makes in that
13 plant?

14 A. A 60/80.

15 Q. And tell me how big that is in regular terms for
16 those of us who know nothing about Michelin.

17 A. The best way I can describe it is it wouldn't fit
18 in this room.

19 Q. Okay.

20 Commissioner Wilkerson: Is it bigger --
21 is it taller than this building?

22 Witness: Not than the building but it
23 -- the height of it would not come in this
24 room; it would not --

25 Commissioner Wilkerson: Okay.

1 Witness: -- fit in this room.

2 Commissioner Wilkerson: But it's --
3 when I say building, it's not taller than
4 this entire building, is it?

5 Witness: No, sir.

6 Commissioner Wilkerson: Okay.

7 Witness: No, sir.

8 Commissioner Wilkerson: All right.
9 Okay.

10 Q. Is the work, is that pretty hard work working the
11 PAP?

12 A. Yes, sir.

13 Q. When you first started at Michelin were you doing
14 hard, physical, work?

15 A. Yes, sir.

16 Q. Do you have any -- ever have any aches and pains?

17 A. Yes, sir.

18 Q. Ever had to take any aspirin or Advil or anything
19 for your pain?

20 A. No, I never had to do that.

21 Q. Ever had any sense that -- especially when you
22 first started that this work is hard?

23 A. Oh, yes, sir. Yeah.

24 Commissioner Wilkerson: How old are
25 you?

1 Witness: I am thirty-seven (37).

2 Commissioner Wilkerson: Thirty-six
3 (36). So, he started at twenty-six (26) and
4 thirty-six (36).

5 Witness: Yeah. I started at
6 twenty-seven (27), yeah.

7 Commissioner Wilkerson: We're talking

8 --

9 Witness: Yeah.

10 Commissioner Wilkerson: -- fifty (50).
11 Okay. I just wanted to make sure.

12 Q. How often would you say you felt aches and pains
13 from doing the work you do there?

14 A. I mean, it -- you know, on a given day, I mean, it
15 could differ but how often? You know, maybe every
16 other week or every other month or something like that.

17 Q. It's tougher when you first start and aren't used
18 to it, isn't it?

19 A. Yeah.

20 Mr. Beard: Commissioner, he's leading
21 the witness.

22 Commissioner Wilkerson: Yes, I don't --

23 Mr. Samuels: That's a hostile witness,
24 Your Honor.

25 Mr. Beard: No, he's not --

1 Commissioner Wilkerson: -- no, he --
2 you called him.

3 Mr. Beard: -- he's a co-employee.

4 Commissioner Wilkerson: He's not
5 hostile; you called him.

6 Mr. Beard: He's a co-employee.

7 Commissioner Wilkerson: You called him,
8 he didn't.

9 Mr. Samuels: Okay.

10 Commissioner Wilkerson: He's not
11 hostile.

12 Mr. Samuels: Fair enough.

13 Q. Does it take any time to get used to the job?

14 A. Yes, sir.

15 Q. What do you have to get used to?

16 A. Just that -- probably the mental aspect of it
17 first, and then the physical.

18 Q. Would you say it's a young man's job or an old
19 man's job?

20 A. I would say that depends on the man.

21 Q. Okay. And was it -- what's the process of getting
22 used to the physical aspects of it?

23 A. Doing it over-and-over; that's what I would say
24 the process is.

25 Q. The more you do it the -- do you need to get in

1 shape to do it?

2 A. Yeah.

3 Q. When new people come on board do you tell them
4 what to expect about any aches and pains they may feel
5 on the job?

6 A. No, not about aches and pains but that it could be
7 hard.

8 Q. What could be hard in what way and what do you
9 tell somebody new?

10 A. Well, if you -- if you haven't done this before it
11 just takes time to get used to. So, that's, you know,
12 with almost anything.

13 Q. Used to the physical hard-work aspect of it?

14 A. Yes.

15 Q. How long do you figure it takes somebody, on
16 average, to get used to it?

17 A. Each person is different; I would say --

18 Q. How long would it --

19 A. -- some people pick it up, you know, faster than
20 others.

21 Q. -- do you know Isaac Brailey?

22 A. Yeah.

23 Q. Did you work with him?

24 A. Yes.

25 Q. When did you work with him?

- 1 A. I can't remember the timeframe but I knew -- I do
2 know that I work with him, though.
- 3 Q. Did you have anything to do with training him or
4 supervising him or anything like that?
- 5 A. I trained him; yes, sir.
- 6 Q. How did he do in the training?
- 7 A. He did pretty good.
- 8 Q. Did he seem like a hard worker?
- 9 A. Yes.
- 10 Q. Did he miss any time from work, up until he
11 ultimately left?
- 12 A. No.
- 13 Q. Always showed up on time?
- 14 A. Yes.
- 15 Q. Did he have any difficulty doing the job that you
16 observed?
- 17 A. Only just with what to do, kind of, like the
18 steps.
- 19 Q. Did he report any injuries to you?
- 20 A. No.
- 21 Q. Did he speak to you of any aches and pains he was
22 having?
- 23 A. No.
- 24 Q. Did you see him having any aches and pains?
- 25 A. No.

1 Q. Would you have expected him with being new at the
2 job to have some pain?

3 A. Yes.

4 Q. Now, was that something that was explained to
5 everybody that was put in that job?

6 Mr. Beard: Asked and answered already,
7 Commissioner. I object to the question.
8 He's already said they didn't talk about
9 aches and pains.

10 Commissioner Wilkerson: And he wouldn't
11 know if that's to be expected.

12 Mr. Beard: He specifically said that
13 answer.

14 Commissioner Wilkerson: He wouldn't
15 know if it's expected. So, you don't have to
16 answer that one; it's already been answered.

17 Mr. Samuels: All right.

18 Q. Mr. Lemon, do you know if you were working on June
19 24th, 2017?

20 A. No.

21 Q. What -- what shift were you working May/June,
22 2017, or do you all rotate shifts?

23 A. We rotate, so.

24 Q. Okay. What are the shifts?

25 A. Evening -- I mean, M-shift and E-shift, which is

1 the morning and a -- a evening shift.

2 Q. And what's the time of each -- starting/ending
3 time of each shift?

4 A. Morning shift, 7:00 A.M. to 7:00 P.M., evening
5 shift, 7:00 P.M. to 7:00 A.M.

6 Q. Okay. How do you feel at the end of that twelve
7 (12) hour shift?

8 A. Tired.

9 Q. Even now after doing that after ten (10) years?

10 A. Oh, yeah.

11 Q. Do you know off the top of your head how long the
12 probationary period is at Michelin?

13 A. No, I don't.

14 Mr. Samuels: That's all the questions I
15 have. Please answer any questions Mr. Beard
16 has for you.

17 CROSS-EXAMINATION

18 By Mr. Beard:

19 Q. Jermaine, did you ever lie on your application to
20 get a job at Michelin?

21 A. No.

22 Q. Do you remember when you went to work for Michelin
23 having to fill out the questionnaire about your medical
24 history and getting a physical and all those kind of
25 things?

- 1 A. Yes.
- 2 Q. Were you truthful to all the answers on the
- 3 questions that were asked of you?
- 4 A. Yes.
- 5 Q. Did you expect and the reason that you answered
- 6 the truth was because you knew that Michelin needed to
- 7 know whether you could perform these jobs or not?
- 8 A. Yeah.
- 9 Q. Okay. So, it was important to be truthful about
- 10 that; is that correct?
- 11 A. Right.
- 12 Q. Okay. Being someone who trains folks to do this
- 13 job, if a doctor had indicated to someone they could do
- 14 no heavy lifting until they had been seen by a surgeon,
- 15 could that person perform the job on the PAP?
- 16 A. Probably not.
- 17 Q. Okay.
- 18 A. No, sir.
- 19 Q. All right. Did Mr. Brailey ever tell you that he
- 20 had, in fact, had to give up a job in 1997, because he
- 21 physically couldn't perform the job because of back
- 22 problems?
- 23 A. No.
- 24 Q. Did he tell you that the last time he saw a doctor
- 25 because of his workers' Comp claim in 1997, was the

1 doctor told him that he would place him on no heavy
2 lifting until he saw a surgeon?

3 A. No.

4 Q. Did you know he'd never seen a surgeon all the way
5 up until the time he came to work for Michelin?

6 A. No.

7 Q. And if I understood your testimony, you don't
8 believe a person who had been told that by a doctor or
9 had been -- indicated that in a report would be
10 physically capable of doing that job; is that correct?

11 A. That's correct.

12 Q. Okay. Is it important for the folks -- well, let
13 me ask you, would you want to know if the person
14 standing beside you or helping you put together one of
15 these carcasses or doing some heavy manual labor, would
16 you want to know if that person was physically capable
17 of doing it?

18 A. Yes.

19 Q. Because if they're not and something goes wrong,
20 could you also get hurt?

21 A. Yes.

22 Q. Okay. Is that the reason Michelin asks all those
23 questions on -- on these questionnaires?

24 A. Yeah.

25 Q. So, Michelin relies upon what you and every other

1 person --

2 Mr. Samuels: Object.

3 Q. -- who applies for a job does; is that correct?

4 Mr. Samuels: Objection, Your Honor,
5 outside this witness' personal knowledge.

6 Mr. Beard: Whether or not Michelin
7 relies on what he says?

8 Mr. Samuels: He cannot speak for
9 Michelin.

10 Mr. Beard: Well, let's find out if he
11 knows.

12 Mr. Samuels: If he could speak for
13 Michelin he would be out -- he would a --
14 legally a hostile witness.

15 Q. Do you know whether or not Michelin relies --

16 Commissioner Wilkerson: You just need
17 to redirect the question --

18 Mr. Beard: -- yes, sir.

19 Commissioner Wilkerson: -- if he knows

20 --

21 Mr. Beard: Okay.

22 Commissioner Wilkerson: -- he may not
23 know.

24 Q. Do you know whether or not Michelin relies upon
25 the answers that people give on those questionnaires as

1 to whether or not they can perform the jobs?

2 A. Yes.

3 Q. Because -- because you're informed that as part of
4 the safety program that you go through, correct?

5 A. Yes.

6 Q. You're informed that because of the -- the -- day
7 one when you come to work for Michelin you have to
8 watch a PowerPoint that talks about workers' Comp
9 safety, what you do if you have a Workers' Comp claim,
10 immediately tell somebody when you get hurt, how the
11 process works; is that correct?

12 A. Yes.

13 Q. Every employee sees that and, in fact, you were
14 involved in training employees that probably had to see
15 that PowerPoint?

16 A. Yes.

17 Q. Okay. And does it make any sense to do a
18 questionnaire with all those questions about people's
19 physical capabilities if it's not going to be relied
20 upon; does that make any sense whatsoever?

21 A. No.

22 Q. And at no time did Mr. Brailey talk to you about
23 or discuss with you aches and pains on the job; is that
24 correct?

25 A. No.

1 Mr. Beard: That's all I have.

2 REDIRECT EXAMINATION

3 By Mr. Samuels:

4 Q. Mr. Lemon, have you ever pulled a muscle?

5 A. No.

6 Q. Never in your life, you never pulled a muscle?

7 A. No.

8 Q. Ever had any kind of injury at all?

9 A. Yes.

10 Q. What kind of injury have you had?

11 A. A knee injury.

12 Q. A knee injury?

13 A. Yes.

14 Q. How is your knee now?

15 A. It's fine.

16 Q. It got completely better?

17 A. Yes.

18 Q. How long ago was that knee injury?

19 A. I was, like, twenty-five (25).

20 Q. Twenty-five (25)?

21 A. Yeah.

22 Q. So, it was about ten (10) or eleven (11) years

23 ago?

24 A. Yes.

25 Q. Okay. It doesn't give you any problems now?

- 1 A. No.
- 2 Q. Did you see a doctor for it?
- 3 A. Yes.
- 4 Q. Did the doctor put you under any work
- 5 restrictions?
- 6 A. No.
- 7 Q. Okay. You saw a doctor because you were in pain?
- 8 A. Yes.
- 9 Q. But you got better?
- 10 A. Yes.
- 11 Q. Your knee doesn't bother you now at all?
- 12 A. No.
- 13 Q. If in the twenty (20) years that Mr. Brailey had
- 14 gone since he had a back injury in 1997, would you just
- 15 want to know that he didn't have anymore back pain?
- 16 A. Yeah.
- 17 Q. And would you want to know if he didn't have any
- 18 restrictions; no doctor was putting him on
- 19 restrictions?
- 20 Mr. Beard: Commissioner, object to the
- 21 form because he was under restrictions.
- 22 Commissioner Wilkerson: I understand
- 23 that.
- 24 Mr. Samuels: Not on June 11th or June
- 25 13th, Your Honor --

1 Mr. Beard: He sure was.

2 Mr. Samuels: -- he was not.

3 Mr. Beard: He sure was. He was -- he
4 was --

5 Mr. Samuels: The doctor took him off
6 restrictions; he was released to full duty.

7 Mr. Beard: -- no. No one took him off
8 restrictions. I object, Commissioner, that's
9 --

10 Commissioner Wilkerson: Not the -- he
11 wasn't taken off restrictions because he
12 never --

13 Mr. Beard: -- never saw a surgeon --

14 Commissioner Wilkerson: -- went to see
15 the surgeon..

16 Mr. Beard: -- that's correct.

17 Commissioner Wilkerson: He was still on
18 those restrictions for twenty (20) years
19 because he never saw the surgeon, unless
20 there's a report out there that he saw a
21 surgeon. I don't know. The information
22 before me still says he's on restriction from
23 1997.

24 Mr. Samuels: No doctor, currently, in
25 2017, put him on restrictions until June

1 24th.

2 Mr. Beard: With all due respect, no
3 doctor that he saw knows about 1997, and what
4 the doctor said. I am -- with all due
5 respect, we can sit here and --

6 Commissioner Wilkerson: I know; I
7 understand.

8 Mr. Beard: -- play the games, I mean,
9 chip up questions and semantics --

10 Commissioner Wilkerson: That's why
11 we're probably going to have to go back and
12 take Dr. Boyd's deposition --

13 Mr. Beard: -- I agree.

14 Commissioner Wilkerson: -- because once
15 you tell him that I don't know what he's
16 going to say but --

17 Mr. Beard: I don't either but we can
18 play this semantical game all day and -- and
19 twist and turn the words --

20 Commissioner Wilkerson: -- I
21 understand.

22 Mr. Beard: -- but the bottom line is --

23 Commissioner Wilkerson: I understand.

24 Mr. Beard: -- these doctors didn't know
25 because this gentleman didn't tell them and,

1 with all due respect, there's no way any of
2 us can know what they would say otherwise.

3 Commissioner Wilkerson: The -- the only
4 report I've got before me is a doctor put him
5 on restrictions until he saw a surgeon. So,
6 you -- that means I have no medical report
7 before me from 1997 until 2017, other than
8 that report, okay? Now, is there a doctor in
9 2017, that confirms that report? No.
10 There's not one in '16, '15, '14, '13, '12,
11 '11, '10, '09, '08, '07, '06, '05, '04, '03,
12 '02, '00, '99, '98 or '97, except that's the
13 only report I've got before me and I don't
14 know -- and if that wasn't covered in Dr.
15 Boyd's deposition of January the 15th, 2018,
16 I mean, I -- I know a motion was made and I
17 said I would wait and consider it at that
18 point in time but it sounds like, unless
19 something changes with the next witness, I
20 don't think it will because they have nothing
21 to do with this, I think we -- you've got to
22 go back to Dr. Boyd and ask him those
23 questions. Unless it's in there, I mean, you
24 all -- you all covered it; I -- I --

25 Mr. Beard: It's -- it's not because the

1 records weren't available; we didn't have the
2 records.

3 Commissioner Wilkerson: -- I don't
4 know. I -- as you know, I don't read the
5 entire thing; I just go to what you all tell
6 me when we're in here.

7 Mr. Samuels: No. Mr. Beard is correct.

8 Commissioner Wilkerson: okay. Well,
9 then --

10 Mr. Samuels: Those records were not --

11 Commissioner Wilkerson: -- okay.
12 That's fine.

13 Mr. Samuels: -- available at the time
14 of Dr. Boyd's deposition.

15 Commissioner Wilkerson: well, I think,
16 since we've opened that wide gate with those
17 questions, unless -- I -- I would say we've
18 got to take Boyd's -- we've got -- we've got
19 to patch '97 to '17. I don't know how we'd
20 patch it; I'll leave that up to you all.

21 Mr. Beard: I agree. I don't know how
22 he does it either and I'm going to withdraw
23 my motion to reconvene. I don't think at
24 this point we have to do that anymore; I
25 think the evidence has turned it around.

1 Commissioner Wilkerson: Okay. I'll ask
2 you that when we finish.

3 Mr. Beard: Okay.

4 Mr. Samuels: Based on your comments,
5 Your Honor, if there is a -- if there is a
6 question that those restrictions somehow from
7 1997, applied twenty (20) years with no
8 complaints, no symptoms, no treatment after
9 then, then I would at that point -- I think
10 if that's where we're going, then Mr. Beard
11 has made it necessary for us to depose Dr.
12 Boyd.

13 Commissioner Wilkerson: The second
14 hearing this week that --

15 Mr. Beard: Unbelievable.

16 Commissioner Wilkerson: -- that once
17 the evidence is presented everybody changes
18 their positions.

19 Mr. Beard: Somebody yesterday filed a
20 --

21 Mr. Samuels: Well --

22 Mr. Beard: -- a seven (7) or eight (8)
23 or ten (10) page response of why I'm not
24 entitled to it; it's unbelievable.

25 Commissioner Wilkerson: So, are you

1 saying you still have the option right now to
2 withdraw your 50?

3 Mr. Samuels: -- to withdraw my 50?

4 Commissioner Wilkerson: Yes.

5 Mr. Samuels: Well, that's -- that's an
6 interesting question, Your Honor. I mean,
7 Preston McDaniel did have a case where --

8 Commissioner Wilkerson: Here or --

9 Mr. Samuels: -- he had wanted to
10 withdraw his Form 50 --

11 Commissioner Wilkerson: -- no.

12 Mr. Samuels: -- after the hearing and
13 after the record had been closed, after the
14 order instructions had come down but before
15 the -- an actual order was signed and the
16 Supreme Court, in that case, said no, you
17 cannot pull your 50 at that point.

18 Commissioner Wilkerson: Okay. So,
19 that's the law of the land.

20 Mr. Samuels: Right. So, no, I don't --
21 I don't believe I --

22 Commissioner Wilkerson: So, how can you
23 withdraw -- how can you withdraw what you've
24 said about the motion that you've already put
25 on the record at 2:50 this afternoon when

1 your position was totally different this
2 morning at 9:45?

3 Mr. Samuels: -- I --

4 Commissioner Wilkerson: Tell me what
5 the difference is in withdrawing your 50 and
6 now wanting to reconsider your opinion at
7 9:45 this morning on the motion.

8 Mr. Samuels: -- well, Your Honor, your
9 -- you indicated to us at --

10 Commissioner Wilkerson: I did.

11 Mr. Samuels: -- at the beginning of
12 this hearing that you would have the hearing
13 go forward and you would decide at the close
14 of the evidence whether to reconvene Dr.
15 Boyd's deposition.

16 Commissioner Wilkerson: And if he
17 withdraws it it's over or if I deny it it's
18 over, right?

19 Mr. Samuels: I think if you deny it
20 it's over but the -- the point about it as
21 what has come out is, you know, my -- my
22 position is this, my position has been that
23 records from 1997, are stale; they are not
24 probative evidence of Mr. Brailey's condition
25 at the time he went to work for Michelin or

1 his condition at the time he got hurt--

2 Commissioner Wilkerson: That's fair.

3 Mr. Samuels: -- particularly when there
4 are -- there is no history of any back
5 problems in the meantime. Mr. Beard has sent
6 out, I think, nine (9) subpoenas. There's no
7 history of an accident at any other job.

8 Mr. Beard: The only job that we've
9 gotten records from is -- would be
10 Westinghouse and --

11 Commissioner Wilkerson: Michelin.

12 Mr. Beard: -- DJJ, that's it --

13 Commissioner Wilkerson: DJJ.

14 Mr. Beard: -- the only two (2) and one
15 of which he didn't even tell us about but --

16 Commissioner Wilkerson: I understand.

17 Mr. Samuels: But there is -- there is
18 no evidence of -- of any other -- any other
19 accidents, any other Workers' Comp claims,
20 except for 1997, twenty (20) years ago --

21 Commissioner Wilkerson: I don't
22 disagree with that, what's before me.

23 Mr. Samuels: -- which had no surgery,
24 the treatment was physical therapy, settled
25 for a nominal amount.

1 Mr. Beard: -- that's because it was --

2 Commissioner Wilkerson: But we don't
3 know why the surgery wasn't done or was --
4 because he never got to somebody that could
5 tell him if it needed to be done; that's
6 what's before me. I don't know.

7 Mr. Samuels: To -- but --

8 Mr. Beard: -- what's before you is no
9 heavy work --

10 Commissioner Wilkerson: I understand.
11 That's --

12 Mr. Beard: -- until he sees a surgeon.

13 Commissioner Wilkerson: -- and I don't
14 know. I -- that's the problem sometimes with
15 Workers' Comp, and you all know this, is
16 there may be something out there or something
17 that's discovered two (2) years down the road
18 that could have turned or flipped the whole
19 case but we don't get to decide what's maybe
20 out there, what could be, what should be
21 there; we've got to make the determination
22 based on what I hear today. That's the only
23 thing I can do.

24 Mr. Samuels: -- but what my -- my
25 position is, you have indicated that you give

1 some weight to Mr. Beard's argument that
2 records from 1997, say no heavy lifting until
3 he sees a surgeon are permanent restrictions
4 covering --

5 Commissioner Wilkerson: I don't --

6 Mr. Samuels: -- twenty (20) years.

7 Commissioner Wilkerson: -- I don't know
8 until I read the whole thing. I haven't even
9 read the doctor's depo. I mean, I -- I mean
10 --

11 Mr. Samuels: And -- and my point is, if
12 that is -- if that is where you are --

13 Commissioner Wilkerson: -- I don't know
14 until I finish --

15 Mr. Samuels: -- but it's --

16 Commissioner Wilkerson: -- that's the
17 problem. That's where I am now because
18 that's what I'm looking -- that's all I've
19 got. If you all want to stop and let me read
20 all this stuff I can tell you where we are
21 but I'm not going to -- I mean, or we can
22 come back Monday and I can tell you where we
23 are. I mean, you all have had this stuff for
24 how long? How long have you had this case?

25 Mr. Samuels: -- how long have I had

1 this case?

2 Commissioner Wilkerson: Yes.

3 Mr. Samuels: Probably August, I think.

4 --

5 Commissioner Wilkerson: Okay. So --

6 Mr. Samuels: -- 2017.

7 Commissioner Wilkerson: -- you've had
8 it since August, I just got it today; how do
9 you expect to know where I am now? I mean,
10 we've learned stuff in here today that
11 neither party knew anything about. So, I
12 don't know how I would know what I know right
13 now until I read the whole stuff.

14 Mr. Samuels: I agree, Your Honor, but
15 the -- the -- the motion to reconvene the
16 deposition was made to -- as I understand it,
17 was made to question Dr. Boyd.

18 Commissioner Wilkerson: That's fine.
19 So, you -- you agree he can't withdraw it, is
20 what you're saying?

21 Mr. Samuels: I'm saying he can withdraw
22 it but I'm saying I'm not bound by the
23 withdrawal. I think --

24 Commissioner Wilkerson: Okay. I
25 understand.

1 Mr. Beard: He is bound by the
2 withdrawal when he --

3 Mr. Samuels: -- if he had good cause --

4 Mr. Beard: -- when he opposed it in the
5 first place. If he had agreed with me then
6 he -- then he could go forward. He hasn't --
7 in fact, he did everything in his power
8 forcing me to pay a lot -- my client to pay
9 me substantial money to draft a motion and to
10 go through all that process. He could have
11 very easily said, yeah, let's go take the
12 deposition; he said no. We had a date, he
13 said, no, I'm busy and I'm not going to let
14 you do it anyway; I mean, that's his
15 position.

16 Commissioner Wilkerson: I understand.
17 I just wanted to make sure. Let's get
18 through with this poor guy; he's probably --

19 Witness: I'm all right.

20 Commissioner Wilkerson: -- he's
21 probably ready to go get something to eat.

22 Witness: I'm all right.

23 Q. Mr. Lemon, when you were hired at Michelin --

24 A. Yeah.

25 Q. -- did you have to undergo a physical exam?

1 A. Yes, sir.

2 Q. And have you undergone other physical exams from
3 Michelin every year or is it just the one (1)?

4 A. Just the one (1).

5 Q. Okay. It was a doctor who examined you?

6 A. Yes.

7 Q. Did the doctor do a thorough exam?

8 A. Yes.

9 Q. Did he examine your back?

10 A. Yeah, I would say.

11 Q. Okay. Made sure that you could twist, turn, bend,
12 stoop, lift without any problems?

13 A. Right.

14 Q. And he -- and the doctor examined your back and
15 cleared you to work; is that right?

16 A. Yes.

17 Q. Even though you haven't any problem with your
18 back, the doctor still examined your back to determine
19 that you were able to work at Michelin?

20 A. Yes.

21 Mr. Samuels: Thank you. No further
22 questions.

23 RECROSS-EXAMINATION

24 By Mr. Beard:

25 Q. If you had had a prior Workers' Comp claim where

1 you were advised by a doctor that you could not go back
2 to work and do heavy labor type of work, as I indicated
3 to you earlier, don't you think you need to tell the
4 doctor that so he can investigate that even more
5 thoroughly?

6 A. Yes.

7 Q. Just doing an examination -- I mean, you know
8 people; you've probably faked pain before yourself
9 because you wanted to make sure you got a job or -- or
10 things of that nature. If -- if you want the money, if
11 you want the job, sometimes you've got to eh, you know,
12 stretch it a little bit; isn't that true?

13 A. Yes, sir.

14 Q. Okay.

15 Mr. Beard: That's all I have. Thank
16 you.

17 Commissioner Wilkerson: Anything on
18 those two (2) questions or three (3)?

19 Mr. Samuels: No, sir.

20 Commissioner Wilkerson: Okay. Can this

21 --

22 Mr. Samuels: The Claimant --

23 Commissioner Wilkerson: -- witness be
24 excused to go where ever he needs to go next?

25 Mr. Beard: Yes, sir.

1 Commissioner Wilkerson: Okay. I just
2 wanted to make -- I'll ask you?

3 Mr. Samuels: -- no objection and -- and
4 --

5 Commissioner Wilkerson: Okay. Sir, you
6 may leave and go where ever -- whatever you
7 need to do next; you don't have to hang
8 around here --

9 Mr. Lemon: All right. Thank you, sir.

10 Commissioner Wilkerson: -- unless you
11 need to for rides with everybody else or
12 whatever --

13 Mr. Lemon: All right. Thank you.

14 Commissioner Wilkerson: -- it doesn't
15 matter to me. Thank you, sir. I appreciate
16 you being here. Any other -- I'm sorry.

17 Mr. Beard: Did you --

18 Mr. Samuels: No other witnesses, Your
19 Honor.

20 Mr. Beard: -- did you drive yourself to
21 my office?

22 Mr. Lemon: Yes.

23 Mr. Beard: I'll get a runner to come
24 pick you up and --

25 Mr. Lemon: Okay.

1 Mr. Beard: -- so you can get on back.

2 Mr. Lemon: All right.

3 Commissioner Wilkerson: Have you got --
4 is that the Claimant's case?

5 Mr. Beard: Can I --

6 Mr. Samuels: Except for the possibility
7 of Dr. Boyd's deposition; yes, sir.

8 Commissioner Wilkerson: I don't know if
9 he heard that. I think I heard it but I'm not
10 sure he heard it. So, when he comes back
11 I'll just get you to repeat what I think I
12 heard you say.

13 Mr. Samuels: Okay. Would this be a
14 good time for another two (2) minute bathroom
15 break?

16 Commissioner Wilkerson: Yes, if you
17 want to. Well, yes.

18 Mr. Samuels: Two (2) minutes.

19 Commissioner Wilkerson: Yes. I
20 understand. Go ahead. We'll just go off the
21 record real quick; that will make it easier
22 for everybody.

23 Mr. Beard: -- are -- that must be what
24 I missed --

25 Commissioner Wilkerson: Yes.

1 Mr. Beard: I apologize.

2 Commissioner Wilkerson: No.

3 (Off The Record)

4 Commissioner Wilkerson: I told him --
5 he didn't understand what you said and I -- I
6 said -- we're back on the record and I asked
7 was this the Claimant's case --

8 Mr. Beard: Okay.

9 Commissioner Wilkerson: -- and,
10 Stephen, I think -- you can go ahead and tell
11 me what you said -- I think he said, except
12 for if I allow Dr. Boyd's deposition to
13 reconvene; is that correct?

14 Mr. Samuels: That's the gist of it --

15 Commissioner Wilkerson: Okay.

16 Mr. Samuels: -- yes, Your Honor.

17 Commissioner Wilkerson: Okay. All
18 right. That's the only -- that's the only
19 thing he said.

20 Mr. Beard: Okay. Do I need to respond
21 to that?

22 Commissioner Wilkerson: I don't think
23 so because I --

24 Mr. Beard: Well, I mean, my response
25 will be, I'm withdrawing that motion --

1 Commissioner Wilkerson: -- I
2 understand.

3 Mr. Beard: -- because I think the
4 evidence has taken us to a place that --

5 Commissioner Wilkerson: I understand.

6 Mr. Beard: -- they didn't want it to
7 take us and I don't think I need the
8 deposition anymore.

9 Commissioner Wilkerson: Okay. And --
10 and your position was that he cannot withdraw
11 it --

12 Mr. Samuels: Well --

13 Commissioner Wilkerson: -- is that
14 right?

15 Mr. Samuels: -- I think he can but I
16 will say this, if he -- if he has withdrawn
17 the motion and cannot depose Dr. Boyd, then
18 he cannot meet his burden of the third prong
19 of the Cooper v. McDevitt and Street test --

20 Mr. Beard: I completely disagree.

21 Mr. Samuels: -- because he --

22 Mr. Beard: I've got a --

23 Mr. Samuels: -- he --

24 Mr. Beard: -- I've got a report that
25 says he physically cannot do it and I've got

1 a doctor who says he physically cannot do it
2 now, a surgeon. I disagree with him.

3 Mr. Samuels: -- he --

4 Commissioner Wilkerson: I understand.

5 Mr. Samuels: -- he has to prove through
6 expert testimony a causal connection between
7 --

8 Commissioner Wilkerson: I understand.

9 Mr. Samuels: -- the alleged
10 misrepresentation and the injury and that's
11 got to be proven through medical evidence.

12 Commissioner Wilkerson: I understand.

13 Mr. Samuels: That's why I opposed
14 reconvening Dr. Boyd's deposition; he can't
15 meet the burden, he --

16 Commissioner Wilkerson: So, why do you
17 want to reconvene it? I mean, you can't --
18 you can't have your -- you can't have the --
19 you can't have your cake and eat it too.

20 Mr. Beard: Because he knows I have met
21 my burden. He knows that --

22 Commissioner Wilkerson: I -- well, I --

23 Mr. Beard: -- he knows that that final
24 --

25 Commissioner Wilkerson: -- but you

1 can't have two (2) positions; that doesn't
2 work.

3 Mr. Beard: -- that final report counts
4 as a causation report and its sufficient to
5 do it and then -- and then what has
6 transpired, you can look at the facts that
7 transpired after the lying on the application
8 and exactly what happened and you can compare
9 2017 to 1997, yourself, and you've got a
10 medical report that says he shouldn't have
11 been doing that job --

12 Commissioner Wilkerson: I --

13 Mr. Beard: -- with all due respect. I
14 mean, we can -- again, we can --

15 Commissioner Wilkerson: -- argue that

16 --

17 Mr. Beard: -- hash it out here but --

18 Commissioner Wilkerson: -- till the
19 cows come home.

20 Mr. Beard: -- Stephen and I both like
21 to go to the big boy court and I don't mind
22 going up there anytime --

23 Commissioner Wilkerson: I understand.

24 Mr. Beard: -- love to go up there.

25 Commissioner Wilkerson: we're glad you

1 all take them up. We -- we rule on stuff
2 five (5) years ago that we've found out we're
3 now wrong on of course five (5) years from
4 now we may find out we were right from five
5 (5) years ago; I don't have a clue.

6 Mr. Beard: But that's not the only
7 defense of this case.

8 Commissioner Wilkerson: I understand.

9 Mr. Beard: There's also credibility --

10 Commissioner Wilkerson: I --

11 Mr. Beard: -- if you believe anything
12 that has been testified to here today.

13 Commissioner Wilkerson: -- I
14 understand. I've got -- this will be fun
15 sitting down and going through. We don't
16 have many like this and I'm glad you all
17 brought it. These are always fun. It's not
18 the broken knuckle and is it the knuckle or
19 did it go into the hand and -- those are --
20 those are aggravating; these are fun.

21 Mr. Samuels: And I don't want to be too
22 repetitive, Your Honor, but the MRI shows a
23 herniated disk at L4,5 --

24 Commissioner Wilkerson: That's -- I'll
25 read it.

1 Mr. Samuels: -- he didn't have it
2 before.

3 Commissioner Wilkerson: I'm going to
4 read it.

5 Mr. Beard: We don't know that he had it
6 -- didn't have it before; we have no earthly
7 idea what he had before.

8 Commissioner Wilkerson: We'll read it
9 -- I'll read it, I promise; I'll read all of
10 it. So, other than that one issue, that is
11 the Plaintiff's case; is that fair?

12 Mr. Samuels: Yes, Your Honor.

13 Commissioner Wilkerson: Tell me how
14 many you've got left for the Defense side. I
15 hear -- the rumor is everybody is gone, which
16 I don't believe but --

17 Mr. Beard: No, they're not all gone.
18 I've got --

19 Court Reporter: Oh, I'm sorry.

20 Mr. Beard: -- Troy Lowman, I've got the
21 Nurse, I've got Derrick Gibson and I've got
22 Mark, so.

23 Court Reporter: -- okay. Just
24 understand -- you know this because you were
25 here the other day -- I like you all but I

1 don't love you all like I love my grandson
2 and he's got a baseball game this evening; we
3 -- I can come back after his baseball game or
4 I'll see you Monday, okay? Because I'm not
5 --

6 Mr. Beard: I'm going to be here Monday
7 anyway.

8 Commissioner Wilkerson: -- I'm not
9 giving up his little baseball game for you
10 all, okay? There's a lot of things -- I'll
11 give up missing a dinner or whatever but I'm
12 not giving up the five (5) year old's
13 baseball game, okay?

14 Mr. Beard: I understand.

15 Commissioner Wilkerson: So --

16 Mr. Beard: I'm with you.

17 Commissioner Wilkerson: -- at around
18 five o'clock-ish if we're not through -- I
19 mean, if we close -- I'm gone because he
20 plays at -- have I got it right? He -- they
21 move all over the place -- six o'clock; so,
22 Avery will be gone, okay?

23 Mr. Beard: The only thing I can say,
24 Commissioner, if you want -- if you want to
25 make a comment to the two (2) lawyers right

1 now, is if we stay on what is relevant to the
2 case we'll be through, I would presume, in
3 forty-five (45) minutes with these four (4)
4 people because every one of them are
5 miniscule in nature, in my opinion, and --

6 Commissioner Wilkerson: well, can get
7 through as many as we want to --

8 Mr. Beard: -- Stephen --

9 Commissioner Wilkerson: -- I don't
10 care. I'm just trying to tell you all that
11 five o'clock-ish I'm going to go watch
12 grandson play baseball, so.

13 Mr. Beard: -- I've got you.

14 Commissioner Wilkerson: All right.

15 Mr. Beard: Do you want me --

16 Commissioner Wilkerson: Yes.

17 Mr. Beard: -- to call my first one?

18 Commissioner Wilkerson: Yes, let's keep
19 them going.

20 Mr. Beard: All right.

21 Commissioner Wilkerson: That's just me.
22 If not we're here Monday.

23 (Off The Record)

24 Commissioner Wilkerson: Stephen, I
25 don't know what your schedule is; I know he

1 is back Monday for that case that lasted
2 eight (8) hours earlier this week, so. I'm
3 not sure what schedule is. I apologize.
4 okay? We can check later; if we don't get
5 through we'll just check. I'm not saying --
6 okay, it wouldn't be fair to you. Sir, I'll
7 get you to raise your right hand; I'm going
8 to have the Court Reporter swear you in.

9 whereupon;

10 Troy Alton Lowman, being duly sworn and cautioned to
11 speak the truth, the whole truth and nothing but the truth,
12 testified as follows:

13 Court Reporter: Please state your full
14 name for the record.

15 Witness: Troy Alton Lowman.

16 Court Reporter: There's the Lowman; I
17 knew we had a Lowman in here somewhere.
18 okay. Thank you, sir.

19 Commissioner Wilkerson: Alton, right,
20 is it?

21 Witness: Yes.

22 Commissioner Wilkerson: Troy Alton,
23 okay, thank you. Please, Mr. Beard.

24 DIRECT EXAMINATION

25 By Mr. Beard:

- 1 Q. Mr. Lowman, if you would please tell me where are
2 you employed.
- 3 A. Michelin Tire.
- 4 Q. How long have you been with Michelin?
- 5 A. Thirty-six (36) years.
- 6 Q. Okay. Are you in US 5 or 7?
- 7 A. Seven (7).
- 8 Q. All right. And what is your title there?
- 9 A. The Training Manager for the plant.
- 10 Q. Okay. What does that mean?
- 11 A. That means I'm responsible for on-boarding new
12 people and insuring the training takes place and it's
13 conducted right and -- and we're meeting our training
14 referentials and stuff.
- 15 Q. Okay. Does that include folks who are still in
16 the probationary part of their -- their hiring or their
17 employment process?
- 18 A. It includes up to the point of validation.
- 19 Q. Okay. What does validation mean?
- 20 A. Validation means you can do the job safely with
21 good quality while you're developing your speed.
- 22 Q. Okay.
- 23 A. So, at validation you can work alone.
- 24 Q. All right. And are you familiar with Isaac
25 Brailey?

- 1 A. Yes.
- 2 Q. And how do you know Mr. Brailey?
- 3 A. He was a new hire.
- 4 Q. Okay. And he worked at US 7?
- 5 A. Worked at US 7, came into the training department
- 6 training for PAP.
- 7 Q. Okay. Which means that he -- he was in your
- 8 department?
- 9 A. Yes.
- 10 Q. All right. Did he ever successfully make it
- 11 through validation?
- 12 A. No.
- 13 Q. All right. So, he was in -- under your
- 14 supervision the whole time?
- 15 A. Right.
- 16 Q. All right. New employees at Michelin, do they go
- 17 through any type of training on Workers' Compensation,
- 18 safety; those types of things?
- 19 A. Yes. All the new employees go through pre-work
- 20 before they get hired with E-Learnings --
- 21 Q. Okay.
- 22 A. -- that talks about safety and -- and different
- 23 personnel issues and stuff.
- 24 Q. Okay.
- 25 A. Then when they come into the plant, on their first

1 day, they've got that on-boarding process and we have a
2 -- a portion designed just for safety and we go through
3 how to report injuries and what to do.

4 Q. Okay.

5 A. And we go through the same thing with quality and
6 Michelin history and so on.

7 Q. All right. Does it include workers' Comp as part
8 of the safety?

9 A. It --

10 Q. How do you report workers' Comp --

11 A. -- yes.

12 Q. -- what you do on workers' Comp?

13 A. It -- it --

14 Q. All right.

15 A. -- it includes how to -- how to report an
16 accident.

17 Q. All right. And do you have -- did you -- the job
18 you do, are you -- do you have an educational
19 background; did you go to college?

20 A. No.

21 Q. Okay. The employees who are under you, are they
22 instructed to notify Michelin whenever someone has an
23 injury on the job or a workers' Comp claim?

24 A. Yes.

25 Q. All right. What is the protocol for doing that?

- 1 A. That all access report it when they happen --
2 Q. Okay.
3 A. -- and that you notify your shift Manager, you
4 Safety Spoke, you fill an accident investigation out.
5 If medical is not open, you go to -- you go to Security
6 because our Security Officers are trained EMT's and
7 they provide care for you.
8 Q. Okay. And all the new employees are notified of
9 that before they start?
10 A. Yes.
11 Q. All right.
12 A. And we even take a tour of the health center,
13 which is Michelin's Health Center we have on the
14 corner. It's a family health center and the first
15 thing the health center lady says is that you do not
16 bring work-related injuries to us; we cannot see you.
17 Q. Okay. And Michelin also has Plant Nurses?
18 A. Yes.
19 Q. All right. Does US 7 have a Plant Nurse?
20 A. Yes, US 7 --
21 Q. Who is it?
22 A. -- Christy.
23 Q. Okay. What's her last name?
24 A. Sirois.
25 Q. Okay. And let's -- let's get more specific about

1 this particular case.

2 A. Uh-huh.

3 Q. Mr. Brailey was working for Michelin back in --
4 sometime between April and -- and, I guess, September
5 of 2017; does that sound about right?

6 A. Uh-huh.

7 Q. Okay. You need to say yes or no instead of
8 uh-huh, just --

9 A. Yes.

10 Q. -- just to make sure --

11 A. I'm sorry.

12 Q. -- we get it on the record.

13 A. Yes.

14 Q. When did you first become aware that Mr. Brailey
15 was claiming to have filed or have -- to have injured
16 himself on the job and wanted to make a Workers'
17 Compensation claim?

18 A. It was June, about lunchtime. It was in June on a
19 Saturday; I believe it was the 24th.

20 Q. Okay. And you said about lunchtime?

21 A. About lunchtime, right. I know that because I was
22 at the Town Square Market working the market when he
23 called me.

24 Q. Okay. And what did he tell you?

25 A. He told me he was at the emergency room with back

1 pains, that he'd -- had hurt his back.

2 Q. Okay.

3 A. And I asked him where he hurt his back and he said
4 he thought he hurt it at work.

5 Q. All right. When he told you he was at the -- at
6 the hospital, did he tell you this was before he was
7 being seen or this was after he had been seen?

8 A. I'm assuming it's after he'd been seen.

9 Q. Okay. And you said it was after -- it was
10 sometime in the -- around 12:00 or so?

11 A. Around 12:00.

12 Q. All right. So, if the medical records from June
13 24th indicate that the last time he saw anyone was
14 around 11:02 --

15 Mr. Samuels: Object to the leading,
16 Your Honor.

17 Q. -- according to the timeline that Mr. Daniels --
18 Mr. Samuels went through later with his client,
19 lunchtime would be after eleven o'clock in the morning;
20 is that fair to say?

21 A. Yes.

22 Q. Okay. And based upon that phone call, what did
23 you do?

24 A. Well, he and I talked and I explained to him the
25 proper procedure; that the health center was not the

1 place to go to. He said he stopped by the health
2 center in the morning and it was closed; I said, well,
3 that's not the right place to go to. I said you go see
4 -- you -- you report to medical and he said, well, the
5 medical was closed and it is closed. I said, but the
6 EMT's in Security, once you report the accident, the
7 EMT's and the Security Officers will take care of you
8 and -- and get the proper situation. And he was saying
9 he was at the hospital. And he then asked me how to
10 file Workers' Comp.

11 Q. Okay. So, he asked you about Workers' Comp,
12 himself, right then?

13 A. Right then.

14 Q. Okay. So, he was concerned about Workers' Comp?

15 A. Uh-huh.

16 Q. Yes?

17 A. Yes.

18 Q. All right. Prior to June the 24th --

19 A. Uh-huh. Yes, sir.

20 Q. -- did Mr. Brailey ever tell you that he had any
21 back problems before that day?

22 A. No, sir.

23 Q. Okay. Were you aware that Mr. Brailey had been to
24 both Lexington Medical Center on -- on June the 11th of
25 2017, and to his personal doctor on June the 13th,

1 2017, claiming to have ten (10) out of ten (10) severe
2 back pain as a result of his job at Michelin?

3 A. No, sir.

4 Q. He made no comments to you?

5 A. No.

6 Q. would he -- would the proper procedure be to
7 notify you?

8 Mr. Samuels: Object.

9 A. Yes.

10 Q. Should you have been notified of that?

11 Mr. Samuels: Object to leading, Your
12 Honor.

13 Mr. Beard: Okay.

14 Commissioner Wilkerson: Okay. Yes.

15 Just --

16 Q. What is the protocol --

17 Commissioner Wilkerson: -- proceed,
18 yes.

19 Q. -- when someone has an injury; who are they
20 supposed to report to?

21 A. Their Manager or the Spoke.

22 Q. Okay. You're the Manager?

23 A. I am the Manager.

24 Q. All right. The Safety Spoke would be who?

25 A. The people they work with. We have spoke roles;

1 so, the -- the Safety Spoke is responsible for
2 reporting the accidents. So, you have the Manager; I'm
3 not there twenty-four/seven (24/7), I'm there Monday
4 through Friday. So, if you get injured on the weekend
5 or a back stick you report it to your Safety Spoke, the
6 Flow Manager in the plant who is responsible for the
7 plant flow and the environment and then they would get
8 in touch with medical to get the proper treatment.

9 Q. All right. The medical records indicate that Mr.
10 Brailey started complaining two (2) weeks before June
11 the 11th; so, somewhere in the -- to the end of May.
12 So, from May until June the 24th, 2017, did you work at
13 Michelin any of those days?

14 A. Yes.

15 Q. Okay. So, Mr. Brailey would have had ample
16 opportunity --

17 A. Yes.

18 Q. -- to notify you --

19 A. Yes.

20 Q. -- and he never did?

21 A. No.

22 Q. Okay. Now, if someone is claiming to have ten
23 (10) out of ten (10) severe pain that they think is
24 related to their job at Michelin, is that something you
25 would want to know?

1 A. Yes, most definitely.

2 Q. Why would you want to know that?

3 A. For their safety and for the safety of Michelin,
4 sir.

5 Q. Okay. What about their co-employees; would you be
6 concerned about their safety?

7 A. I would.

8 Q. Okay. Some of the -- some of the jobs that these
9 folks do in US 7 require teamwork, not just single
10 individuals?

11 A. Virtually every job requires teamwork to some
12 degree.

13 Q. Okay. So, if someone has that kind of pain, it
14 could impact the other employees as well?

15 A. Yes, it could.

16 Q. All right. And it's your testimony that at no
17 time before June the 24th had you ever heard that Mr.
18 Brailey had been complaining of these problems for at
19 least almost a month?

20 A. At --

21 Mr. Samuels: Object to leading, Your
22 Honor.

23 A. -- at no time before --

24 Commissioner Wilkerson: Whoa.

25 A. -- June 24th --

1 Commissioner Wilkerson: Whoa, whoa,
2 whoa --

3 A. -- June 24th was the first --

4 Commissioner Wilkerson: -- whoa, don't
5 answer.

6 Mr. Beard: Yes.

7 Commissioner Wilkerson: Just rephrase.

8 Mr. Beard: Yes, sir.

9 Q. Prior to June 24th, 2017, had you ever been given
10 any indication of -- of injury or accident by Mr.
11 Brailey?

12 A. -- no, sir.

13 Q. Okay. Are you familiar at all with the -- the
14 physical examinations and the questionnaires that are
15 filled out for safety purposes or for medical questions
16 -- medical history questionnaires that the employees
17 fill out?

18 A. No, sir.

19 Q. Okay.

20 Mr. Beard: Thank you, Mr. Lowman.

21 That's all I have.

22 Commissioner Wilkerson: Mr. Samuels?

23 Mr. Samuels: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 By Mr. Samuels:

- 1 Q. Mr. Lowman, do your employees at Michelin just
2 sort of day-to-day -- it's pretty physical work, isn't
3 it?
- 4 A. It is physical work.
- 5 Q. It requires a lot of lifting, pulling, stretching?
- 6 A. It requires lifting, pulling and stretching, yes.
- 7 Q. And a lot of employees, especially when they're
8 new and not used to it, they get pain, don't they?
- 9 A. Yes.
- 10 Q. I mean, that's a normal, expected, thing?
- 11 A. That's a normal, expected, thing.
- 12 Q. You don't want them filing a Workers' Compensation
13 claim just because they're sore from normal work, do
14 you?
- 15 A. If the pain is affecting their life and they can't
16 work -- they can't function properly; yes --
- 17 Q. Okay.
- 18 A. -- I'd want them to report an accident.
- 19 Q. Well, what if it's not an accident, what if it's
20 just --
- 21 A. well --
- 22 Q. -- pain from just the normal work; do you guys --
23 would you want them to report that, would you accept
24 that as a Workers' Comp claim?
- 25 A. -- I'm not in the Workers' Comp; I just -- I just

1 take it as an accident to report and an accident
2 investigation. So, the accident investigation, it says
3 accident but pain could be an accident because you've
4 got pain from something.

5 Q. I just want to know that the -- the next time I
6 have a claim against Michelin with somebody who doesn't
7 have an accident but still has pain from working that
8 you all will accept it.

9 Commissioner Wilkerson: He -- that's
10 not his job.

11 Mr. Samuels: I know.

12 Commissioner Wilkerson: He said he
13 didn't do workers' comp.

14 Mr. Samuels: It was --

15 Commissioner Wilkerson: He can't accept
16 it because he doesn't know what happened --

17 Mr. Beard: This --

18 Commissioner Wilkerson: -- that caused
19 the pain.

20 Mr. Beard: -- this is why we don't get
21 finished before five o'clock --

22 Commissioner Wilkerson: I understand.

23 Mr. Samuels: -- it was --

24 Mr. Beard: -- because we go down these
25 tangents.

1 Commissioner Wilkerson: I don't have a
2 clue. Pain --

3 Mr. Samuels: -- it was simply --

4 Commissioner Wilkerson: -- pain is not
5 an accident.

6 Mr. Samuels: -- it was simply a lighter

7 --

8 Commissioner Wilkerson: Oh, I
9 understand.

10 Mr. Samuels: -- a lighter question but

11 --

12 Commissioner Wilkerson: An accident
13 that causes pain is an --

14 Mr. Samuels: -- I think Your Honor made
15 my point.

16 Commissioner Wilkerson: -- is an
17 accident, okay? Pain is not an accident.

18 Mr. Samuels: That's -- and that's
19 precisely my point.

20 Q. Pain is not an accident and what they're taught to
21 do is how to report accidents, correct?

22 A. I would say pain is a accident, I mean, you -- you
23 could hurt your back and not have an accident. I mean,
24 you did something to cause your back to hurt; so, yes,
25 it's a accident. Pain is the result of some kind of

1 injury that happens. So, we were -- we are trained to
2 report injuries that happen when they happen. So, if
3 you notice pain in your back or if you notice some kind
4 of stiffness that you can't do your job function
5 properly and you can't function at home, you report it.

6 Q. But if you can do your job, then you don't need to
7 report it --

8 A. Are you having --

9 Q. -- if it is just pain?

10 A. -- pain; that's the question, are you having pain?

11 Commissioner Wilkerson: And you believe
12 if you're having pain you can't do your job?

13 Witness: If you're having pain --

14 Commissioner Wilkerson: And you --

15 Witness: -- where your back can't
16 straighten up and you're hunched over and you
17 can't do your job, you -- you can't do it.

18 Commissioner Wilkerson: -- okay.

19 That's fine.

20 Witness: I mean, but you may not have

21 -- you may not have had an accident, okay?

22 Commissioner Wilkerson: That's fair.

23 Witness: My knee has pain but did I
24 have an accident and cause my knee to hurt?

25 Q. And your -- you've already testified that people

1 new in the job are going to have pain but that's not
2 going to be considered an accident, right?

3 A. No.

4 Q. Just getting used to it because it's hard work?
5 You've got to get in shape --

6 Mr. Beard: Commissioner, again --

7 Q. -- work up to it?

8 Mr. Beard: -- I'm going to object.
9 He's already testified he doesn't do Workers'
10 Comp; he doesn't understand the nuances of
11 what we're talking about; that's a -- that's
12 an --

13 Commissioner Wilkerson: He doesn't do
14 Workers' Comp.

15 Mr. Beard: -- that's actually a legal
16 question.

17 Commissioner Wilkerson: And he doesn't
18 do Workers' Comp.

19 Mr. Beard: Whether it's an accident or
20 not is a legal question.

21 Commissioner Wilkerson: And he doesn't
22 get to decide it nor does this gentleman get
23 to decide it; the insurance carrier gets to
24 decide it.

25 Mr. Samuels: That I understand but --

1 Commissioner Wilkerson: The Employer --
2 Mr. Samuels: -- the question --
3 Commissioner Wilkerson: -- does not get
4 to decide.

5 Mr. Samuels: -- but he's -- he's
6 testified about training people about
7 reporting accidents; he used the word
8 accident. So, if he is the Trainer then he
9 should be able to -- to testify that we
10 accept -- if -- if everybody who takes the
11 job is going to be sore and feel pain until
12 they get used to it, are they wanting them to
13 report that as an accident?

14 Commissioner Wilkerson: Well, it can't
15 be everybody; the last guy said he didn't
16 have any problem. So, it can't be everybody.
17 He's never

18 Witness: Everybody does not --

19 Commissioner Wilkerson: -- had a muscle
20 strain.

21 Witness: -- have pain, okay?

22 Mr. Beard: With all due respect --

23 Witness: A new person into the job
24 could develop pain if you're not in shape.

25 Mr. Beard: -- he's -- he's testified

1 that they should notify them if they are in
2 pain; that's what he said.

3 Witness: Yes.

4 Mr. Samuels: I think counsel is
5 testifying --

6 Mr. Beard: No.

7 Mr. Samuels: -- to this guy's
8 testimony.

9 Mr. Beard: All right. Well -- well,
10 Commissioner, you heard it; with all due
11 respect, come on.

12 Commissioner Wilkerson: I'm here
13 Monday; I don't care.

14 Court Reporter: I am too.

15 Mr. Samuels: All right.

16 Q. And, Mr. Lowman, let's talk about what happened on
17 June 24th.

18 A. Uh-huh.

19 Q. So, you received a call from Mr. Brailey?

20 A. Yes.

21 Q. And he was reporting an accident to you?

22 A. Yes.

23 Q. And he told you it happened that morning at 5:30?

24 A. He was reporting to me that he was at the hospital
25 with pain in his back and thinks that he hurt it at

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1 work around 5:30. I can't remember. I -- I put it
2 down in my notes but I can't remember what time it was.

3 Q. Do you have notes on this? Did you create a paper
4 record of his report of an accident?

5 A. Yes.

6 Q. Where is that, sir?

7 A. Where is it?

8 Q. Where is it? It's never been produced to me.

9 A. It's --

10 Q. Did you do an accident report?

11 A. -- no. I -- I did a documentation of what our
12 phone conversation was.

13 Q. Okay. Is there supposed to be an accident report
14 done when somebody makes a -- a claim?

15 A. There should be, yes.

16 Q. Okay. Who -- who does that?

17 A. The Safety Spoke and the employee who was injured.

18 Q. Okay. So, you've got this report now --

19 A. No, I don't have the report now.

20 Q. -- no, I don't mean now. I mean, you -- forgive

21 me, bad -- bad way to ask the question. You got this
22 phone call from Mr. Brailey reporting the accident at
23 work at Michelin?

24 A. Yes.

25 Q. You took some kind of notes?

- 1 A. Yes.
- 2 Q. And those are somewhere; do they still exist?
- 3 A. Yes.
- 4 Q. Michelin has there somewhere? Do you have them?
- 5 A. Yes.
- 6 Q. Do you keep them in a file?
- 7 A. Yes.
- 8 Q. Okay. Is it a file of accidents? Is it a safety
- 9 file? Is it Mr. Brailey's file?
- 10 A. It's just a list of documents that I maintain.
- 11 It's a coaching session, a document session; a
- 12 documented phone call.
- 13 Q. All right.
- 14 A. Yes, sir.
- 15 Q. So --
- 16 A. Yes, sir. Yeah.
- 17 Q. -- when Mr. Brailey reports to you that there is
- 18 an accident, was an accident report ever filled out at
- 19 Michelin?
- 20 A. No. Because Mr. Brailey has to be there to fill
- 21 one out so he can put the facts into it.
- 22 Q. All right. When he came to -- do you know if he
- 23 was ever asked to fill out an accident report?
- 24 A. He was asked to come back into work and then we
- 25 could fill an accident report out.

1 Q. Was he asked to come back and specifically to --
2 to fill out an accident report?

3 A. No. He was asked to come back to work.

4 Q. Did anybody --

5 A. He was asked to report the accident to Security,
6 which in turn would generate an accident investigation.
7 He was asked to report back to the plant to -- to
8 report to Security to let them know of his issue and
9 that would have initiated the accident report and
10 investigation going on.

11 Q. -- and I'm sorry, sir, you didn't testify to that
12 and I don't see any record of that in --

13 Commissioner Wilkerson: Yes, he did.

14 Q. -- the progress notes for a particular case,
15 Michelin records.

16 Commissioner Wilkerson: He did testify
17 to it. He said there was a three (3) prong
18 system that if nobody is there on the
19 weekends that their -- all their Security is
20 trained as EMT's, EMS's, and that's the last
21 resort of reporting anything and whomever
22 that is would take him to the proper place he
23 needed to go to; so, he did testify to it.

24 Mr. Samuels: He testified that that was
25 the procedure that, essentially, should have

1 happened.

2 Commissioner Wilkerson: But it didn't.

3 Mr. Samuels: It didn't.

4 Commissioner Wilkerson: Okay.

5 Mr. Samuels: But now that he has
6 reported -- now that Mr. Brailey has reported
7 to Mr. Lowman --

8 Q. -- did anybody do an investigation?

9 Commissioner Wilkerson: That's --
10 that's a fair question.

11 A. No, because he didn't report back to work.

12 Q. Even though he was sent to Dr. Izard?

13 A. He did not --

14 Q. You still didn't do -- you still didn't do an
15 investigation or create any kind of accident report?

16 A. -- no.

17 Q. If I understood your testimony, Mr. Brailey
18 telling you -- he was calling you from the emergency
19 room?

20 A. I believe that's correct.

21 Q. Were you aware he had left the emergency room by
22 11:02?

23 A. No.

24 Q. Did you have any involvement with any of his work
25 restrictions or getting him back to work or anything

1 like that?

2 A. He never returned to work, so --

3 Q. All right. Were you involved with his termination
4 at all?

5 A. -- no.

6 Q. Okay. This probationary period people have --

7 A. Uh-huh.

8 Q. -- is it ninety (90) days?

9 A. A hundred and eighty (180).

10 Q. A hundred and eighty (180)?

11 A. (Nodded head in an up-and-down motion).

12 Q. All right. So, at the time that Mr. Brailey had
13 his work accident on June 24th, he was still well
14 within the probationary period?

15 A. Yes.

16 Q. And the probationary period Michelin, basically,
17 reserves the right to terminate for any reason?

18 A. Yes.

19 Mr. Samuels: No further questions.

20 REDIRECT EXAMINATION

21 By Mr. Beard:

22 Q. If Mr. Brailey would have ever returned to the
23 plant as instructed, what would have occurred?

24 A. We would have completed an accident investigation.

25 Q. Okay. How would you have done that, by

1 interviewing him?

2 A. Yes.

3 Q. Okay. And did he ever give any explanation for
4 why he wasn't returning to work --

5 A. No. He didn't --

6 Q. -- or did you ever even hear from him again?

7 A. -- he didn't return my phone calls.

8 Q. Okay. Now, I asked you if he notified you about
9 his problems on June the 11th and June the 13th and you
10 indicated no; is that correct?

11 A. Correct.

12 Q. On June the 11th we have a report --

13 Mr. Beard: -- Commissioner, it's page
14 13 of the Claimant's APA's.

15 Q. He was there seeing the Lexington Medical Center
16 Hospital ER folks and this was his complaint: Back
17 pain after lifting at work. Does that sound like an
18 accident to you?

19 A. Back pain after lifting at work?

20 Q. Yes.

21 A. It could be.

22 Q. Okay. Would you want your employee who was severe
23 enough in back pain to go to the hospital claiming it
24 was lifting at work; would you want them to tell you
25 that?

1 A. I would want them to tell me that.

2 Q. Okay. And he didn't tell you that, did he?

3 A. No, sir.

4 Q. All right. And had he told you that, what kind of
5 precautions or actions would you have taken?

6 A. Had he have told me that we would have gotten him
7 in contact with medical to have him -- to have him
8 evaluated and provide the proper treatment.

9 Q. Okay. You could have determined whether he is
10 physically capable of doing the job?

11 A. Yes.

12 Q. All right. The report says, the patient was doing
13 some heavy lifting at work prior to the onset of his
14 pain. He didn't tell you that, did he?

15 A. No.

16 Q. To your knowledge did he ever tell anyone in
17 management that or anyone in that chain, the spoke,
18 you, any of those folks?

19 A. Not that I'm aware of.

20 Q. Okay.

21 ~~Mr. Beard: Commissioner, page 7 of~~

22 Claimant's APA's, June -- this is June the
23 13th of 2017.

24 Q. I think I understood you testified that Mr.
25 Brailey did not tell you he went to his personal doctor

1 on June 13th with low back pain; is that right?

2 A. Correct.

3 Q. It says, has had a new job at Michelin moving
4 heavy stuff, there now for about the past two (2)
5 weeks, having left lower back pain for the past two (2)
6 weeks, and I'm quoting the report, "Pain is ten (10)
7 out of ten (10)". Now, if you've got an employee with
8 pain that is ten (10) out of ten (10) that they are
9 saying has been going on for multiple weeks after
10 starting to lift heavy stuff, would you want to know
11 that?

12 A. Yes, I would.

13 Q. Does that make you question whether that person
14 would be physically capable of performing your job?

15 A. Yes.

16 Q. Okay. And had Mr. Brailey told you that, you
17 could have properly investigated it, correct?

18 A. Correct.

19 Q. It's hard to do that years after or a year after
20 the fact, isn't it?

21 A. Yes, it is.

22 Q. Okay. Are you aware that Mr. Brailey previously
23 worked at a company called Richtex Bricks in 1997?

24 Mr. Samuels: Your Honor, objection,
25 beyond the scope of cross.

1 Mr. Beard: I'll withdraw.

2 Commissioner Wilkerson: It is.

3 Mr. Beard: No further questions.

4 Commissioner Wilkerson: Thank you.

5 RECROSS-EXAMINATION

6 By Mr. Samuels:

7 Q. All right. So, Mr. Lowman, your testimony is that
8 if Mr. Brailey had told you he'd gone to the emergency
9 room on June 11th or actually Urgent Care on June 11th
10 and his family doctor on June 13th, you would have
11 filled out a report and investigated?

12 A. I would have had him report to Medical first
13 because everything that is work-related should go
14 through Medical first and not through your personal
15 physician; when you go through your personal physician
16 it's more personally related. Everybody is trained to
17 go through Medical to report it in the proper way.

18 Q. I've got that.

19 A. Okay.

20 Q. That's not really my question. My question is,
21 isn't it true that Mr. Brailey reported an accident on
22 June 24th and neither you nor anybody else at Michelin
23 did an investigation?

24 A. That is correct because Mr. Brailey did not return
25 back to work into the production environment, into the

1 plant.

2 Q. And isn't it also true that no one did the
3 Michelin Accident Report from that June 24th accident?

4 A. That is true.

5 Q. And I know you want to put this on Mr. Brailey but
6 he is a new employee, you're the Manager; don't you
7 guys have a responsibility to fill out reports?

8 A. We do.

9 Q. And you didn't do that in this case, did you?

10 A. We didn't because I couldn't --

11 Q. Even --

12 A. -- I could not determine if it was work-related.
13 I talked to Mr. Brailey, he was at his personal doctor;
14 I asked him to come back to Medical to report it to
15 Security, he failed to do that. So, at that point, in
16 my judgment, it's personal and it's not work-related.

17 Q. -- so, you don't fill out a report?

18 A. Correct.

19 Q. Even though he told you it was work-related?

20 A. He failed to come in to -- to even sit down and
21 talk about it. So, I could not call him back; I tried
22 calling him back and he didn't return my phone calls.

23 Q. Well, didn't he go to Michelin's company doctor?

24 A. He did but I don't -- I don't work with Michelin's
25 company doctor; I don't work with him, I'm not in an

1 office with him. The Michelin company doctor is over
2 here (indicating); I'm over here in this facility
3 (indicating).

4 Q. Wouldn't somebody have met him when he was at the
5 Michelin company doctor?

6 A. Security, EP, would have sent him up to the
7 doctor. So, you come into a different gate at the US 5
8 facility, I'm at US 7, and Security lets you into the
9 gate and you go up this -- up this walkway to the
10 doctor. So, I didn't know he was coming and it was
11 being handled through Medical; that's all I can say.

12 Q. Medical, is there a Nurse?

13 A. Yes.

14 Q. That's Christy -- I don't know how to pronounce
15 her name?

16 A. Christy Sirois or Janet Ruoff.

17 Q. Christy Sirois or Janet Ruoff?

18 A. Uh-huh.

19 Court Reporter: Could we get a spelling
20 on Janet's name -- last name, please?

21 Mr. Samuels: R-U-O --

22 Commissioner Wilkerson: I misunderstood
23 you, Mr. Beard --

24 Mr. Samuels: -- okay.

25 Commissioner Wilkerson: -- I thought

1 you said forty-five (45) minutes for four
2 (4), you meant forty-five (45) per the four
3 (4). I'm sorry I misunderstood you; so,
4 we're three (3) more hours. Okay. My fault.

5 Court Reporter: I never did get the
6 spelling for Janet's last name.

7 Mr. Beard: R-U-O-F-F, Ruoff.

8 Court Reporter: Thank you.

9 Q. So, if we have a letter from a lady named Sharon
10 West and she says we have investigated this claim,
11 talking about Mr. Brailey's claim; that's not a true
12 statement, is it?

13 Mr. Beard: Commissioner --

14 A. Who is Sharon West?

15 Mr. Beard: -- Commissioner, with all
16 due respect, he has already said he's not
17 part of the Workers' Comp process, Sharon --

18 Commissioner Wilkerson: I don't think
19 he knows.

20 Mr. Beard: -- I will stipulate Sharon
21 West is the Adjustor --

22 Commissioner Wilkerson: Yes.

23 Mr. Beard: -- for Workers' Comp and
24 this gentleman couldn't possibly answer this
25 question.

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1 Commissioner Wilkerson: I mean, I don't
2 know.

3 Mr. Beard: And Stephen knows --

4 Commissioner Wilkerson: He doesn't know
5 anything --

6 Mr. Beard: -- he can't answer the
7 question.

8 Commissioner Wilkerson: -- about
9 workers' Comp. This is a procedure guy; the
10 gist of his discussion is, your guy never
11 followed the procedure. Since he never
12 followed the procedure, he doesn't do any
13 investigations; is that fair?

14 Witness: That's fair.

15 Commissioner Wilkerson: Okay. That's
16 what I thought I'd heard for --

17 Witness: We have procedures to do but I
18 --

19 Commissioner Wilkerson: -- thirty-two
20 (32) minutes.

21 -- Witness: -- I need to follow the
22 procedure. If you don't --

23 Commissioner Wilkerson: He didn't
24 follow the procedure.

25 Witness: -- I don't know this -- Sharon

1 West, I've never met her in my thirty-six
2 (36) years with Michelin.

3 Mr. Samuels: Fair enough. Thank you,
4 Mr. Lowman. No further questions.

5 Mr. Beard: One question, Mr. Lowman.

6 FURTHER REDIRECT EXAMINATION

7 By Mr. Beard:

8 Q. Healthworks, where Dr. Izard is located, that's
9 downtown Columbia; that's not out at the plant,
10 correct, or do you even know?

11 A. I have no idea where HealthWorks is.

12 Q. Okay. Thank you.

13 Mr. Beard: That's all I have.

14 A. I've never been there.

15 Mr. Beard: That's all I have. Thank
16 you, sir.

17 Commissioner Wilkerson: Okay. Because
18 I thought it was at Michelin. I learned
19 something too. Thank you. Do we need to
20 keep this gentleman for anything or can he be
21 dismissed to go?

22 Mr. Samuels: He can be dismissed, Your
23 Honor --

24 Commissioner Wilkerson: Okay.

25 Mr. Beard: Fine --

1 Mr. Samuels: -- as far as I'm
2 concerned.

3 Mr. Beard: -- fine by me to go.

4 Commissioner Wilkerson: Okay.

5 Mr. Beard: Yes, sir.

6 Commissioner Wilkerson: Sir, you --
7 you're dismissed. Thanks.

8 Mr. Lowman: All right. Thank you.

9 Commissioner Wilkerson: Who is next?

10 Mr. Beard: Nurse Sirois.

11 (Off The Record)

12 Commissioner Wilkerson: Ma'am, raise
13 your right hand; we're going to swear you in
14 and take some testimony.

15 whereupon;

16 Christy Sirois, being duly sworn and cautioned to speak
17 the truth, the whole truth and nothing but the truth,
18 testified as follows:

19 Court Reporter: Please state your full
20 name for the record.

21 Witness: Christy Sirois.

22 Court Reporter: Yes, we've had a lot of
23 people --

24 Commissioner Wilkerson: Spell it, just
25 for the record --

1 Court Reporter: -- spell the last name,
2 please.

3 Commissioner Wilkerson: -- we've got it
4 but --

5 Witness: S, as in Sam, I-R-O-I-S, as in
6 Sam.

7 Court Reporter: Thank you.

8 Witness: You're welcome.

9 Court Reporter: All right. I'm done
10 with her; you can have her.

11 Mr. Beard: Thank you, ma'am.

12 DIRECT EXAMINATION

13 By Mr. Beard:

14 Q. Do you care if I call you Christy?

15 A. That's fine.

16 Q. Okay.

17 A. Yes, sir.

18 Q. Christy, where are you employed?

19 A. I'm employed with Palmetto Health, Healthworks.

20 Q. Okay. And as part of your employment, where are
21 you actually -- where is the physical location that you
22 work?

23 A. It is at Michelin in Lexington.

24 Q. Okay. And are you in US 5 or US 7?

25 A. I'm at US 7.

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- 1 Q. All right. And you serve as the Plant Nurse?
- 2 A. Yes.
- 3 Q. Okay. What are your days of work --
- 4 A. I --
- 5 Q. -- and hours?
- 6 A. -- I work Monday through Friday --
- 7 Q. Okay.
- 8 A. -- but I take calls twenty-four/seven (24/7).
- 9 Q. All right. And you have been the Plant Nurse at
- 10 the US 7 plant for how long?
- 11 A. For US 7 I've been there a little over four (4)
- 12 years but I started at 5 --
- 13 Q. Okay.
- 14 A. -- a year prior to that.
- 15 Q. All right. And you were the Plant Nurse
- 16 throughout the year 2017?
- 17 A. Yes.
- 18 Q. That would have included all of June of 2017?
- 19 A. Yes.
- 20 Q. All of May of 2017?
- 21 A. Yes.
- 22 Q. Okay. Do you know Mr. Brailey?
- 23 A. Not personally. I -- I saw him when he came into
- 24 HealthWorks to see Dr. Izard. I may have done his new
- 25 hire drug screen and set him up for an appointment but

1 I cannot remember.

2 Q. All right. When you say when he came into his
3 appointment with Dr. Izard at HealthWorks, are you
4 talking about the downtown office of HealthWorks?

5 A. Yes.

6 Q. Okay.

7 A. The 1333 Taylor Street location.

8 Q. All right. So, that wouldn't have been out at the
9 plant?

10 A. That was out of the plant. That was the Monday
11 after the weekend of the incident.

12 Q. No. What I'm saying is -- so, you all came
13 downtown for the visit --

14 A. Yeah. I brought the chart --

15 Q. -- the visit that to doctor --

16 A. -- I brought the chart to Dr. Izard when he saw
17 him, so.

18 Q. -- okay. Downtown?

19 A. Downtown.

20 Q. All right. So, tell me, chronologically, what you
21 recall from June the 24th of 2017.

22 A. What I recall is, on a Saturday I received a call
23 from the Shop Manager asking me if I knew anything
24 about Mr. Brailey and an injury or anything and I did
25 not.

1 Q. Okay. And the Shop Manager would be who?

2 A. That would have been Tyrone Gilmore.

3 Q. Okay. All right. And then -- so, what happened
4 after that?

5 A. I told him I did not know. He asked me could I
6 try to follow up with that and he sent me Mr. Brailey's
7 number.

8 Q. Okay.

9 A. So, that was on a Saturday.

10 Q. All right.

11 A. I called Mr. Brailey and asked him, you know, what
12 happened and what was going on.

13 Q. Okay. There is a document that's been submitted
14 into evidence by Mr. Brailey and his attorney dated
15 June 24th, 2017.

16 Mr. Beard: Commissioner, this would be
17 page --

18 Commissioner Wilkerson: 88.

19 Mr. Beard: -- 88 of the Claimant's
20 APA's.

21 Commissioner Wilkerson: Yes.

22 Witness: Let me get my glasses.

23 Mr. Beard: Do you need those too?

24 Witness: Yeah, I'll need them.

25 Q. Let me ask if that's an entry you made on June

1 24th, 2017?

2 A. Okay. Okay.

3 Q. Did you make that entry?

4 A. I did.

5 Q. Okay. And so -- so, when did you ultimately
6 actually talk to Mr. -- this may help you -- did you
7 actually talk to Mr. Brailey?

8 A. I cannot remember -- I -- I cannot give you the
9 exact time; I just remember it was on a Saturday and it
10 was probably the afternoon. I actually had called and
11 called and called --

12 Q. Okay.

13 A. -- and I couldn't get in touch with him. And I
14 called Tyrone back and let him know I was not able to
15 get in touch with him and reach him. And I think
16 Tyrone finally got in touch with him or sent him a text
17 and let him know that I would be calling. And then, I
18 finally talked to him; so, it was probably later in the
19 afternoon on that Saturday.

20 Q. Okay. It says here, I called the employee on 6/24
21 around 3:57 P.M. --

22 A. Uh-huh.

23 Q. -- and what did Mr. Brailey tell you?

24 A. He had told me that -- well, looking at the note
25 -- that his back had started to ache when he was on the

1 PAP and he went to the Lexington ER -- he had actually
2 went to the Michelin Family Health Center, which was
3 the non-ops center but they were closed. And I
4 explained to him that, you know, you could have come to
5 US 7 Medical or Security; that would have been the
6 protocol. And I asked him if he had -- I think I
7 remember -- I can't say for sure if he had reported it
8 to anybody.

9 Q. Okay.

10 A. I don't remember.

11 Q. All right.

12 A. But -- and then, he had just told me -- I asked
13 him did he have anything radiating, any numbness, you
14 know, when it happened, how did it happen and then I
15 think afterwards he had -- he had stated they had
16 diagnosed him with a lumbar strain and he told me the
17 medication that he was given.

18 Q. Okay. Did he tell you how it happened?

19 A. Not specifics, no.

20 Q. Okay.

21 A. I -- he was very vague on how it happened, so.

22 Q. It says here in the report, employee denied
23 anything specific that started the pain at work and he
24 denies anything personal outside of work --

25 A. Right.

1 Q. -- is that what he told you?

2 A. Right.

3 Q. Okay.

4 A. That he didn't really know. That he denied any
5 specific incident; he just started having the back
6 pain.

7 Q. All right. Prior to June the 24th of 2017, had
8 you ever heard of or had any communications at all
9 about Mr. Brailey?

10 A. No.

11 Q. Were you aware that Mr. Brailey had been treating
12 with both the hospital and Lexington Medical Center and
13 his personal doctor before this June 24th, '17 incident
14 about his back?

15 A. No.

16 Q. Okay. If someone goes to the doctor or the
17 hospital or anywhere and claims to be having back pain
18 to the point that it's ten (10) out of ten (10) back
19 pain and they are relating it to the job that they do
20 out at Michelin, is that something that should have
21 been reported to you or the Bull or the Safety Spoke or
22 the Manager or someone?

23 A. Yes.

24 Q. Okay. To your knowledge had that ever happened
25 before June the 24th?

1 A. To my knowledge, no.

2 Q. Okay. As a Nurse, in your opinion, is it safe for
3 someone who is claiming to be in ten (10) out of ten
4 (10) pain to continue to do the very thing that they
5 are claiming to cause them ten (10) out of ten (10)
6 pain?

7 A. No.

8 Q. Okay. Do you do some of the physicals and do
9 these medical questionnaires that the -- that the new
10 employees fill out?

11 A. No, I do not.

12 Q. Okay. If Mr. Brailey had contacted you prior to
13 June the 24th of '17, and told you that he was in ten
14 (10) out of ten (10) pain that he thought was related
15 to doing the lifting that he was doing out on the US 7
16 PAP Operator job, what would you have done?

17 A. I would have brought him in for an assessment and
18 then I would have referred him to Dr. Izard for further
19 evaluation.

20 Q. Okay. And when he did finally contact you on June
21 the 24th, is that what you did?

22 A. I did. I set him up for Monday, which was the
23 first business day that he could see Dr. Izard downtown
24 at Healthworks.

25 Q. All right. And you accompanied him to that visit;

1 is that --

2 A. I met him there at that visit, yes.

3 Q. -- okay. And did you -- were you notified of the
4 results of the visit?

5 A. Yes.

6 Q. Okay. Did Mr. -- was Mr. Brailey supposed to
7 return to see Dr. Izard after that?

8 A. He was, on Wednesday.

9 Q. So, two (2) days later on the 28th?

10 A. Yes.

11 Q. Okay. Did he do that?

12 A. No.

13 Q. Do you know why he didn't do that?

14 A. I called him, because Dr. Izard had came to the
15 plant, and he stated that he did not have a way.

16 Q. He, being Mr. Brailey, said that?

17 A. Mr. Brailey, yes.

18 Q. Okay. Were -- was Mr. Brailey notified that
19 Michelin would come and get him and make sure he got
20 there or that --

21 A. Yes.

22 Q. -- transportation would be provided?

23 A. Yes.

24 Q. And did he show up?

25 A. No.

1 Q. Okay. And this was on a day when Dr. Izard was
2 actually coming out to the plant on Wednesdays?

3 A. Yes.

4 Q. Is that the only day he comes to the plant?

5 A. Yes.

6 Q. Okay.

7 Mr. Beard: Commissioner, that's all I
8 have.

9 Commissioner Wilkerson: Okay. Please,
10 answer any questions that Mr. Samuels may
11 have.

12 Witness: Okay.

13 Commissioner Wilkerson: Thank you.

14 CROSS-EXAMINATION

15 By Mr. Samuels:

16 Q. Ms. Sirois, you received this phone call from
17 Tyrone Gilmore --

18 A. Yes, sir.

19 Q. -- that Mr. Brailey had been to the emergency room
20 and had reported a work accident, correct?

21 A. Yes.

22 Q. And you got that call about 9:30 in the morning?

23 A. I would estimate, yes, around that time.

24 Q. Okay. And -- and we know that because this record
25 that you created here at page 88, that was at 9:30,

1 right?

2 A. That is when I wrote -- put it in the next
3 business day that I come into work because I'm not at
4 work on Saturday.

5 Q. All right. Even though it's dated June 24th,
6 2017?

7 A. I put the date -- when I go in OHM I put the date
8 in there of when I actually had the conversation.

9 Q. Okay. So, you're thinking the conversation you
10 had was about 9:30?

11 A. And then I write in the time --

12 Q. Okay.

13 A. -- of what I remember from the conversation. I
14 may or may not have wrote a time on that one --

15 Q. Okay.

16 A. -- I would have to review it, look at it and see.

17 Q. And you understood that Mr. Brailey had called
18 Tyrone from the emergency room?

19 A. I do not recall that he called him from the
20 emergency room, no.

21 Q. Okay. And what he did report was a work-related
22 accident; is that correct?

23 A. I do not know.

24 Q. Well, he reported -- well, your notes -- left back
25 pain that started on 6/24/17, while stretching and

- 1 pulling rubber?
- 2 A. Yes.
- 3 Q. That would be something he would be doing at
- 4 Michelin, right?
- 5 A. Well, if that's -- yes.
- 6 Q. And that's what he told you as to when his back --
- 7 A. On that Saturday?
- 8 Q. -- yes, ma'am.
- 9 A. He was very vague that day when I was asking the
- 10 questions how it started and I will not -- I will let
- 11 them explain what happened. To start with he said
- 12 nothing specific and I said, well, is there's something
- 13 that happened out of work and he said, no. He was
- 14 very, kind of, backwards-and-forth. And then, I said,
- 15 you need to tell me where it happened because I can't
- 16 tell you where it happened. So, I said -- he said it
- 17 happened at work. And I said, well, then, how did it
- 18 happen at work. And then, that's what he told me.
- 19 Q. Stretching and pulling rubber?
- 20 A. That's what he told me, yes.
- 21 Q. And that's what you wrote down?
- 22 A. Yes. That was on Saturday.
- 23 Q. Did you do any investigation of his accident?
- 24 A. No.
- 25 Q. Who would normally --

- 1 A. I do not --
- 2 Q. -- do that?
- 3 A. -- that would be safety.
- 4 Q. Okay. Did you speak to safety about what had
- 5 happened with Mr. Brailey?
- 6 A. I updated them.
- 7 Q. And do you know whether they did any kind of
- 8 investigation?
- 9 A. They usually always do an investigation on that.
- 10 Q. Do they create a written report of an
- 11 investigation?
- 12 A. They should but I did not see that.
- 13 Q. Okay. You ultimately prepared a Form 12-A; is
- 14 that right?
- 15 A. Pardon me?
- 16 Q. You ultimately prepared a Form 12-A, a First
- 17 Report of Injury?
- 18 A. (Shook head in a side-to-side motion).
- 19 Q. You did not?
- 20 A. First -- is it the First Report of Occupational?
- 21 Q. Yes. I'll -- I'll show it to you.
- 22 A. The FROI?
- 23 Commissioner Wilkerson: Probably not.
- 24 Q. This form right here on page 87.
- 25 A. Yes.

- 1 Q. This?
- 2 A. Yes.
- 3 Q. Okay.
- 4 A. Yes, that one I created.
- 5 Q. On June 27, 2017?
- 6 A. Yes.
- 7 Q. And you wrote, employee stated that he was
- 8 stretching rubber and his lower back started to ache;
- 9 he kept working and the pain got worse. He did not
- 10 notify you?
- 11 A. Yes.
- 12 Q. I assume by not notifying anyone you're saying
- 13 that the first notification came when he was already at
- 14 the emergency room?
- 15 A. I do not know that. My notification came on
- 16 Saturday after he had been in the emergency room.
- 17 Q. Right. June 24th, 2017?
- 18 A. Uh-huh.
- 19 Q. If an employee had back pain coming from work,
- 20 went to a doctor, you would want to know that they were
- 21 under no work restrictions; isn't that true?
- 22 A. I would want to know, yeah, if they had
- 23 restrictions --
- 24 Q. Okay.
- 25 A. -- or no restrictions.

1 Q. All right. And if Mr. Brailey went to Lexington
2 Medical Center Urgent Care on June 11th, 2017, and his
3 family doctor on June 13th, 2017, and was not given
4 work restrictions, you would be comfortable relying on
5 those doctors to let him work --

6 A. No.

7 Q. -- would you not? No? You wanted him to go to
8 Dr. Izard?

9 A. Yes.

10 Q. Because Dr. Izard is the company doctor?

11 A. He is.

12 Q. And Dr. Izard -- so, you -- you took Mr. Brailey
13 to Dr. Izard --

14 A. I did not --

15 Q. -- or met him there?

16 A. -- take him; I told him that he would need to see
17 Dr. Izard and gave him the address and I went there
18 with the chart because it was first thing when they
19 opened and I did not have time to fax or mail; I went
20 straight from my home to Healthworks that morning.

21 Q. And you say the chart, what's the chart?

22 A. It would be my notes or his new hire charts, a
23 file --

24 Q. Okay.

25 A. -- and his new hire records and stuff that he

- 1 filled out would be in there.
- 2 Q. Okay. That would have included the -- being
- 3 cleared for full duty work after the physical exam?
- 4 A. No, because I did not have that.
- 5 Q. Okay. That's not part of the chart?
- 6 A. No. I didn't have -- I didn't know any of that
- 7 information. Oh, you mean the new hire?
- 8 Q. When he was hired.
- 9 A. The new hire? Yes. That would have been part of
- 10 the chart, yes.
- 11 Q. Okay. So, this document -- I will show this to
- 12 you. I'm going to show you a document received from
- 13 Michelin that is in response to a subpoena; do you --
- 14 are you familiar with this document?
- 15 A. Yes, I am.
- 16 Q. What is it?
- 17 A. This is whenever they are a new hire and they go
- 18 to Healthworks and get examined by a physician; this is
- 19 how I know that they are clear to work at Michelin.
- 20 Q. Okay. Do you recognize the signature?
- 21 A. That looks like possibly Dr. Tomarchio.
- 22 Q. Dr. Tomarchio?
- 23 A. Uh-huh.
- 24 Q. He's one of the doctors at Healthworks?
- 25 A. Yes.

- 1 Q. Okay. Is he a good doctor?
- 2 A. He is.
- 3 Q. He does a very thorough physical exam?
- 4 A. I'm not there at Healthworks but I would assume
- 5 so, yes.
- 6 Q. And when Mr. Brailey -- didn't you -- were you in
- 7 with Mr. Brailey when Dr. Izard examined him?
- 8 A. No, I was not.
- 9 Q. Do you know what Dr. Izard's diagnosis was?
- 10 A. Lumbar strain.
- 11 Q. Okay. Did you know he also seemed to think that
- 12 Mr. Brailey had a urinary tract infection?
- 13 A. Yes, based on the symptoms that he listed on his
- 14 injury report he had to fill out when he was there.
- 15 Q. He did not prescribe anything for the urinary
- 16 tract infection though, did he?
- 17 A. No. He referred him to see his doctor based on
- 18 the symptoms he was having --
- 19 Q. Okay.
- 20 A. -- to see if there was anything else going on.
- 21 Q. Did he order an MRI?
- 22 A. No.
- 23 Q. Are you aware that Mr. Brailey ultimately had an
- 24 MRI?
- 25 A. I do not remember. If I -- if he had had an MRI

1 it would have been after the incident and then I
2 received those results.

3 Q. Were you aware that he had an MRI that showed a
4 herniated disk at L4,5?

5 A. No.

6 Q. Were you aware that he has a Neurosurgeon who has
7 taken him out of work and is recommending he have
8 surgery?

9 A. When did that occur?

10 Q. That occurred -- I'm not going to look through and
11 give you the --

12 A. Was that after --

13 Q. -- exact date --

14 A. -- was that after --

15 Q. -- but I will tell you it was after --

16 A. -- if it was after --

17 Q. -- yes.

18 A. -- then I have it followed --

19 Q. Yes.

20 A. -- with the case --

21 Q. Yes.

22 A. -- so.

23 Q. Yes, it was after.

24 A. Yes.

25 Q. It was --

1 Commissioner Wilkerson: In September or
2 thereabout --

3 Mr. Samuels: -- okay.

4 Commissioner Wilkerson: -- I think.
5 That's when he saw the Neurosurgeon, I think.
6 He saw some other doctor in that. He didn't
7 see Dr. Boyd until, what, August or
8 September?

9 Mr. Samuels: I believe it was August.
10 He saw the PA July 24th.

11 Commissioner Wilkerson: In August of
12 '17, okay.

13 Q. As a Nurse, if somebody has a work accident, has a
14 herniated disk at L4,5 and should have surgery,
15 wouldn't you agree that person should be treated and
16 kept out of work?

17 A. That depends at -- yeah, they would need to be
18 restricted. I don't always necessarily agree with a
19 herniated disk as having surgery, you know, that's
20 based on the doctors and the doctor's opinion. It --
21 it all depends on the symptoms and, like I say, I have
22 not reviewed his chart and looked at anything; so, I
23 can't give you a solid answer on that one.

24 Q. Let's put it this way, wouldn't you agree that a
25 doctor who had an MRI and was a Neurosurgeon was better

1 placed to accurately diagnose Mr. Brailey's condition
2 as opposed to a doctor who did not order an MRI and do
3 that kind of diagnostic testing?

4 Mr. Beard: Commissioner, I -- I would
5 object to that. Other than to say, if that's
6 true, I want you to listen to what he just
7 said --

8 Commissioner Wilkerson: I got it.

9 Mr. Beard: -- then every IME he ever
10 gives you needs to be thrown in the trash
11 can.

12 Commissioner Wilkerson: I agree.
13 That's why I say --

14 Mr. Beard: I --

15 Commissioner Wilkerson: -- you've got
16 to be careful --

17 Mr. Beard: -- I object --

18 Commissioner Wilkerson: -- what you say
19 in one case --

20 Mr. Beard: -- yes.

21 Commissioner Wilkerson: -- it carries
22 over to the next case.

23 Mr. Beard: I object to the question,
24 though, as he -- he's improperly --

25 Commissioner Wilkerson: You may want

1 her to answer it.

2 Mr. Beard: -- well, he's -- it's --
3 it's an improper question. There's no way
4 she can -- every single surgeon says
5 something different; they don't all agree on
6 everything.

7 Commissioner Wilkerson: I understand.
8 Do you want her to answer that or not.

9 A. No.

10 Mr. Samuels: If she's able. If she's
11 not able to answer it, that's fine --

12 Commissioner Wilkerson: Okay.

13 Mr. Samuels: -- I'll move on to
14 something else.

15 A. No.

16 Commissioner Wilkerson: Okay. So, we
17 should throw all IME's out, right, both
18 sides; is that right?

19 Mr. Samuels: That's not what I said,
20 Your Honor. What I -- what I said was --

21 Commissioner Wilkerson: That wasn't the
22 question.

23 Mr. Samuels: -- that --

24 Commissioner Wilkerson: I just asked.

25 Mr. Samuels: -- that --

1 Commissioner Wilkerson: And notice I
2 said both sides because we get them both
3 ways.

4 Mr. Samuels: -- what I'm saying and I
5 understand his argument, what I'm saying is
6 that Dr. Izard, who disagreed with --

7 Commissioner Wilkerson: A Neurosurgeon.

8 Mr. Samuels: -- a Neurosurgeon,
9 Doctor's Care and the --

10 Commissioner Wilkerson: But --

11 Mr. Samuels: -- and the emergency room,
12 is not as well placed as Dr. Boyd is, in
13 particular, because Dr. Boyd had the MRI.

14 Commissioner Wilkerson: -- when was the
15 MRI done?

16 Mr. Samuels: I'm going to say August
17 but I would have to look for sure.

18 Commissioner Wilkerson: So, none of
19 those other doctors had that?

20 Mr. Beard: Nor did Dr. Izard.

21 Commissioner Wilkerson: Yes, that's
22 what I'm saying. No -- no doctor had that,
23 so --

24 Mr. Samuels: The MRI was done July
25 29th, 2017.

1 Commissioner Wilkerson: -- and we don't
2 -- we don't know what happened between June
3 11th, 13th, 24th -- we don't have a clue what
4 happened.

5 Mr. Samuels: Well, we do know what
6 happened on June -- July -- on June 24th,
7 Your Honor, and we have --

8 Commissioner Wilkerson: Well, we had a
9 lot of coughing and hacking and all kind of
10 crazy things --

11 Mr. Beard: And no radiating --

12 Commissioner Wilkerson: -- we don't
13 know what caused it.

14 Mr. Beard: -- and no radiating pain on
15 June the 24th.

16 Commissioner Wilkerson: I don't know.
17 I just wanted to make sure I didn't miss it.

18 Mr. Samuels: And we had radiating pain
19 and numbness at Dr. Izard on June 26th, 2017,
20 which he ignored --

21 Commissioner Wilkerson: I understand.

22 Mr. Samuels: -- and did not properly
23 treat.

24 Commissioner Wilkerson: I understand.

25 Mr. Samuels: Ms. Sirois, that's all the

1 questions I have. Thank you.

2 Witness: Thank you.

3 Mr. Beard: Just a couple, Commissioner.

4 REDIRECT EXAMINATION

5 By Mr. Beard:

6 Q. Mr. Samuels showed you a physical exam note from
7 doctor -- how do you say his name?

8 A. Dr. Izard.

9 Commissioner Wilkerson: No, the other
10 one.

11 Q. No. Dr. Tar --

12 A. Oh, Tomarchio.

13 Q. -- Tomarchio --

14 A. Tomarchio.

15 Q. -- that indicated that he was apparently -- he had
16 passed the physical and was fit to come work in the
17 plant, correct?

18 A. Correct.

19 Q. All right. You're a Plant Nurse, if somebody
20 wants a job bad enough at Michelin -- Michelin pays a
21 lot of money, don't they --

22 A. Uh-huh.

23 Q. You need to answer.

24 A. Yes.

25 Q. Okay.

1 A. I'm sorry.

2 Q. If somebody wants a job bad enough, can they fake
3 symptoms --

4 Mr. Samuels: Objection, calls for
5 speculation.

6 Q. -- can they fake --

7 A. Yes, sir.

8 Commissioner Wilkerson: Well, anybody
9 can fake --

10 Mr. Beard: He -- he started the process
11 by saying that, you as a Nurse --

12 Commissioner Wilkerson: -- no.

13 Mr. Beard: -- Dr. Tomarchio --

14 Commissioner Wilkerson: Yes.

15 Mr. Beard: -- is a great doctor.

16 Commissioner Wilkerson: Yes. I think
17 he gets to follow back up on that doctor's --

18 Mr. Beard: Sure.

19 Commissioner Wilkerson: -- issue.

20 Q. My -- my point is this, if somebody wants a job
21 bad enough, even when they're not physically capable or
22 if they -- they're not physically -- they are medically
23 not properly able to do that, can they pass that
24 physical?

25 A. If they do not tell the truth, yes.

1 Q. Okay. Now, are you aware that Mr. --

2 Mr. Samuels: Objection, Your Honor, she
3 has no way of knowing -- she has already
4 testified she doesn't know what the physical
5 is --

6 Commissioner Wilkerson: She doesn't
7 have any idea --

8 Mr. Samuels: -- or the problem.

9 Commissioner Wilkerson: -- if he told
10 the truth or not, though, does she?

11 Mr. Samuels: She said --

12 Commissioner Wilkerson: She said if
13 they're not -- she just said if they're not
14 telling the truth they can pass it. She
15 wasn't in here.

16 Mr. Samuels: -- she has no way of
17 knowing that.

18 Commissioner Wilkerson: She doesn't
19 know if he told the truth or --

20 Mr. Beard: No way of knowing what?

21 Commissioner Wilkerson: -- if he did
22 tell the truth. She didn't say he didn't
23 tell the truth. He just -- she said, if
24 somebody does not tell the truth that they
25 can get through that initial evaluation.

1 Mr. Samuels: And I would object that
2 she would have no way of knowing that because
3 she is not in the initial evaluation.

4 Commissioner Wilkerson: You're not
5 listening. You're not listening. If
6 somebody doesn't tell the doctor the truth,
7 there is no way for that doctor to properly
8 evaluate somebody. It doesn't matter if it's
9 your clients or Grady's client; if somebody
10 is lying -- I'm trying to be nice, a
11 bald-faced liar, never tells the truth --
12 she's saying that the doctor has no way to do
13 that and they can get through the physical if
14 they do all those things; is that not what
15 you testified to?

16 Witness: Yes.

17 Commissioner Wilkerson: Okay.

18 Witness: Yes.

19 Commissioner Wilkerson: If --

20 Mr. Samuels: Fair enough, Your Honor.

21 Commissioner Wilkerson: -- she's not
22 saying your client did that; I don't think.
23 She would have no way to know that; she's
24 been sitting outside for seven (7) hours, I
25 think, maybe eight (8) now.

1 Q. If someone who is giving that physical and asking
2 those -- answering the questions on that questionnaire
3 that Dr. Tomarchio is reviewing and making an
4 assessment base upon, can they withhold information
5 and, in fact, they lie about information from the past,
6 is it really possible for Dr. Tomarchio to do a proper
7 evaluation?

8 A. No.

9 Q. In fact, don't the doctors need to know that
10 information to follow up and investigate where
11 necessary --

12 A. Yes.

13 Q. -- because there may be a job that this gentleman
14 can do that's just not that job; is that --

15 Mr. Samuels: Object to leading, Your
16 Honor.

17 Q. -- fair?

18 A. Yes.

19 Mr. Beard: I'll -- I'll withdraw.

20 Commissioner Wilkerson: Withdraw that,
21 yes.

22 Mr. Beard: Okay.

23 Commissioner Wilkerson: Just strike
24 that from the record.

25 Q. If the record has established that Mr. Brailey has

1 not been truthful on multiple documents, is it possible
2 for Dr. Tomarchio to have done a proper, thorough,
3 investigation of his condition?

4 A. No.

5 Q. Okay.

6 Mr. Samuels: Objection, calls for
7 speculation.

8 Mr. Beard: That's all the questions I
9 have.

10 Commissioner Wilkerson: Tell me how it
11 can be speculation. She just testified
12 earlier if you -- if they don't tell the
13 truth there's a difference in don't tell the
14 truth and proper evaluation?

15 Mr. Samuels: She is not present when
16 the doctor does these examinations. There
17 has been testimony --

18 Commissioner Wilkerson: I don't
19 disagree with that.

20 Mr. Samuels: -- there has been
21 testimony by another Michelin employee, two
22 (2) Michelin employees, including Mr.
23 Brailey, that the physical exam -- even if
24 you have no complaints about your back, it's
25 still very thorough on the back.

1 Commissioner Wilkerson: I understand.
2 Those were lay-persons as you would be a
3 lay-person to a doctor; I would be a
4 lay-person. She is testifying to a medical
5 person and as she is a medical person. Her
6 testimony is that of a Nurse and what she
7 does dealing with doctors. She would be in a
8 better position to determine what medical is
9 than anybody sitting in this room.

10 Mr. Samuels: Respectfully, Your Honor,
11 she is not an expert; she has not been
12 qualified as an expert.

13 Commissioner Wilkerson: That -- you're
14 not listening. Do you have a medical degree?

15 Mr. Samuels: I do not, Your Honor.

16 Commissioner Wilkerson: I don't either.
17 Mr. Beard, do you have a medical degree?

18 Mr. Beard: I do not.

19 Commissioner Wilkerson: Do you have a
20 medical degree?

21 Witness: Yes, sir.

22 Commissioner Wilkerson: What is it in?

23 Witness: I have my Bachelors in
24 Nursing.

25 Commissioner Wilkerson: That was what I

1 just said. The only person in this room that
2 can testify to a medical situation, I mean,
3 she's got a degree in nursing; nobody else
4 has that degree.

5 Mr. Beard: And -- and with all due
6 respect, her -- her answers were not as an
7 expert witness --

8 Commissioner Wilkerson: No.

9 Mr. Beard: -- her answers were as a
10 medical person.

11 Commissioner Wilkerson: I understand;
12 that's why I said that.

13 Mr. Beard: Mr. Samuels just, basically,
14 said all these other lay-people were experts
15 because they said it was a very thorough
16 examination; that's a factual dispute that
17 you will ultimately decide.

18 Commissioner Wilkerson: I understand.

19 Mr. Beard: You'll get to decide that.

20 Commissioner Wilkerson: That's why I
21 was just trying to make sure I didn't miss
22 it.

23 Mr. Samuels: They know and they
24 testified that the doctor gives them a very
25 thorough examination of their back and tested

1 their ability to twist, turn, bend, stoop and
2 lift.

3 Commissioner Wilkerson: But we don't
4 know if we listing -- lifting a gallon of
5 milk or pulling and stretching a tire on any
6 of those, do we?

7 Mr. Beard: I believe the -- this --
8 this witness just testified that anybody
9 could fake a -- could fake it --

10 Commissioner Wilkerson: I understand.

11 Mr. Beard: -- if they didn't tell the
12 truth --

13 Commissioner Wilkerson: I've just got
14 --

15 Mr. Beard: -- and they wanted the job.

16 Commissioner Wilkerson: -- remember it
17 all goes into the pot and I've got to figure
18 out what the preponderance of the evidence
19 is.

20 Mr. Samuels: If I may, Your Honor, I'd
21 like to introduce the work clearance from the
22 personnel file.

23 Mr. Beard: I have no objection.

24 Commissioner Wilkerson: Oh, that's --
25 that's the one you showed earlier, right?

1 Mr. Samuels: Yes, Your Honor.

2 Commissioner Wilkerson: That's fair.

3 Mr. Beard: I have no objection.

4 Commissioner Wilkerson: Is it C-1?

5 Good point. We haven't done any C's, have
6 we?

7 Court Reporter: No, sir.

8 Commissioner Wilkerson: Okay. I don't
9 remember.

10 Court Reporter: We only have one
11 exhibit and that's D-1 --

12 Commissioner Wilkerson: D-1, okay --

13 Court Reporter: -- and that would be
14 that --

15 Commissioner Wilkerson: -- which is
16 amazing in a case like this.

17 Court Reporter: -- it is.

18 Commissioner Wilkerson: Which is
19 proper.

20 (CLAIMANT'S EXHIBIT NUMBER ONE WAS MARKED FOR
21 IDENTIFICATION)

22 Commissioner Wilkerson: Any other
23 questions --

24 Mr. Beard: None.

25 Commissioner Wilkerson: -- of this

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1 witness? I'm sorry.

2 Mr. Beard: None from the Defense.

3 Commissioner Wilkerson: Any other
4 questions?

5 RE CROSS-EXAMINATION

6 By Mr. Samuels:

7 Q. Ms. Sirois, you were not present when Dr.
8 Tomarchio did the physical examination of Mr. Brailey,
9 were you?

10 A. No, I was not.

11 Q. But you are aware that Mr. Brailey was cleared to
12 work full unrestricted duty by Dr. Tomarchio, correct?

13 A. Yes.

14 Q. And were not present when Jermaine Lemon would
15 have had a -- his pre-clearance physical exam, would
16 you -- were you?

17 A. No.

18 Q. And you wouldn't have any knowledge as to how
19 thorough either of those exams were, would you?

20 A. No.

21 Q. Thank you.

22 Mr. Samuels: Nothing further.

23 Commissioner Wilkerson: We need the
24 Jeopardy thing now. Any other questions?

25 Mr. Beard: None.

1 Commissioner Wilkerson: Oh, I'm sorry.
2 Okay. Is she -- she can leave?

3 Mr. Beard: She can unless she wants to
4 sit and wait for the last so we can all ride
5 together because this next witness --

6 Commissioner Wilkerson: Well, you've
7 got two (2) more.

8 Mr. Beard: -- just one (1).

9 Commissioner Wilkerson: Oh, I'm sorry.
10 Just one (1) more --

11 Mr. Beard: Just one (1).

12 Commissioner Wilkerson: -- okay.
13 Whatever you want to do, ma'am, you --

14 Ms. Sirois: Okay.

15 Commissioner Wilkerson: -- you can go
16 outside.

17 Ms. Sirois: All right. Thank you.

18 (Off The Record)

19 Commissioner Wilkerson: Who is next?

20 Mr. Beard: Mark Gross, Your Honor.

21 Commissioner Wilkerson: Oh, so you are
22 calling Mark. Okay. I wasn't sure who -- I
23 wasn't sure -- I don't know who is outside.

24 Mr. Beard: No one is left outside.
25 This is the final witness --

1 Commissioner Wilkerson: That's the
2 happiest group --

3 Mr. Beard: -- that I will be calling.

4 Commissioner Wilkerson: -- here, the
5 ones that aren't outside. Mr. Gross, I think
6 you've been here long enough to know to raise
7 your right hand.

8 Whereupon;

9 Mark Stephen Gross, being duly sworn and cautioned to
10 speak the truth, the whole truth and nothing but the truth,
11 testified as follows:

12 Court Reporter: Please state your full
13 name for the record.

14 Witness: Mark Stephen Gross.

15 Court Reporter: S-T-E-V or P?

16 Witness: S-T-E-P-H-E-N.

17 Court Reporter: Thank you, sir.

18 DIRECT EXAMINATION

19 By Mr. Beard:

20 Q. Mark, where are you employed?

21 A. I'm employed at Michelin Tire at US 7.

22 Q. How long have you been working there?

23 A. At US 7, I've been there since May of 2017.

24 Q. Okay.

25 A. Michelin for thirty-seven (37) years.

1 Q. All right. And what is your title at the US 7?

2 A. It's the Safety Manager.

3 Q. All right. And so, you would have been the Safety
4 Manager about the time that Mr. Brailey actually
5 started working in -- in US 7?

6 A. That's correct.

7 Q. All right. And do you know Mr. Brailey?

8 A. No, sir.

9 Q. Okay. Have you ever met him before today?

10 A. I talked to him on the phone but I had not met
11 him.

12 Q. Okay. As the Safety Manager, are you notified
13 when someone files a workers' Comp claim or makes a
14 workers' comp allegation or how does that work?

15 A. As a Safety Manager if there's any injuries or
16 even near misses I am notified.

17 Q. Okay. Explain the process at Michelin, how are
18 new employees notified of the rules and the protocol
19 and those types of things?

20 A. Okay. Before a person comes to work for Michelin
21 there is approximately six (6) hours of computer based
22 training that they go through, which includes some
23 safety orientation and then the first day that they are
24 at the plant they start a on -- we call on-boarding
25 process and as part of that, on the first day the

1 safety Department has a couple hours of training time.
2 In that training time they are given instructions of
3 what to do if there is an injury, the process to report
4 it.

5 Q. Okay. And once they come -- physically begin
6 working, how do they -- what other training do they
7 receive in safety and Workers' Compensation protocol?

8 A. Once -- once they -- besides that initial
9 training, when they go to their specific departments
10 they get some training in that department, which will
11 include specifically who to notify if they have any
12 issues.

13 Q. All right. And would Mr. Brailey have -- have
14 been through that process prior to June the 11th of
15 2017?

16 A. Yes, sir.

17 Q. Okay. And you've, obviously, heard all the
18 testimony; you've heard the witnesses testify. To your
19 knowledge, did anyone in management at Michelin have
20 any idea that Mr. Brailey was claiming to have back
21 problems since somewhere around the end of May all the
22 way up until at least June the 24th?

23 A. No, sir.

24 Q. Okay. Was anyone notified that he had been to the
25 hospital at Lexington Medical Center on June the 11th

1 claiming to have severe back pains related to doing
2 lifting, heavy lifting, at -- at the plant?

3 A. No, sir.

4 Q. Was anyone notified that on June 13th he went to
5 his personal physician claiming to have ten (10) out of
6 ten (10) pain as a result of doing heavy lifting on the
7 job at Michelin?

8 A. No, sir.

9 Q. Is that something that should have been reported
10 under the protocol?

11 A. Yes, sir.

12 Q. Okay. Had he done so --

13 A. Uh-huh.

14 Q. -- what would have been the proper procedure?

15 A. If the -- if he would have been having issues at
16 work and he would have reported it there's a listing:
17 Daytime, we have the Nurse at the plant has been
18 testified. In the evenings and back-shifts we have
19 Flow Managers, a Flow Manager on every crew that would
20 be notified; they would, in turn, notify Security who
21 would provide whatever treatment was needed, including
22 calling the Nurse if necessary.

23 Q. What about the Workers' Comp process; how -- what
24 kind of determination or what would have gone on as far
25 as whether that was Workers' Comp or not?

1 A. At that point we're -- we're really not looking to
2 -- at Workers' Comp or not; what we're looking is to
3 get treatment -- treatment for this person.

4 Q. Okay. And whether it's Workers' Comp or not is
5 not an issue?

6 A. That is correct.

7 Q. All right. Who ultimately decides whether
8 something is going to be accepted, as Workers' Comp or
9 not out at the plant?

10 A. It is determined by an Adjustor outside of the
11 company.

12 Q. Okay. And that person, you assume, is discussing
13 with your legal counsel?

14 A. Yes.

15 Q. All right. In this particular case, how did you
16 become aware that Mr. Brailey was claiming to have been
17 injured on June the 24th?

18 A. I got a phone call from our Plant Manager, who
19 happened to be in France at the time, because he had
20 been informed that there had been a possible injury,
21 asking me if I had any knowledge of it and -- which I
22 did not.

23 Q. Okay. And what day was that on?

24 A. That would have been on the 24th.

25 Q. All right. And do you have any idea or any

1 recollection of what time you got the phone call?

2 A. It would have been late in the afternoon.

3 Q. Okay. And when you got that phone call, what did
4 you do; what is the next process?

5 A. I called Troy Lowman to --

6 Q. Okay.

7 A. -- who is -- who -- who was his Direct Manager, to
8 make sure -- find out if he knew anything and what was
9 going on.

10 Q. All right. And did Troy know anything?

11 A. Yes, at that time he did.

12 Q. All right. And what was your understanding?

13 A. That Troy had gotten the Nurse involved and that
14 the Nurse had had contact with Mr. Brailey and that
15 there was an appointment set up for Monday morning.

16 Q. All right. And you've obviously seen the medical
17 records that have been -- or the medical documentation
18 that's the Michelin documents, page 88 of Claimant's
19 APA's; I mean, you've seen that document --

20 A. Yes.

21 Q. -- before, correct?

22 A. Yes.

23 Q. All right. And that's the normal -- that the
24 Nurse's notes, the --

25 A. Right.

1 Q. -- what the Nurses create?

2 A. That's correct.

3 Q. All right. What is the procedure following
4 someone making that claim and whether it's Workers'
5 Comp or not, what is the next procedure to take place?
6 In other words, Mr. Lowman explained about --

7 A. Uh-huh.

8 Q. -- coming back to the plant and filling out
9 accident reports, what happens?

10 A. Oh, okay. If a person reports an injury we do an
11 incident report; it typically is started by the Safety
12 Spoke that Troy mentioned.

13 Q. Okay.

14 A. What is going to be done is a very quick
15 investigation to see if there is some kind of risk out
16 there that caused the problem.

17 Q. Okay.

18 A. Then -- and this would be with the person that has
19 made the report. If the person wasn't available, we
20 would wait till that person came back so we could
21 understand exactly what happened.

22 Q. Okay. So, you need the actual factual basis to do
23 your investigation?

24 A. That's correct.

25 Q. All right. And in this case, did Mr. Brailey, to

1 this day, ever come back out to the plant and give any
2 kind of a report or meet with you so that you could
3 fill out that investigation?

4 A. He did not.

5 Q. Okay. So, two (2) days later he goes to Dr. Izard
6 on June the 26th?

7 A. That's correct.

8 Q. All right. And has that evaluation, when did you
9 next become involved with his case?

10 A. It would have been on the -- two (2) days later on
11 the 28th.

12 Q. How -- how did you become involved?

13 A. The Nurse informed me that Mr. Brailey had a -- an
14 appointment with Dr. Izard that afternoon but she had
15 been told that he could not come; he told her -- Isaac
16 told her he could not come because he did not have a
17 ride.

18 Q. Okay. And so, how -- what did you do then?

19 A. So, I called Mr. Brailey and we discussed -- you
20 know, we talked for a couple of minutes. I verified
21 that he didn't have a ride to come to the plant and
22 when he said that was correct, I offered to send a taxi
23 to his house to pick him up to come see the doctor and
24 then take him back home.

25 Q. Was it your understanding he lives fairly close to

1 the plant?

2 A. That's correct.

3 Q. All right. And what did he say when you made that
4 offer?

5 A. When he -- when I made that offer he immediately
6 said, you need to talk to my lawyer and hang up on me
7 --

8 Q. Okay.

9 A. -- hung up on me.

10 Q. So, on June the 28th, by then he already had a
11 lawyer or at least that's what he represented to you on
12 the phone?

13 A. That's what he represented to me on the phone.

14 Q. Okay. And you're aware he had another lawyer
15 before Mr. Samuels?

16 A. That's correct.

17 Q. All right. So, at any other time after that did
18 you ever contact with Mr. Brailey?

19 A. I did not.

20 Q. All right. And I -- I am assuming -- correct me
21 if I'm wrong -- did he come back and see Dr. Izard on
22 the 28th?

23 A. He did not.

24 Q. All right. Now, you've heard about the physical
25 examination and the questionnaire information.

1 Mr. Beard: Let me find it here.
2 Commissioner, I'm looking at page 16,
3 Defendant's APA's.

4 Commissioner Wilkerson: I can hardly
5 wait till we go paperless; that's the rumor,
6 one day we're all going paperless.

7 Mr. Beard: It would be nice if we had a
8 big old screen we could all just look at.

9 Mr. Samuels: I'd love it.

10 Mr. Beard: That's what they do in
11 Federal Court.

12 Commissioner Wilkerson: Yes.

13 Q. What is that document?

14 A. This is a health questionnaire for a post-offer
15 examination.

16 Q. Okay. Is that something that every employee at
17 Michelin is required to go through?

18 A. Yes.

19 Q. All right. And does that take place in
20 conjunction with the physical examination?

21 A. Yes.

22 Q. All right. And is this document done for a
23 reason?

24 A. Yes.

25 Q. What is the purpose of the document?

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1 A. To find out if there's any concerns, health-wise,
2 physical -- any physical concerns.

3 Q. Okay. And do you rely on the answers that your
4 employees give you on those documents?

5 A. Yes.

6 Q. Okay. If, for instance in this case, if Mr.
7 Brailey had said, I do have prior back ache or injury
8 or pain, in fact, I had a Workers' Comp claim,
9 etcetera, etcetera; would you have investigated that?

10 A. Yes.

11 Q. All right. Were you given the opportunity to
12 investigate that based upon his answer?

13 A. No.

14 Q. All right. Was any doctor given the opportunity
15 to investigate that based upon his answer?

16 A. No.

17 Q. All right. Would you have instructed a doctor to
18 do that had they brought that to your attention?

19 A. Yes.

20 Q. All right. Knowing what you know now, and hearing
21 all the testimony you've heard today, and all the
22 information about the prior Workers' Compensation
23 claim, and the fact that he had been released from
24 heavy duty work until seeing a surgeon, if you had
25 known all the information and investigated all that

1 information, would that have concerned you about Mr.
2 Brailey?

3 A. Yes.

4 Q. Do you -- in reviewing what has transpired in this
5 case from late May, complaining immediately upon going
6 into physical work up until June the 24th, making no
7 contact to -- with you whatsoever, does this sound at
8 all like what happened in 1997, based on what you've
9 seen and heard?

10 A. Yes.

11 Q. And just because Mr. Brailey may have had
12 pre-existing problems and if he had been honest and
13 forthright, would then Michelin look to see if there
14 were other opportunities that he could have within the
15 plant?

16 A. No. Based on the questionnaire and his responses
17 to the questionnaire, what we would have done is to
18 seek further information on the condition itself.

19 Q. Okay. And let's assume the information came back
20 and said he can't do the PAP Operator job, would he
21 then have to go through the process of applying for yet
22 a different job or you all would have looked for a --
23 other jobs potentially he could perform?

24 A. Probably not.

25 Q. Okay.

1 Mr. Beard: Thank you, sir. That's all
2 the questions I have.

3 Commissioner Wilkerson: Mr. Samuels.

4 Mr. Samuels: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 By Mr. Samuels:

7 Q. Mr. Gross, are the physical examinations the
8 doctors do important to Michelin?

9 A. Yes.

10 Q. So, they want to make sure that the doctors do a
11 thorough exam?

12 A. Correct.

13 Q. And that thorough exam, every exam, is going to
14 include an examination of the back; isn't that true?

15 A. Personally, I'm not aware of exactly what the
16 physical exam is; so, I can't tell you how thorough it
17 is.

18 Q. Got it. But you did hear Mr. Lemon testify?

19 A. Uh-huh.

20 Q. And you would agree that Mr. Lemon described a
21 thorough examination of the back, testing whether
22 somebody can lift, bend, twist, stoop, squat and so
23 forth --

24 A. Correct.

25 Q. -- isn't that true?

- 1 A. That is true but I -- I don't know how much -- how
2 much weight they're picking up or how much twisting,
3 so.
- 4 Q. But the point is though --
- 5 A. Uh-huh.
- 6 Q. -- that you've heard actually two (2) witnesses --
- 7 A. Uh-huh.
- 8 Q. -- testify that the doctor gave them thorough
9 examinations of the back, right?
- 10 A. Yes, I heard that.
- 11 Q. And you can't dispute that, can you, because you
12 have not been in those exams?
- 13 A. That is correct.
- 14 Q. And, in fact, that examination by Dr. Tomarchio,
15 he cleared Mr. Brailey to work full unrestricted duty;
16 isn't that true?
- 17 A. That is correct.
- 18 Q. And that was what you needed to know --
- 19 A. Yes, sir.
- 20 Q. -- if the doctor cleared him; you were good to go,
21 right?
- 22 A. Yes, sir.
- 23 Q. And you relied on your doctors to be thorough?
- 24 A. Correct.
- 25 Q. And you've also, I know, heard a lot of testimony

1 but does Michelin want every single instance of pain or
2 soreness to be reported as a Workers' Comp claim?

3 A. We want everyone that has pain doing their job to
4 report it; yes, sir. I -- but we don't look at a
5 Workman's Comp right off the bat.

6 Q. So, in fact, if somebody has pain, as long as they
7 go to the doctor, the doctor clears them to work,
8 they're getting treatment, getting medication, you're
9 okay with that?

10 A. If someone reports that they're having pain, we
11 want to investigate and see is it just work hardening
12 or is it something that we need to pursue with medical
13 treatment.

14 Q. Got you. So -- so, what you'd want to know is if
15 somebody has strained muscles due to heavier workload
16 at new job, no emergent signs of symptoms, exercise to
17 lose weight, a need for strengthening up the core
18 muscles and proper lifting techniques; that's what
19 you'd want to know, isn't it --

20 A. I'm -- I'm little confused --

21 Q. -- from a doctor?

22 A. -- what -- you're asking --

23 Q. You wanted to make sure that it's not an injury --

24 A. -- correct.

25 Q. correct?

- 1 A. Yes.
- 2 Q. That it's just pain --
- 3 A. Right.
- 4 Q. -- like pain from working a new job, not really
5 being in shape because you're new at the job --
- 6 A. Right.
- 7 Q. -- that kind of thing?
- 8 A. Uh-huh. Yes.
- 9 Q. And you -- you expect people who are new to the
10 job, a lot of them are going to have pain and be sore
11 just because it's hard work and they're not used to it?
- 12 A. Yes, minor, you know, soreness but --
- 13 Q. Right. So --
- 14 A. -- okay. Yeah.
- 15 Q. -- so, like, with Mr. Brailey, you know, his
16 doctor tells him, you need to strengthen up your core
17 muscles and use proper lifting techniques --
- 18 A. Uh-huh.
- 19 Q. -- but you can work?
- 20 A. Yeah.
- 21 Q. So, you have the information -- or I won't say you
22 have the information but Mr. Brailey has the
23 information, he's getting that taken care of and he's
24 cleared to work. You wouldn't know anything different
25 if you'd had that information, would you?

- 1 A. Probably not, no.
- 2 Q. It was actually on June 24th, 2017 --
- 3 A. Uh-huh.
- 4 Q. -- that you heard -- got a phone call from France,
- 5 that Mr. Brailey had had a work accident?
- 6 A. I heard that he had gone to the doctor and claimed
- 7 to have a work accident; yes, sir.
- 8 Q. And you've heard the testimony, you -- you've
- 9 looked at his medical records --
- 10 A. Uh-huh.
- 11 Q. -- you know now that he's been diagnosed with a
- 12 herniated disk and that surgery is recommended by his
- 13 Neurosurgeon; you're aware of that, right?
- 14 A. That's what the report says; yes, sir.
- 15 Q. Okay. And you would agree nobody before June
- 16 24th, 2017, while he was working at Michelin, had put
- 17 him under restrictions or recommended surgery?
- 18 A. One more time.
- 19 Q. You would agree --
- 20 A. Huh-uh.
- 21 Q. -- that no doctor, while Mr. Brailey was working
- 22 at Michelin, had put him under restrictions before June
- 23 24th, 2017?
- 24 A. No doctor that he saw after he came to work for
- 25 Michelin had; yes, sir.

1 Q. Right. Not Dr. Tomarchio, not his family doctor,
2 not Lexington Medical Center?

3 A. Correct.

4 Q. Only after June 24th, 2017, did they take him out
5 of work or put him under work restrictions, correct?

6 A. Yes.

7 Q. Okay.

8 A. That's when he was taken out of work.

9 Q. And --

10 Mr. Samuels: -- that's the only
11 questions I have. Thank you.

12 REDIRECT EXAMINATION

13 By Mr. Beard:

14 Q. If an employee claims to have ten (10) out of ten
15 (10) pain as a result of doing the job at your plant,
16 do you expect to hear that information?

17 A. Yes, sir.

18 Q. In fact, is it important for you to know that
19 information so that you can make sure they don't hurt
20 themselves or anyone else any further?

21 A. Yes, sir.

22 Q. And, in fact, if Mr. Brailey had honestly come in
23 and told you on the 11th or the 13th what he had told
24 the hospital or the -- his personal doctor, we probably
25 wouldn't be here, would we?

1 A. That's correct.

2 Q. Okay. It's because he failed to give you that
3 information that maybe we're here; isn't that correct?

4 A. That's correct.

5 Q. Based on everything else you've heard, based on
6 the review of those medical records from before, based
7 on the testimony, do you really believe anything Mr.
8 Brailey says at this point?

9 Mr. Samuels: Objection, Your Honor.

10 That is an absolutely improper question
11 eliciting a -- a witness' opinion regarding
12 other witnesses, pitting witnesses --

13 Mr. Beard: With -- with all due
14 respect, Mr. Samuels said, and I quote,
15 "You've heard two (2) people give testimony
16 about the strenuous things that they do in
17 these physical examinations." One of the two
18 (2) people would be this gentleman sitting in
19 the chair right here. I've got a right to
20 then follow up and say do you believe
21 anything this gentleman said; I've got a
22 right to do that. He opened that door.

23 Commissioner Wilkerson: Tell me how you
24 didn't open the door by pitting the other two
25 (2) people against another person.

1 Mr. Samuels: Because --

2 Commissioner Wilkerson: He has a right
3 to ask the question.

4 Mr. Samuels: -- because I -- because I
5 was talking about the substance of the
6 testimony that they gave.

7 Commissioner Wilkerson: How do I know
8 what you're talking about? I keep reminding
9 you, I don't have a clue what you all are
10 talking about. You all talk in circles. I
11 don't have a clue what you're talking about.
12 If you're talking -- because you've got one
13 opinion before we started about the depo,
14 you've got another opinion now; it moves
15 based on the question. I never know what you
16 all are talking about on either side; that's
17 why we have evidence. If we -- if we -- if I
18 knew what you all were talking about why
19 would I ask you to put your positions on the
20 record; wouldn't I just read what you hand
21 me? I never know what either side is talking
22 about. So, if you open the door, he gets the
23 right to ask a question.

24 Mr. Samuels: I -- I didn't open the
25 door as to whether or not he believed

1 testimony. An opinion -- an attorney asking
2 a --

3 Commissioner Wilkerson: You asked about
4 the doctor who is not even here; do you
5 believe those doctors know what they're
6 doing, on several occasions. You asked
7 several times, do you believe what your
8 doctor tells you. So, I think you opened the
9 door. He gets to tell me what he believes of
10 your client; I don't know what it's going to
11 be.

12 Mr. Samuels: -- okay. Fair enough,
13 Your Honor.

14 Commissioner Wilkerson: I mean, I think
15 it's a fair question.

16 Q. Do you need me to repeat the question?

17 A. Please.

18 Q. Based on everything you've heard and everything
19 that you reviewed, do you believe anything that Mr.
20 Brailey is saying in this case?

21 A. I do not.

22 Q. In addition to relying on that physical
23 examination Mr. Samuels showed you, the physical exam
24 or -- or read to you and -- or you've heard about the
25 physical exam that he passed, and you said you do rely

1 on your doctors and you rely on those things; you rely
2 on the employees to honestly answer the questionnaires
3 so that you can do the investigation that needs to be
4 done, correct?

5 A. That is correct.

6 Q. And your doctors, do they also rely upon the
7 questionnaires and the answers so that they can do the
8 thorough investigation?

9 A. Yes.

10 Mr. Samuels: Objection, Your Honor,
11 calls for speculation --

12 Q. Do you believe this --

13 Mr. Samuels: -- on evidence --

14 Mr. Beard: -- I'll withdraw it.

15 Mr. Samuels: -- not personally --

16 Mr. Beard: -- I'll withdraw it.

17 Commissioner Wilkerson: Yes.

18 Q. Do you believe it's possible for the doctor to do
19 a thorough investigation if the patient does not
20 truthfully answer the questionnaire?

21 Mr. Samuels: Objection, Your Honor, the
22 witness is unqualified to answer that
23 question.

24 Commissioner Wilkerson: well, he would
25 be unqualified to answer your questions about

1 his doctors, true? So, do we strike yours as
2 well?

3 Mr. Beard: Commissioner, he's the
4 Safety --

5 Mr. Samuels: I reckon not --

6 Mr. Beard: -- Manager.

7 Mr. Samuels: -- that's fine, Your Honor.

8 Commissioner Wilkerson: I --

9 Mr. Samuels: I'll let the questions go;
10 it's fine.

11 Commissioner Wilkerson: -- I just --
12 you've got to -- you can't -- again, you
13 can't have your cake and eat it too; you've
14 either got to decide I want to keep it or I
15 want a bite of the cake. Come on now.

16 Q. Is it possible, Mr. Gross, for a doctor -- for
17 your company doctor or your plant doctor who is doing a
18 physical examination on a new perspective employee, do
19 a thorough investigation if they are lied to on a
20 questionnaire about someone's medical history?

21 A. They will not be able to.

22 Q. Thank you, sir.

23 Mr. Beard: That's all I have.

24 Commissioner Wilkerson: Any follow ups?

25 Mr. Samuels: Yes, sir.

RECROSS-EXAMINATION

By Mr. Samuels:

Q. Mr. Gross, you did believe Mr. Lemon's testimony about how thorough the physical examination was, though, didn't you?

A. Yes.

Q. Okay. And you would expect Michelin's doctors to do a thorough physical examination?

A. Yes.

Q. That's what you want, isn't it?

A. Yes.

Q. And you know that they are going to always pay particular attention to the back because that's -- it's such a vulnerable important area, isn't it?

A. I do not know that.

Q. You now know that because of Mr. Lemon's testimony, which you believe, correct?

A. In -- in Mr. Lemon's opinion, yes, but --

Q. And --

A. -- I've --

Q. -- your doctor, Dr. Tomarchio --

A. -- uh-huh.

Q. -- cleared Mr. Brailey to full duty work, didn't he?

A. That's correct.

1 Q. You also heard testimony that Mr. Brailey was a
2 good worker, able to do the work and nobody noticed him
3 having any difficulty doing the work; isn't that true?

4 A. That's true.

5 Q. And even though he had pain, he had no difficulty
6 doing the work until June 24th, 2017; isn't that true?

7 A. That's true.

8 Q. And --

9 Mr. Samuels: -- no further questions,
10 Your Honor.

11 FURTHER REDIRECT EXAMINATION

12 By Mr. Beard:

13 Q. So, even though he had ten (10) out of ten (10)
14 pain, he was able to continue working and --

15 Mr. Samuels: I --

16 Commissioner Wilkerson: Wait a minute;
17 let him finish the question or are you
18 through?

19 Mr. Samuels: -- we -- we're getting
20 into re-redirect.

21 Mr. Beard: -- well, it doesn't matter.

22 Commissioner Wilkerson: It doesn't
23 matter.

24 Mr. Beard: I get to go if he lets me.

25 Commissioner Wilkerson: He still gets

1 --

2 Mr. Beard: I think we've done that a
3 lot today.

4 Commissioner Wilkerson: -- yes.

5 Mr. Samuels: Fair enough.

6 Commissioner Wilkerson: Yes.

7 Q. So, even though he was in ten (10) out of ten (10)
8 pain, he was able to continue to do his job and con
9 everybody out there and not tell anybody what was going
10 on; is that correct?

11 A. That's correct.

12 Q. Just like he probably did when he did the physical
13 examination to get the job in the first place, correct.

14 A. Correct.

15 Q. All right. So, Mr. Lemon, you heard him testify,
16 right?

17 A. Yes, sir.

18 Q. What did Mr. Lemon say when he was asked the
19 question, did you tell the truth on all the questions
20 on your questionnaire; what was his answer?

21 A. Yes.

22 Q. You've read Mr. Brailey's questionnaire and you've
23 heard his testimony, are those two (2) things
24 consistent? Did -- did Mr. Brailey tell the truth on
25 his questionnaire?

1 A. He did not.

2 Q. Okay. So, there's a big difference between those
3 two (2) individuals, correct?

4 A. That is correct.

5 Q. It would have been a lot easier for the doctor to
6 make an examination of the person who told the truth,
7 thoroughly, than the person who lied, thoroughly,
8 correct?

9 A. That is correct.

10 Mr. Beard: That's all I have.

11 FURTHER RECROSS-EXAMINATION

12 By Mr. Samuels:

13 Q. Would you agree that between 1997 and 2017, a
14 period of twenty (20) years, that there is no evidence
15 of Mr. Brailey having any back pain or going to any
16 doctor for back problems?

17 A. There is no evidence, no; you're correct.

18 Q. And wouldn't you agree that there is no evidence
19 that Mr. Brailey was currently having any back pain at
20 the time he was examined by Dr. Tomarchio and at the
21 time that he filled out the questionnaire?

22 A. That's correct.

23 Q. When people fill out the questionnaire, do you
24 expect them to answer all the questions?

25 A. Yes, sir.

- 1 Q. Fill in all the blanks?
- 2 A. Yes, sir.
- 3 Q. And is there somebody there with the employee as
- 4 they're filling this out making sure they fill in all
- 5 the blanks and answer all the questions?
- 6 A. No, sir.
- 7 Q. Does somebody check afterwards to make sure that
- 8 everything is properly filled out?
- 9 A. That I do not know.
- 10 Q. Because I -- I've got to ask you --
- 11 A. Uh-huh.
- 12 Q. -- I mean, I'm looking at it, page 16, it's got
- 13 his name --
- 14 A. Right.
- 15 Q. -- and there are answers to some of the questions
- 16 but there's no address, phone number, emergency
- 17 contact, relationship to emergency contact, phone or
- 18 family doctor?
- 19 A. That is correct.
- 20 Q. Is that information not equally important?
- 21 A. On that form, I would say not.
- 22 Q. You would say not?
- 23 A. That's correct.
- 24 Q. You don't know what it -- you don't want to know
- 25 who his family doctor is so you can obtain medical

1 records if you need to? So, a part of this --

2 A. Huh-uh.

3 Q. -- so, this form really isn't as important as it
4 has been said, is it?

5 A. It's very important to understand the physical --
6 the physical conditions of the perspective employee.

7 Q. But nobody goes back and makes sure that this is
8 properly filled out, do they?

9 A. I was not there when that was done --

10 Q. Right.

11 A. -- and I can't tell you.

12 Q. They fill out a ton of paperwork, right, when
13 they're hired?

14 A. I think there's quite a few, yes.

15 Q. Quite a lot?

16 A. Yeah.

17 Q. And they go through it pretty fast?

18 A. There's nothing that creates a need for speed when
19 they're filling it out.

20 Q. Okay.

21 Mr. Samuels: No more questions, Your
22 Honor.

23 Commissioner Wilkerson: Oh, I'm sorry.

24 Mr. Beard: One --

25 Commissioner Wilkerson: I'm still

1 writing.

2 Mr. Beard: -- one --

3 Commissioner Wilkerson: I apologize.

4 Mr. Beard: -- one follow up. Page 16.

5 Commissioner Wilkerson: I had not
6 fallen asleep.

7 FURTHER REDIRECT EXAMINATION

8 By Mr. Beard:

9 Q. Page 16, Mr. Gross.

10 A. Uh-huh.

11 Q. There's a box that says, Declaration and
12 Authorization; do you see that?

13 A. Yes, sir.

14 Q. Can you just read into the record, slowly --

15 Commissioner Wilkerson: Page 16? Hold
16 on, let me get to it.

17 Mr. Beard: -- yes, sir.

18 Commissioner Wilkerson: Is it your 16
19 or --

20 Mr. Beard: Yes, sir. I'm sorry, my 16,
21 the -- this is the -- the questionnaire.

22 Mr. Samuels: Your Honor, I'll stipulate
23 that it says what it says.

24 Mr. Beard: That's fine.

25 Commissioner Wilkerson: -- okay.

1 Mr. Beard: I still want him to read it
2 for the record.

3 Commissioner Wilkerson: Okay, for the
4 record.

5 Q. If you would, just read into the record what that
6 says.

7 A. It says, I declare that all information contained
8 herein is true and complete to the best of my
9 knowledge. I understand and agree, thus, that any
10 false, misleading or incomplete information will make
11 me subject to disqualification from employment or
12 subject to dismissal at any time. I hereby authorize
13 Michelin to make any investigation it deems appropriate
14 and, expressively, authorize any physician, hospital,
15 clinic or other persons or entity Michelin may contact
16 to release particulars of my health, medical health
17 other than gastric information or any claim to
18 Michelin. A photocopy of this authorization shall be
19 valid as the original.

20 Commissioner Wilkerson: Let me ask a
21 question. Is that gastric or genetic? I
22 can't read it.

23 Mr. Samuels: It's --

24 Witness: My contacts are fuzzy --

25 Mr. Samuels: -- it's genetic.

1 Witness: -- it says genetic.

2 Commissioner Wilkerson: What?

3 Mr. Samuels: It's genetic.

4 Mr. Beard: It's genetic.

5 Witness: It's genetic.

6 Commissioner Wilkerson: Okay. I
7 couldn't read it --

8 Witness: It's genetic.

9 Commissioner Wilkerson: -- I was going
10 to ask you. That's okay. I thought --

11 Witness: Sorry, fuzzy contacts.

12 Commissioner Wilkerson: -- no, no,
13 that's okay. I -- mine's a little fuzzy too
14 and it's -- it is late in the day.

15 Mr. Beard: My head --

16 Commissioner Wilkerson: So, I thought
17 --

18 Mr. Beard: -- my head --

19 Commissioner Wilkerson: I just wanted
20 to get it right.

21 Mr. Beard: -- my head is fuzzy right
22 now.

23 Commissioner Wilkerson: I apologize.

24 Q. Did -- sentence number 1, was the information
25 contained in the report true and accurate?

1 A. No.

2 Q. All right. And Mr. Brailey has admitted that
3 today, correct?

4 A. That is correct.

5 Q. Could Mr. Brailey, in fact, could be fired for
6 that reason alone; is that not true?

7 A. That is correct.

8 Q. All right. And he acknowledged that?

9 A. That is correct.

10 Q. And it also says that that authorizes you,
11 Michelin, to have any doctor investigate the condition;
12 you weren't given that opportunity in this case, were
13 you?

14 A. That is correct.

15 Q. Because Mr. Brailey withheld the information?

16 A. That is correct.

17 Q. And, in fact, we now know that Mr. Brailey was
18 restricted from doing any heavy duty work since at
19 least 1997, until seen by a surgeon, correct?

20 A. That is correct.

21 Q. Thank you, sir.

22 Mr. Beard: That's all I have.

23 Commissioner Wilkerson: Anything else?

24 FURTHER RECROSS-EXAMINATION

25 By Mr. Samuel[s]:

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1 Q. Sir, Mr. Brailey was terminated on July 9th, 2017;
2 isn't that correct?)

3 A. You -- I'm not positive of the date but, yes.

4 Q. Okay.

5 A. Okay.

6 Q. That had nothing to do with his questionnaire, did
7 it?

8 A. That is correct.

9 Q. Okay. And when this case was denied in July of
10 2017, that had nothing to do with this questionnaire,
11 did it?

12 A. I'm not part of that process --

13 Q. Okay.

14 A. -- so, I can't tell you.

15 Q. You understand that this questionnaire did not
16 even become an issue in this case until this hearing
17 had been continued twice?

18 A. Again, I don't know --

19 Q. Okay.

20 A. -- exactly when it became important.

21 Mr. Beard: That's actually incorrect.

22 It's on the first Form 51 filed, fraud in the
23 application, affirmative defenses raised.

24 Mr. Samuels: Your Honor, it's on every
25 application but it --

1 Mr. Beard: It's raised.

2 Mr. Samuels: -- it's on every 51 that
3 Mr. -- Mr. Beard files. My -- my point about
4 that is, he amended his pre-hearing brief and
5 APA months after the original hearing was
6 set; that's my point.

7 Mr. Beard: Read the first Form 51 --
8 Commissioner Wilkerson: All right.

9 Mr. Beard: -- that's all I can tell
10 you; it's on the Form 51.

11 Commissioner Wilkerson: Okay. How
12 could it be months? I didn't -- I didn't
13 have the hearing until, what, January?

14 Mr. Beard: Yes, sir.

15 Commissioner Wilkerson: So, it couldn't
16 be months.

17 Mr. Samuels: That was not an issue at
18 the --

19 Commissioner Wilkerson: What?

20 Mr. Samuels: -- at the -- when we
21 convened for the hearing in January.

22 Mr. Beard: It actually was amended when
23 you allowed me to get the Workers' Comp file
24 --

25 Commissioner Wilkerson: That was in

1 February?

2 Mr. Beard: -- correct.

3 Commissioner Wilkerson: Okay. So, it's
4 been less --

5 Mr. Beard: That's the only time I've
6 amended my pre-hearing brief --

7 Commissioner Wilkerson: -- it's been
8 less than two (2) months.

9 Mr. Beard: -- just because Stephen had
10 raised some issue about the Form 51 was
11 improper to begin with --

12 Commissioner Wilkerson: Okay.

13 Mr. Beard: -- some --

14 Commissioner Wilkerson: Okay.

15 Mr. Beard: -- some issue like that.

16 Commissioner Wilkerson: I don't know.
17 That's fine. Because you had -- you at that
18 point also raised 11-B had not been answered;
19 so --

20 Mr. Beard: Correct.

21 Commissioner Wilkerson: -- the hearing
22 doesn't count --

23 Mr. Beard: Correct.

24 Commissioner Wilkerson: -- basically.

25 Mr. Beard: That's exactly what I did.

1 Commissioner Wilkerson: Okay.

2 Mr. Beard: And he --

3 Commissioner Wilkerson: I understand.

4 Mr. Beard: -- he amended that --

5 Commissioner Wilkerson: I understand.

6 Mr. Beard: -- just on his last
7 pre-hearing brief.

8 Commissioner Wilkerson: I understand.

9 That's why I was going there. I -- I know
10 it's scary --

11 Mr. Beard: Again, I -- with all due
12 respect --

13 Commissioner Wilkerson: -- I'm reading
14 it.

15 Mr. Beard: -- I mean, it's the constant
16 I did something but it's okay if he does
17 something; he's done it all day long today.

18 Commissioner Wilkerson: It's fine.
19 I've got to make the decision, then you all
20 can go before the next group and then you all
21 can decide who wants to carry it to -- to the
22 Court of Appeals; I'm fine with that.

23 Q. Sir, one of the questions on this questionnaire
24 is, number 26, are you presently being treated for any
25 condition --

1 Mr. Beard: Commissioner --

2 Q. -- that may inhibit your ability to work.

3 Mr. Beard: -- and just -- I -- I just
4 -- the only reason I'm doing this is because
5 we're going to keep going all night long.

6 Commissioner Wilkerson: You are.

7 Mr. Beard: I only asked him about the
8 declaration portion, that's it. We've been
9 through the other stuff earlier.

10 Commissioner Wilkerson: Yes.

11 Mr. Beard: Stephen is now reopening or
12 trying to reopen beyond that and I object to
13 that. I don't think we just to keep going
14 on, and on, and on.

15 Commissioner Wilkerson: No.

16 Mr. Beard: And I object.

17 Commissioner Wilkerson: I understand.
18 We just -- we need to wrap it up.

19 Mr. Samuels: I'm wrapped up, Your
20 Honor.

21 Commissioner Wilkerson: As long as --
22 yes -- as long as there's nothing else
23 specifically to the last questions that were
24 asked.

25 Mr. Beard: No further questions. No

1 further witnesses from the Defense. The
2 Defense withdraws its motion to depose or
3 reconvene the deposition --

4 Commissioner Wilkerson: I understand.

5 Mr. Beard: -- of Dr. Boyd..

6 Commissioner Wilkerson: Okay. And your
7 position is on that?

8 Mr. Samuels: My position is that we
9 should be allowed to reconvene the deposition
10 based on the evidence presented today.

11 Commissioner Wilkerson: Even though
12 before we started you didn't want to take
13 that?

14 Mr. Samuels: That is correct, Your
15 Honor.

16 Commissioner Wilkerson: You did one
17 live yesterday?

18 Mr. Samuels: That is correct, Your
19 Honor.

20 Commissioner Wilkerson: Because you
21 wanted the hearing to take place. And I said
22 after the hearing I would decide if I need
23 Dr. Boyd's deposition taken to determine -- I
24 never said what I needed to determine -- but
25 I always wait and see what has taken place

1 today to see if I need it. I don't need it.
2 So, I would say, I'm not going to allow it to
3 be taken at this point in time. I'll let you
4 all argue can you withdraw? I don't think
5 you did. Can you change your position? I'll
6 let somebody else decide that. That will be
7 a great Supreme Court action. Because if
8 that's the case there's no need to prepare
9 APA's and opinions; just come in here and
10 argue at the end what you want. So -- but I
11 understand clearly. This concludes our
12 hearing. Let me meet with the attorneys,
13 briefly, because I've got to be gone in
14 fifteen (15) minutes. So, I thank everybody
15 for being here. I appreciate it.

16 (THERE BEING NO FURTHER QUESTIONS OR DISCUSSION, THE
17 HEARING CONCLUDED AT 4:40 P.M.)
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

CERTIFICATE

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Hearing of Isaac Brailey, vs. Michelin;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 435 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 5th Day of May, 2018.

Gloria G. Davis
Gloria G. Davis
Notary Public for South Carolina
My Commission Expires 12/21/21

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STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1708221

Isaac Brailey,
Claimant,
v.
Michelin,
Employer,
and
Safety National Casualty
Corporation,
Carrier/Defendants.

COPY

FULL COMMISSION HEARING

Monday, October 22, 2018
1:29 p.m. - 1:54 p.m.

The Full Commission Hearing was heard before Commissioners Susan S. Barden, T. Scott Beck and Gene McCaskill, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 22nd day of October, 2018, before Travis McLeod, Court Reporter and Notary Public in and for the State of South Carolina.



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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



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CALL TO ORDER:

COURT REPORTER: Today is Monday October 22nd, 2018.

This is South Carolina Workers' Compensation Case Number 1708221. This is the case of Isaac Brailey, claimant versus Michelin, employer and Safety National Casualty Corporation, carrier. The appellant is the claimant represented by Stephen B. Samuels. The respondent is represented by Grady L. Beard. Each side is allowed 10 minutes for oral argument and the appellant three minutes in reply. You are requested to argue the grounds of exception and stay within the record.

COMMISSIONER BECK: Now prior go going on the record there was a discussion off the record regarding Mr. Beard's prior representation of me in a matter 22 years ago. Mr. Samuels, it's my understanding you've had an opportunity to contemplate whether or not you'll ask for a recusal or not. You've chosen to proceed with me on the panel, sir. Correct?

MR. SAMUELS: That is correct, Your Honor.

COMMISSIONER BECK: All right. Mr. Samuels.

ARGUMENT BY MR. SAMUELS:

MR. SAMUELS: May it please the Commission. I



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1 represent Isaac Brailey in this appeal to the
2 Single Commissioner. There were primarily
3 three issues on appeal. This is a denied case.
4 The Single Commissioner found quote, I find the
5 claimant was unable to return to work after
6 June 24th, 2017 due to a separate incident.
7 That finding, Your Honor, refers to the June
8 24th work injury that's pled in this case.
9 Point being that finding confirms that there
10 was an accident on that date that did arise out
11 of the course of employment. So in fact with
12 that finding with the evidence presented, Mr.
13 Brailey did prove his prima facie case of
14 proving the work related accident. What really
15 happened here is that the Single Commissioner
16 denied the case under two affirmative defenses
17 pled by the defendants specifically under the
18 Cooper and Capers cases. And we would contend
19 that they did not meet their burden of proof to
20 prove those affirmative defenses and that is
21 the core of this appeal. To give Your Honors
22 some sense of the background facts, 20 years
23 ago when Bill Clinton was President of the
24 United States it was a different world Isaac
25 Brailey had a lumbar and thoracic sprain while



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1 working for Richtex Bricks. He was -- saw the
2 company doctor twice, he was out of work for
3 two weeks and five days and he clinchered that
4 case for a nuisance value of \$2,500. For the
5 next 20 years Mr. Brailey worked, 15 years of
6 which he spent at Westinghouse and he had no
7 back problems what so ever. He received no
8 treatment for any back pain or back injuries.
9 He was laid off from Westinghouse after 15
10 years there and went to apply at Michelin, the
11 company he hoped to retire with. He was given
12 the standard questionnaire and he was asked in
13 March of 2017, do you have problems with or
14 have you ever had medical attention for the
15 following, back injury, headache or pain or
16 have you ever experienced a medical problem
17 that would affect your ability to work? We
18 acknowledged he checked no to those questions.
19 That is the only evidence about that issue.
20 There is no medical record of a physical exam,
21 no statement from a company doctor, nothing.
22 Just simply the fact that he signed the
23 questionnaire where he did not -- admittedly
24 did not disclose that 20 years before he'd had
25 a minor back injury that had affected his work



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1 for two and a half weeks. He started working
2 for Michelin and in June -- June 11th, 2017 he
3 was experiencing back pain. He talked to his
4 co-workers and they said, well, you know, it's
5 a new job, this is hard physical work, you
6 should expect this. And then he went to urgent
7 care on June 11, 2017 on his own. Did not
8 claim it under Michelin workers' comp. He
9 reported low back pain from heavy lifting at
10 work with no radiation. He was given some
11 medication, released to work full duty no
12 restrictions. June 13th, 2017 he goes back to
13 -- this time to his family doctor, essentially
14 the same thing. New job at Michelin, doc says,
15 likely strained muscles due to heavier work
16 load at job, no restrictions, no radiation,
17 nothing of significance. On June 24th, 2017
18 early hours Saturday morning he is working, he
19 is stretching rubber and he now has what he
20 feels is an injury, feels sudden pain. He
21 reports it to his supervisor, medical is closed
22 at that point in time so he went, after he
23 left, to the ER. Through texts and
24 communications he had with the plant nurse and
25 supervisors at that time. This time the doctor



1 at the emergency room was concerned, put him
2 under work restrictions, referred him to a
3 neurosurgeon at Lexington Brain and Spine. He
4 was asked to come back in to see Dr. Izard, the
5 company doctor, on June 26th, 2017. Dr. Izard
6 frankly gave him some pretty highly
7 inappropriate recommendations. Told him not to
8 take the medication he'd been prescribed, told
9 him not to go to the neurosurgeon and told him
10 that he had a urinary tract infection. Perhaps
11 not surprisingly his inappropriate
12 recommendations created some conflict between
13 Michelin management and Mr. Brailey. In any
14 case he went on and followed up, got an
15 appointment with a neurosurgeon, went back to
16 the emergency room and saw Dr. Scott Boyd at
17 Lexington Brain and Spine where he'd been
18 referred. He had an MRI, which showed a
19 herniated disc, he was not presenting with
20 radiculopathy, in fact he presented to Dr.
21 Izard with radiculopathy even though Dr. Izard
22 never documented it, but it is documented in
23 the hand-written pain diagram. And this was a
24 new symptom that began June 24th, 2017 and
25 that's what accounts for the finding with



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1 accident and causation in this case. And Dr.
2 Boyd was extensively deposed and he stuck by
3 his opinion that there was an incident on June
4 24th, 2017, that to a reasonable degree of
5 medical certainty was in injury that lead to
6 the need for surgery. So we move forward, the
7 case is tried. As I said, I believe the
8 finding from the Single Commissioner confirms
9 that there was an injury by accident and that's
10 proven by the medical evidence. The question
11 is did the defendants present sufficient
12 evidence to prove their affirmative defenses?
13 Now the Cooper case has three elements.
14 Employee must knowingly and willfully make a
15 false representation as to his physical
16 condition, the employer must rely upon the
17 false representation and it must have been a
18 substantial factor in the hiring, and there
19 must be a causal connection between the false
20 representation and the injury. So objectively
21 acknowledge Mr. Brailey did not disclose his
22 back injury from 20 years before. I would
23 suggest quite frankly that that having had such
24 a minor incident and no problems for 20 years
25 tends to show that this was not a knowing and



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1 willful misrepresentation but I understand that
2 is something that's up for y'all to decide. I
3 think the significance here is there's no proof
4 of reliance. The safety manager testified just
5 generically that company and its doctor are not
6 able to investigate the extent of the injury,
7 and it's impossible for plant doctors to
8 conduct investigations and examinations of the
9 employee. But they never produced documents of
10 a physical examination, they never produced
11 evidence of clearance from work, they never
12 presented the person who actually hired or
13 interviewed Mr. Brailey. So to say that this
14 was a significant or substantial factor in
15 hiring, there's no proof of that. This is
16 merely an allegation where they want to paint
17 this guy as a bad guy because they got a bad
18 answer on a questionnaire. And, you know, this
19 is not a minor thing. You've got to present
20 evidence to prove this defense. And the second
21 thing that they cannot prove is a causal
22 connection because you've got to prove it by
23 medical evidence. You can't simply say, well
24 he didn't disclose this on his examination, now
25 he's got an injury. Well, you know, there is



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1 no evidence to prove causal connection and in
2 fact when you think that Mr. Brailey saw two
3 doctors, June 11th and June 13th, who cleared
4 him to return to work without restrictions, he
5 was cleared. You cannot say that there is
6 evidence to show that there's any causal
7 connection between what happened 20 years ago,
8 not when he's cleared by two doctors who know
9 he's having back pain. There's no evidence to
10 support this defense and for that reason should
11 be reversed. The other defense the Single
12 Commissioner found is one I've seen raised many
13 times but never seen proven in any workers'
14 compensation case in my 20 years in practice.
15 That is the Capers defense. Capers, if Your
16 Honors recall, was a dishwasher who was
17 allergic to dish soap. He got contact
18 dermatitis, he filed a workers' compensation
19 claim because of this, claimed he was
20 permanently and totally disabled. That claim
21 ended and sometime thereafter he went back with
22 a new employer, developed the exact same
23 condition as he knew he would because he was
24 allergic to dish soap. That is deemed not to
25 be an accident because you have certainty that



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1 if you expose yourself to dish soap it is going
2 to trigger your allergy. So ---

3 COMMISSIONER BECK: Finish your thought.

4 MR. SAMUELS: Thank you. Merely because Mr. Brailey
5 had a back sprain 20 years ago, there is no way
6 that other than speculation one can say that he
7 knew with certainty that he would have
8 developed a herniated disc working at Michelin.
9 Therefore Capers cannot be proven. Thank you.

10 COMMISSIONER BECK: Mr. Beard.

11 ARGUMENT BY MR. BEARD:

12 MR. BEARD: Thank you, Commissioners. It's always
13 amazing when you go to these hearings and we
14 come in here and argue to the Full Commission
15 how it always feels like we're all in a
16 different room and we were all in a different
17 area.. Stephen said on June the 13th, '17, 11
18 days before the date of accident alleged in
19 this case, he had gone to his family doctor and
20 there was nothing of significance other than a
21 lumbar strain. What he didn't say is, read the
22 medical record, it says his client was having
23 10 out of 10 pain. When we deposed Dr. Boyd,
24 Dr. Boyd was asked, what does 10 out of 10 pain
25 mean, Dr. Boyd? This would have been 11 days



1 before this alleged accident. Dr. Boyd said,
2 that means you're in the worst pain that you
3 could ever possibly be in according to the
4 scales that we use to measure that. That was
5 the claimant's statement to his personal family
6 doctor of which he did not notify Michelin. So
7 Stephen laid the background out pretty well
8 with regards to what happened in this case.
9 What he left out were some pretty important
10 facts. He left out that his client denied any
11 kind of preexisting back problems on his Form
12 50, his client denied any preexisting back
13 problems on his application to come to work for
14 us where the specific questions are asked, have
15 you ever had or do you have back pain, ever,
16 any kind of back pain in your life? No. Have
17 you ever had back pain that kept you from
18 working or put you out of work? Answer, no.
19 Well during the course of the discovery in the
20 case he said he worked at Westinghouse after he
21 worked at this place in 1997, Richtex Bricks.
22 We didn't know anything about Richtex Bricks
23 because he didn't tell us about it during
24 discovery. We found out about it when we came
25 over here for hearing number one that didn't go



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1 forward because we found out there was a prior
2 workers' comp claim. So we got that
3 information and found out he did have a prior
4 workers' comp claim, did have a settlement. It
5 was a denied claim as well and in a minute I'm
6 gonna tell you how it's almost identical to
7 what we're here for now. So we get this
8 information, we find out about this prior back
9 claim, we get Westinghouse's personnel file.
10 Well they had a lot better questions on there
11 than Michelin did, I'll grant that. They asked
12 him point blank, you ever settle a workers'
13 comp case, ever had a workers' comp case, ever
14 had a back -- this is just a couple of years
15 after he left the job at Richtex Bricks.
16 Course he answered, no, no, no, no all the way
17 down the road and he lied to them as well. Now
18 his job at Westinghouse admittedly was not
19 heavy duty work. He admitted in his deposition
20 it was more sedentary type work, less than
21 anything he was doing at Michelin or had done
22 at Richtex Bricks. But he shows a history in
23 his applications of being an untruthful person.
24 He admitted in the hearing eventually on cross-
25 examination that he lied to everybody, he



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1 acknowledged that. He said, yes I lied. I
2 lied on my application. What he didn't do was
3 initially he said, I didn't lie when Stephen
4 asked him questions, and finally under cross-
5 examination he did -- he was admitting of not
6 being truthful about these things. The
7 importance of all the facts as they were laid
8 out are this, the Commissioner found that this
9 gentleman didn't meet his burden of proof that
10 he got hurt on June the 24th. Not -- the
11 Commissioner's finding says there was an
12 incident. There's no doubt he claims an
13 incident. There's no doubt about that. We
14 don't dispute that he said that later after he
15 went to a doctor and came back and called some
16 folks on that particular day. Of course he
17 violated protocol when he did that. This
18 gentleman worked for Michelin, he was still on
19 probationary status when this supposedly
20 happened. He worked for us for less than two
21 months when all of this happened. The first
22 three weeks was nothing but orientation sitting
23 in a classroom learning how to do it. He then
24 goes on June the 11th, June 13th before all of
25 this complaining of back problems which if you



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F819

1 read the medical records he said, I think it's
2 because I'm doing some work, I'm doing manual
3 labor, I'm not used to it. My back's sore.
4 And he says that. But then he tells his
5 doctor, I've got 10 out of 10 pain doing this
6 stuff. Not one single time has he ever come
7 back and tell a single individual at Michelin,
8 I have 10 out of 10 pain, I think it's being
9 caused by the job that I'm doing for you, so
10 I'm just gonna come on back and keep on doing
11 that 10 out of 10 pain job until something like
12 this ultimately happens and we have to deal
13 with denying a workers' comp claim because he
14 has not been truthful, he has fabricated things
15 throughout all of his applications and done
16 this type of information. We got lucky after
17 we got the report from the Commission about
18 Richtex Bricks, so we subpoenaed some records.
19 And we end up getting some medical records back
20 from this Richtex Bricks case. And I guess
21 there's no other way to do it but just to read
22 these records from Dr. -- says Dr. Norris in
23 1997. He saw him a couple of times. But what
24 he says is, patient will be placed on orwel,
25 Flexeril, heat and stretching. He is



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1 instructed on no heavy lifting times one week
2 and he is to return to clinic in one week. I
3 also discussed with this gentleman in no
4 uncertain terms if he has been having back pain
5 for three weeks, the entire time he has been
6 working for Richtex, if he does not respond
7 very well and very fast to some conservative
8 treatment it might be in his and Richtex's best
9 interest for him to find new employment. Comes
10 back a week later and sees the doctor, still,
11 of course, having severe pain, being in all
12 types of pain. He states he is having
13 difficulty sleeping at times all though at the
14 same time he tells me that the Flexeril knocks
15 him out at night. I do not have the records
16 from the Doctors Care, and he is unsure exactly
17 what the diagnosis was or what he was told. He
18 mentions that he knows something is wrong with
19 his back and he wants to go to a back
20 specialist. It seems today that Mr. Brailey
21 and I have a very difficult time communicating
22 and I certainly feel that with him having only
23 been an employee three weeks at Richtex and
24 mentioning a back specialist after he had been
25 improving on the therapy I had recommended, he

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1 may very well be in a litigation thought
2 process. I believe it certainly would be
3 prudent for both myself and Richtex Bricks to
4 send him to an orthopedic surgeon. Then he
5 says, he reports the pain in the middle of his
6 back also down the low back. Diagnosed with
7 lumbar and thoracic problems. It seems he
8 wants to be evaluated by a back specialist. I
9 feel like Dr. Bethea at Moore Clinic would
10 certainly put this to rest more expediently,
11 however as stated above I don't feel that
12 Richtex nor myself need to undertake any
13 liability with this young man who, in my
14 opinion, is unable to perform the job required
15 at Richtex and he was even told this the very
16 first day. I restated that today. I will
17 place him on no heavy lifting until he sees a
18 surgeon. He never saw a surgeon, he never did
19 what he was supposed to do. He was terminated
20 from this job by general employment release
21 along with a clincher because he could not
22 physically perform heavy manual labor, which is
23 what he applied to do with my client. So the
24 Commissioner found, because Dr. Boyd said that
25 he did not stand by his questionnaire, and of



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1 course there's no way the two of us can stand
2 here and read to you 50 something pages of a
3 deposition. But what he did say was, I can't
4 tell you whether he got hurt on June the 24th
5 or not, which is what he's claiming because
6 you've presented to me history that's not what
7 I was told. In fact he thought it was his
8 impression there were no problems prior to June
9 the 24th. Not only did he not know about June
10 the 11th or June the 13th just a couple of
11 weeks before the alleged date of accident, he
12 didn't know about this prior 24 years although
13 he finally read something in his record where
14 the claimant had said something about maybe 25
15 years ago I had some problem that went away
16 with no medical treatment whatsoever. Also an
17 untruth that he told to Dr. Boyd. So Dr. Boyd
18 did not stand by the date of accident. He
19 stood by all the things he thought needed to be
20 treated. He said that has nothing to do with
21 causation. He said I -- this is how I would
22 treat this person regardless of the cause of
23 his problems, but he did not stand by the date
24 of accident on causation. We have met every
25 single thing that is required by the McDevitt

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1 and Street case assuming you even get there.
2 You don't get there unless you disagree with
3 Commissioner Wilkerson that there is an injury
4 by accident. There is no injury by accident
5 because they can't meet the date of accident
6 proof required to a reasonable degree of
7 medical certainty from a doctor. More
8 importantly the Commissioner pointed out three
9 other things. He did point out that the Cooper
10 case would have defeated this claim. We met --
11 we put up four witnesses who testify, we rely
12 on the answers. If they don't tell the truth
13 then there's nothing the doctors can do, but
14 doctors can't do examinations on something that
15 you don't tell them about. The nurse said it
16 is easy to fake a physical examination if you
17 want a job bad enough for the job. You just go
18 in and you suck it up and you suck up the pain
19 and you get the job. So we've got reliance,
20 we've got a lie and we got the medical records
21 from this doctor right here that says he cannot
22 do heavy labor work, should not ever be doing
23 heavy labor work and was supposed to go to a
24 surgeon which he never did. Capers case,
25 again, Stephen says he's never seen it happen.



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1 I think I've probably seen it happen 50 times
2 in my workers' comp cases. So maybe when
3 you're on the defense side you see that a
4 little bit more. But in Capers it says that
5 when you have a condition like Capers had, and
6 he explained it do you, the gentleman who was
7 trying to wash the dishes and is allergic to
8 the dishwasher detergent. You do not have an
9 unlooked for event if you've had that kind of
10 situation in the past. So therefore it is not
11 an injury by accident. This gentleman -- it is
12 almost identical what he did at Richtex Bricks
13 and what he's now doing at Michelin except he
14 didn't lie on an application back then because
15 he didn't have to fill out one where he'd had
16 a preexisting accident.

17 COMMISSIONER BECK: All right. Your ---

18 MR. BEARD: Commissioner, also on the intentional
19 42-9-60, that wasn't addressed, but he also
20 ruled that that would have barred him for not
21 telling him about 10 out of 10 pain and going
22 forward. Thank you.

23 COMMISSIONER BECK: Mr. Samuels.

24 REPLY BY MR. SAMUELS:

25 MR. SAMUELS: Thank you, Commissioner. I get that



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1 Mr. Beard wants to make my guy look like a bad
2 guy, I know that. That's what we see when the
3 evidence supports an injury. If you can't win
4 on the evidence then you try to paint the
5 claimant as a bad guy. I get that, I know that
6 tactic. I know that my guy struggled on cross-
7 examination. He was confused, beat up,
8 whooped, I've seen that with Mr. Beard many
9 times. He's an excellent excellent attorney at
10 cross-examining these people. But let's get a
11 few things straight. First off, they knew
12 about Richtex because Mr. Brailey testified to
13 it in his deposition at November 25th, 2017.
14 So he was forthcoming. And he did go to a
15 doctor and the comments about how and why he
16 resigned, there's no evidence to any of that.
17 Second off let's talk about Dr. Boyd's opinion.
18 Dr. Boyd's opinion -- Dr. Boyd knew about the
19 previous stuff from June, 2017. He knew about
20 those previous exhibits. They were in his
21 record. Dr. Boyd said to a reasonable degree
22 of medical certainty in a questionnaire and in
23 his deposition that this was causally related.
24 The statement that he backed away from that is
25 simply false. There are other false statements



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PB26

1 in defendant's brief that I think very
2 important. For example, at page 7 of their
3 brief they say, he chose ---

4 COMMISSIONER BARDEN: Where are you on page 7 so we
5 can follow along?

6 MR. SAMUELS: I'm sorry.

7 COMMISSIONER BARDEN: That's okay?

8 MR. SAMUELS: I'm trying to get through my three
9 minutes here ---

10 COMMISSIONER BARDEN: I understand.

11 MR. SAMUELS: --- talking too fast.

12 COMMISSIONER BARDEN: I'm not holding you up, just
13 tell me where you are.

14 MR. SAMUELS: Sure.

15 COMMISSIONER BARDEN: On page 7.

16 MR. SAMUELS: On page 7, top of the first full
17 paragraph.

18 COMMISSIONER BARDEN: Okay.

19 MR. SAMUELS: They say, he chose to treat at Doctors
20 Care where he neglected to report that there's
21 a workers' compensation injury that he
22 previously met with Dr. Izard. In fact it
23 says, on the hand-written intake form he simply
24 wrote his name and signed it. But in the
25 narrative report from that they said that he



1 was seen by the company doctor at Michelin who
2 gave him no restrictions and this -- and the
3 question is, was it filed under workers'
4 compensation? He said, yes. So they are
5 misrepresenting in their brief what is in the
6 medical records and what my client did. On the
7 physical therapy intake form there's a question
8 whether it was related to a work accident. I
9 would agree that that was blank but he also
10 checked yes as to whether a workers'
11 compensation claim was filed. I would close,
12 Your Honor, by saying there's a lot of
13 arguments from counsel but there is no evidence
14 to refute Dr. Boyd's testimony and there's no
15 evidence to support any of these affirmative
16 defenses. Therefore as a matter of law they
17 have failed in their burden to prove their
18 affirmative defenses, Mr. Brailey has proved
19 his through medical evidence to a reasonable
20 degree of medical certainty. Therefore this
21 claim should be accepted and the Single
22 Commissioner's Order should be reversed. Thank
23 you.

24 (There being nothing further, the full commission
25 hearing concluded at 1:54 p.m.)



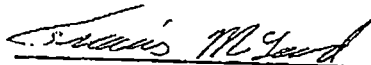
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(803) 252-3445 / (800) 822-0896
P828

CERTIFICATE

This is to certify that the within hearing consisting of twenty three (23) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on May 1, 2019.



Travis McLeod
Notary Public for South Carolina
My Commission Expires: January 3, 2027



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(829) 52-3445 / (800) 822-0896

MICHELIN NORTH AMERICA

Confidential Health Questionnaire for Post-Offer Examination

Name <u>Isaac D. Brachy</u>	Emergency contact
Address	Relationship
Phone	Emergency contact phone
	Family Doctor

Do you have problems with, or have you ever had medical attention for any of the following:

This section for Employee	YES	NO	Comment
1. Eye sight, color vision or depth perception	0	0	
2. Nose, throat, ear, sinus, balance or hearing problem	0	0	
3. Headaches or migraine	0	0	
4. Breathing or lung problems, asthma, bronchitis, emphysema, lung surgery or shortness of breath	0	0	
5. Have you ever had a heart attack or any other kind of heart, circulation, or blood pressure problems?	0	0	
6. Stomach, ulcer, digestive, or bowel problem	0	0	
7. Kidney, or bladder problem	0	0	
8. Hernia or rupture	0	0	
9. Skin rashes, eczema, or dermatitis	0	0	
10. Joint problems, e.g. shoulder, elbow, wrist, hand, finger	0	0	
11. Arthritis or recurrent joint problems, e.g. hip, knee, ankle, foot	0	0	
12. Bone fracture or disease	0	0	
13. Back injury, backache or pain	0	0	
14. Blood disorder or anemia	0	0	
15. Diabetes, thyroid or other gland problems	0	0	
16. Drug allergies, hay fever, or general allergy	0	0	
17. Emotional disorder, anxiety, depression, sleep disorder or chronic fatigue	0	0	
18. Seizures, fits, fainting spells, dizziness, sudden loss of balance, epilepsy, impaired coordination or dexterity	0	0	
19. Are you currently taking any medication?	0	0	
20. Have you previously worked in an industry exposing you to dust, chemicals, or solvents?	0	0	High Blood Pressure Example
21. Have you experienced a medical problem that affected your ability to perform your work?	0	0	
22. Have you been hospitalized? When? Why?	0	0	
23. List any surgical procedures you have undergone	0	0	
24. Have you smoked tobacco any time in the past 10 years?	0	0	
25. Have you ever experienced claustrophobia or panic attacks?	0	0	
26. Are you presently being treated for any condition that may inhibit your ability to work?	0	0	
27. Have you ever worn a respirator? Please describe usage.	0	0	
28. Do you wear dentures?	0	0	
29. Have you ever suffered heat stroke or illness related to a hot environment?	0	0	

Declaration and Authorization

I declare that all information contained herein is true and complete to the best of my knowledge. I understand and agree that any false, misleading or incomplete information will make me subject to disqualification from employment or subject to dismissal at any time. I hereby authorize Michelin to make any investigation it deems appropriate and expressly authorize any physician, hospital, clinic, or other person or entity Michelin may contact, to release particulars of my health, medical history, (other than genetic information) or any claim to Michelin. A photocopy of this authorization shall be as valid as the original.

Signature of Employee Isaac D. Brachy

Date 3.20.17

NA/EP Instruction: Clearance for PIV Operators (Form 2)

Name: Isaac Briley Chorus ID: _____ Date: 1/1/17

Based on my examination, this individual is:

☐ NOT MEDICALLY CLEARED to operate PIV.

☒ MEDICALLY CLEARED to operate a PIV.

☒ Without restrictions

☐ With Restrictions:

Comments (ex. further proficiency demonstration needed?)

Signature: [Signature] Medical Professional - RN, NP, PA, MD/DO

Date: 3/21/17

This section to be completed by SP

☐ Medically Accommodated – Company and employee have agreed that the employee can safely perform the essential functions of the job.

SP AGREEMENT _____

EMPLOYEE AGREEMENT _____

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-000556

RECEIVED
JAN 10 2020
SC Court of Appeals

Isaac Brailey, Employee/Claimant, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed
to be included by any of the parties and not any other material.



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January 10, 2020
Columbia, S.C.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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Workers' Compensation Commission

Appellate Case No.: 2019-000556

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v.

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

**SUPPLEMENTAL
RECORD ON APPEAL**

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SPRINGWOOD LAKE FAMILY PRACTICE

Isaac Brailey

12/4/97

Workers Comp - Richtex Bricks

S: This is a 31 y/o black male who has been working for Richtex for three weeks and of note he has had back pain for three weeks. This has been worsening over the past couple of days since a possible injury while lifting some bricks on Tuesday of this week. Denies any difficulty with ambulation, weakness in either lower extremity, bowel or bladder dysfunction, or tingling in upper or lower extremities. He is right hand dominant. He also reports some right hand and arm tingling in the AM. This is not pain but simply tingling. Prior to being employed in Richtex he was an industrial machine operator. He has no previous history of back problems. Current medications none. Medicine allergies none.

O: WT 222. BP 134/70. Pulse 72. Physical exam is a well nourished, well developed, calm, cooperative black in no acute distress. Back exam shows tenderness to palpation of the intervertebral space at L2-3. Also there is pain with forward flexion, although he has full ROM of his back and flexion extension and lateral flexion. There is tenderness and muscle spasm in the bilateral lumbar region without any significant swelling. Bilateral straight leg raise is negative. Muscle strength 5/5 and DTR's 2+. Internal and external rotation of the thighs illicit no pain. Also there is tenderness at the intervertebral space of T11-12. Bilateral upper extremities are neurovascularly intact with 5/5 muscle strength, 2+ DTR's and sensation is symmetrical bilateral upper and lower extremities and trunk. LS spine films are obtained and show no significant abnormality except for some questionable abnormal posterior wedging of L5 but there is no spondylolysis or spondylolisthesis.

A: 1. Lumbar strain.

P: Patient will be placed on Oruvail, Flexeril, heat and stretching. He is instructed on no heavy lifting times one week and he is to return to clinic in one week. I also discussed with this gentleman in no uncertain terms if he has been having back pain for three weeks, the entire time he has been working for Richtex, if he does not respond very well and very fast to some conservative treatment it might be in his and Richtex's best interest for him to find new employment.

G. Thomas Norris, III, M. D.

GTN / jdh

001

SPRINGWOOD LAKE FAMILY PRACTICE

Issac Brailey

12/11/97

Workers Comp - Richtex Bricks

S: Last week on 12/4/97 patient presented for his first visit here.. He is a 31 y/o male and had been working for Richtex for three weeks.. He had noted back pain and soreness for three weeks. Then he reported this vague episode of lifting some bricks and he felt that he may have injured himself at that time although he denied any significant change at the time of this incident. Of note, three days after he saw me, he was at Doctors Care wanting a second opinion, although he was not following my instructions. He had only been stretching once per day. He had been taking Oruvail, Flexeril as well as applying the heat. He states he is having difficulty sleeping at times although at the same time he tells me that the Flexeril knocks him out at night. I do not have the records from the Doctors Care and he is unsure exactly what the diagnosis was or what he was told. He mentions that he knows something is wrong with his back and he wants to go to a back specialist. It seems today that Mr. Brailey and I have a very difficult time communicating and I certainly feel that with him having only been an employee three weeks at Richtex, and mentioning a back specialist after he had been improving on the therapy I had recommended, he may very well be in a litigation thought process. I believe it certainly would be prudent for both myself and Richtex bricks to send him to an orthopaedic surgeon. LS spine films were obtained last week. I read them as essentially normal except for some wedging of L5. However, the dictated radiologist reading is not available today. Patient continues to deny weakness in either extremity, difficulty with ambulation, bowel or bladder dysfunction, or tingling in either upper or lower extremity. He reports the pain is in the middle of his back, hurts sometimes when he is sitting and when he bends forward. Current medications are Oruvail and Flexeril. Medicine allergies none.

O: WT 218. BP 118/74. Pulse 84. No physical exam is performed today secondary to what I felt was a very hostile encounter.

A: 1. Lumbar strain.
2. Thoracic strain.

P: Patient does report on Oruvail, heat, Flexeril and stretching, this has improved. However, it seems he wants to be evaluated by a back specialist. I feel like Dr. Bethea at Moore Clinic would certainly put this to rest most expediently, however, as stated above, I don't feel that Richtex nor myself need to undertake any liability with this young man who, in my opinion, is unable to perform the job required at Richtex and he was even told this the very first day. I restated that today. I will place him on no heavy lifting until he sees the surgeon.

G. Thomas Norris, III, M. D. / jdh

002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Workers' Compensation Commission

Appellate Case No.: 2019-000556

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JAN 17 2020
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v.

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and Safety National Casualty Corp., Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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January 17, 2020
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1708221

Appellate Case No. 2019-000556

RECEIVED

JAN 30 2020

SC Court of Appeals

Isaac D. Brailey, Claimant, ... Appellant,

v.

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

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in finding that Isaac Brailey failed to meet his burden of proof that he suffered an compensable injury by accident arising out of his employer.
2. Whether the Appellate Panel erred as a matter of fact and law in finding Michelin proved the elements of the Cooper v. McDevitt and Street defense, as Brailey did not make a knowledgeable, wilful and material misrepresentation on his application for employment; that Employer relied on the physical examination clearing Brailey for work (confirmed later by Dr. Izard); and there is no evidence of a causal connection between any alleged misrepresentation and the ultimate work-related injury.
3. Whether the Appellate Panel erred in finding this claim was barred by Capers v. Flautt when no factual findings were made to support such a defense and when the defense does not apply to this case in that there was no evidence that Claimant knew or could have known with certainty that he would injure his back at Michelin.
4. Whether the Appellate Panel erred in finding as a matter of law that this claim was barred by Section 42-9-60 when no factual findings were made to support such a defense and there is no evidence that Brailey intentionally and willfully caused injury to himself by continuing to work full duty when no doctor put him under work restrictions until his accident on June 24, 2017.
5. Whether the Appellate Panel erred in finding Brailey was not a credible witness as such finding is not supported by substantial evidence; and even if it where, such a finding is insufficient to support a denial of the claim.

STATEMENT OF THE CASE

This appeal from the Workers' Compensation Commission arises out of job-related injuries suffered by the Appellant, Isaac Brailey, on June 24, 2017. Brailey's Employer, Michelin, denied his claim on July 13, 2017. [R.P. 135].

Brailey filed a Form 50 (Notice of Hearing) on October 4, 2017, alleging he suffered an injury by accident arising out of and in the course of his employment with Michelin on June 24, 2017. Brailey sought medical treatment and temporary total disability compensation. [R.P. 47].

Michelin and its insurance carrier, Safety National Casualty Corporation, timely filed a Form 51 (Employer's Answer to Request for Hearing), on November 3, 2017. Michelin asserted a general denial of all allegations asserting "Claim under investigation." Michelin also pled all affirmative defenses available under Title 42 and common law. [R.P. 49].

The case was set for a hearing on September 26, 2017. Respondents moved for multiple continuances, resulting in the hearing being reset for December 14, 2017; January 31, 2018; February 5, 2018; and February 28, 2018. The case was tried before on March 23, 2018.

Commissioner Avery Wilkerson issued a Decision and Order denying the claim on November 8, 2017. In his Order, he held:

IT IS THEREFORE ORDERED that claimant failed to prove he sustained a compensable injury to his back of [sic] left leg on June 24, 2017. Moreover, even if he had met his burden of proof, his claim would be barred by *Capers v. Flautt*, §42-9-60, and the fraud in the application for employment defense. [R.P. 24].

Appellant timely filed his Form 30 (Notice of Appeal) to the Full Commission. Oral arguments were heard on October 22, 2018. The Appellate Panel issued a Decision and Order affirming with amendments on February 28, 2019. [R.P. 25-46]. This appeal followed.

STATEMENT OF THE FACTS

This is an appeal from a Form 50 hearing in a denied case. Isaac Brailey, the employee in this workers compensation case, is 51 years old. Brailey was employed as a production worker at Michelin. Brailey sustained a work related injury to his back on June 24, 2017. The Commission denied his claim for the reasons set forth in the Argument section of this brief.

Approximately twenty years earlier, Brailey had worked for Richtex Brick for about three weeks. On approximately December 4, 1997, Brailey felt pain in "the middle of the back . . . just below the ribs." [R.P. 408, line 25-p. 409, line 11]. Brailey no longer has pain in this area of the back. He currently has pain "on my left side . . . above my hip or right at my hip" resulting from his June 24, 2017 work accident at Michelin. [R.P. 409, line 12-p. 410, line 4].

In 1997, Brailey went to two doctor's visits with the Richtex company doctor, Dr. Thomas Norris. Brailey's employer was "very cooperative. I went to physical therapy, you know, they said it might have a - a muscle strain; I don't know but they - I went to physical therapy and non-restriction on certain things." [R.P. 410, lines 5-12].

Brailey saw Dr. Norris on December 4th and 11th, 1997. X-rays were "essentially normal. . ." He was improving with therapy. Consistent with his hearing testimony, Dr. Norris confirmed "He reports the pain is in the middle of his back . . ." He noted no symptoms of weakness or tingling in either extremity. Dr. Norris diagnosed Brailey with lumbar and thoracic strain. Dr. Norris - plainly believing that Brailey had suffered no serious injury referred him to Dr. Bethea (an orthopaedic surgeon) who "would certainly put this to rest most expediently . . ." He stated "I will place him on no heavy lifting until he sees the surgeon." [Supp. R.P. 1-2].

Brailey never saw Dr. Bethea. He settled his claim on a clincher (full and final release) for

a nominal sum (\$2,500.00) in June 1998. [R.P. 149].

For the next twenty years, Brailey had no problems with his back and no workers' compensation claims. Brailey worked as a quality control technician for Westinghouse for 16 years, until he was laid off in a reduction in force in March 2016. During his time at Westinghouse, Brailey had to lift pellets and containers, work with pipe wrenches, and push carts weighing 6-700 pounds. He had no back injuries at Westinghouse and was able to pass a physical examination every year he was there. [R.P. 413, line 1-p. 414, line 17].

Brailey worked briefly as a correctional officer for the Department of Juvenile Justice before joining Michelin in April 2017. He had long hoped to join Michelin and stay there until retirement.

As part of the hiring process, Michelin required employees to undergo a physical examination by a company doctor before beginning work. When Brailey filled out his health questionnaire for Michelin on March 2, 1997, he admittedly did not disclose his previous back strain from 20 years before.¹ [R.P. 176; p. 420, line 17-p. 422, line 21]. Brailey was given a complete physical exam by Dr. Tomarchio and cleared for work with Michelin. Brailey testified the physical examination was thorough, including examining his ability to turn, bend, lift and squat. He experienced no pain during the examination. [R.P. 624, line 15-p. 625, line 1; p. 831].

Other Michelin employees who had undergone the post-offer physical confirmed the examination was thorough. Jermaine Lemon, Brailey's trainer, confirmed that even though he had no previous problem with his back, the company doctor still examined his back to make sure he

¹Brailey also left off his address, phone number, emergency contacts and family doctor. This would be consistent with his testimony that they hurried him through the process and he "just filled it out as quickly as possible." [R.P. 176; p. 420, lines 6-12].

“could twist, turn, bend, stoop, lift without any problems.”² [R.P. 683, line 23-p. 684, line 20].

Mark Gross, Michelin’s Safety Manager testified that once Dr. Tomarchio cleared Brailey for full unrestricted duty, Michelin had what they needed to know and Brailey was good to go. [R.P. 778, lines 14-22].

Brailey started working for Michelin on April 17, 2017. The work was strenuous and, as expected, caused body aches – eventually including back pain. 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.” His concern was ensuring it was pain from working a new job rather than an injury. [R.P. 778, line 25-p. 781, line 1].

After working on the job for almost two months, Brailey decided he needed to be checked out by a doctor for back pain that had been going on for about a week. On June 11, 2017, Brailey went to Urgent Care. He reported “low back pain particularly in the left lumbar paraspinal region for the past several days. Patient was doing some heavy lifting at work prior to the onset of pain. He

²Michelin’s other three witnesses knew nothing about the examination. Plant nurse Christy Sirois “assumed it was thorough,” but had no first hand knowledge.” [R.P. 746, lines 3-5]. Even though he is a Training Manager who presumably would have undergone a similar physical exam when he was hired, Troy Lowman testified he was “not familiar at all with the physical examinations and the questionnaires . . .” [R.P. 707, lines 13-18]. Mark Gross, the Safety Manager, agreed Michelin wanted to be sure the doctors do a thorough exam, but testified “Personally, I’m not aware of exactly what the physical exam is, so, I can’t tell you how thorough it is.” [R.P. 777, lines 7-17].

denied any history of prior back rales. [sic] No direct trauma. No incontinence or radiation.” [R.P. 67-69]. Brailey was given a muscle relaxer and pain medication. He was not placed under any work restrictions.

Two days later, on June 13, 2017, Brailey went to Dr. Marom, his family doctor, reporting “left lower back pains for the past 2 weeks.³ Has had new job at Michelin, moving heavy stuff – there now for about past 2 weeks. Pain is 10/10 with certain movements. . . . no radiation into legs.” [R.P. 61]. Dr. Marom diagnoses “acute low back . . . no radicular signs/symptoms . . . discussed likely strained muscles due to heavier work load at new job.” [R.P. 65].

Brailey continued to work for Michelin with no additional issues for the next 11 days. On Saturday June 24, 2017, he was working in the early morning “stretching the rubber on tires” when he felt a sudden sharp pain in his back. He reported the issue to Jermaine who told him “yeah, I know that hurt you.” [R.P. 439, line 3-p. 440, line 5]. At the end of the shift, Brailey went to the nurses station. He discovered it was not open during third shift weekends, so he went to the emergency room at Lexington Medical Center, arriving shortly after 9:00 am. [R.P. 440, lines 6-16].

At the emergency room, brailey reported “lower back pain to left side since he was working last night, states does a lot of lifting/pulling and started hurting then.” [R.P. 72]. Brailey was given medication and – unlike his previous two doctor visits – taken out of work for three days.⁴ He was

³This was the first time Brailey ever reported back pain to Dr. Marom. Previous records dating from before he started working at Michelin show no history of back pain. [R.P. 55-59].

⁴The fact no doctors put Brailey under work restrictions until after the June 24, 2017 work accident is a critical fact in this case. Troy Lowman testified “If the pain is affecting their life *and they can’t work* – they can’t function properly; yes I’d want them to report an accident.” [R.P. 708, lines 12-18 (emphasis added)]. Consistent with Lowman’s testimony, Brailey reported his accident the same day it happened – which was also the first time any doctor wrote him out work.

also referred to a neurosurgeon at Lexington Brain and Spine. [APA page 25].

Brailey called his training supervisor, Troy Lowman, from the emergency room. He told Lowman "he thought he hurt [his back] at work." [R.P. 701, line 14-p. 702, line 4]. Lowman testified he explained to Brailey how he should have reported the accident to the Health Center and Plant Nurse. When Brailey told him he done so and both were closed, he told Brailey he should have reported to Security. He and Brailey then discussed how to file a workers' compensation claim. [R.P. 702, line 24-p. 703, line 10].

After speaking with Brailey, Lowman contacted the plant nurse, Christie Sirois. Sirois called Brailey. He told her "he was seen in the ER for lower left back pain that started on 6/24/17 while stretching and pulling rubber." Sirois told Brailey not to take the medication prescribed by the emergency room and set him up to see the company doctor, Dr. Izard, on Monday morning. [R.P. 142].

On Monday morning, June 26, 2017, Brailey reported to Dr. Izard. On intake, he filled out a pain diagram showing left sided back pain with numbness radiating down his left buttock to just below his knee. [R.P. 82]. Dr. Izard documented "pain located in the Upper Leg, left side of back, left leg numbness . . ." [R.P. 83]. Dr. Izard recorded:

There seems to be a significant degree of symptom amplification and magnification by the employee. I explained to the employee that at the worst he has a back strain which should require only treatment with NSAIDs and a muscle relaxant. I also explained to him that *he may very well have a urinary tract infection* since he was having difficulty urinating and having pain in the CVA area on the left side. He was advised to discontinue taking Percocet because of the high risk for addiction and the high risk for hyperalgesia related to the Percocet. The employee was also *advised not to follow-up with the neurosurgeon* that he will follow-up with me at Michelin medical department on Wednesday, 06/28/2017. [R.P. 84(emphasis added)].

Dr. Izard gave "no work restrictions at this time." [R.P. 86].

Concerned with the contradictory advice and the misdiagnosis of a urinary tract infection, Brailey went back to the emergency room the next day, on June 27, 2017. He stated “he has numbness in his right leg and also states when he coughs it hurts his back.”⁵ He was diagnosed with left sided sciatica, given an injection, oral steroids and Percocet, referred to Lexington Brain and Spine, and taken out of work for another three days. [R.P. 87-96].

The next morning, Brailey called Christie Sirois. He told her he could not see Dr. Izard that day because he did not have a ride. She asked if he is “treating this personally and he stated no that it was work related.” [R.P. 142].

On Friday, June 30, 2017, Brailey went to Doctor’s Care. He reported “he was hurt at Michelin. He says the Michelin doc told him to put ice on it and he had no work restrictions. He has muscle spasm, loss of balance. He has been seen twice in the ER for this problem.” Given that he was already on medication from the ER, the doctor had nothing more to offer and “I told he and his wife he needed to see the ortho.” [R.P. 99].

Brailey never returned to work at Michelin. Michelin terminated his employment “for not being a good fit during your probationary period” on July 6, 2017. [R.P. 137]. Michelin’s carrier formally denied the claim on July 13, 2017. [R.P. 135].

On July 24, 2017, Brailey started treatment with a neurosurgeon, Dr. Scott Boyd. He reported the June 24, 2017 injury at Michelin. His “pain has been increasing and is now radiating down his LEFT leg towards the thigh with numbness in the LEFT calf.” An MRI and physical

⁵The reference to *numbness in his right leg* appears to be a typographical error as Brailey was diagnosed with *left sided sciatica*. When asked about the reference to right leg numbness, Dr. Boyd testified “I believe that could be either a patient reporting error or a physician recording error, as everywhere else in the records at other – it seems to be left-sided.” [R.P. 341, lines 15-18].

therapy were ordered. [R.P. 106-109]. Brailey also reported to Dr. Boyd that "he hadn't had previous back problems, except maybe 25 years ago he had an episode that resolved without any treatment." [R.P. 112; p. 309, line 17-p. 310, line 6].

The MRI showed a "Left paracentral disc extrusion at L4-5 with a large superiorly migrated extruded disc fragment measuring 13 x 12 x 14 mm, which results in complete effacement of the left lateral recess, with contact and likely compression of the transiting nerve roots." [R.P. 110].

Dr. Boyd opined Brailey "needs surgery" and kept him out of work. Brailey wanted to avoid surgery, so physical therapy was provided. [R.P. 123].

On November 19, 2017, Dr. Boyd completed a questionnaire in which he provided causation to the work accident to a reasonable degree of medical certainty. [R.P. 125].

Dr. Boyd was deposed on January 15, 2018. After reviewing all medical records, he testified:

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. [R.P. 344, lines 8-19].

Dr. Boyd added the pain running down his left leg in a radicular pattern "would be consistent with a disk herniation" which is what he found on the MRI. [R.P. 344, line 20-p. 345, line 1]. Dr. Boyd opined to a reasonable degree of medical certainty "I believe that, more likely than not, he injured his lumbar spine at his employment, including some episode on June 24th." [R.P. 345, line 15-p. 346, line 4]. Dr. Boyd maintained his opinion on causation throughout the deposition. There is no

conflicting medical evidence.⁶

As of the hearing, Brailey remained out of work waiting on surgery.

The case was tried before Commissioner Wilkerson on March 23, 2018. By Decision and Order dated July 10, 2018, Commissioner Wilkerson denied the claim. He made various findings, the most important being:

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. I find the claimant was unable to return to work after June 24, 2017 due to a separate incident. I find the June 24, 2017, incident is not compensable based upon the greater weight of the evidence and the other reasons stated within this finding. [R.P. 23, Finding of Fact 10].

The Commissioner primarily denied the claim based on finding Respondents proved the affirmative defenses set out in Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973), Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct.App.1991) and S.C. Code Ann. § 42-9-60 (2007) (“No compensation shall be payable if the injury . . . was occasioned by the . . . wilful intention of the employee to injure . . . himself . . .”).

The Appellate Panel affirmed with minor modifications.

⁶Respondents moved shortly before the hearing to reconvene the deposition of Dr. Boyd to cross-examine him on the 1997 medical records from Dr. Norris. The motion was denied although Commissioner Wilkerson reserved to hold a final decision until after hearing testimony.. At one point in the hearing Appellant withdrew his previous objection to reconvening the deposition – at which time Respondents announced they were withdrawing the motion. Commissioner Wilkerson accepted the withdrawal and closed the record. [R.P. 23, Finding of Fact 11].

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (2007).

“[T]he guiding principle undergirding our workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission’s decision “must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Wynn v. People’s Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission “based on rank speculation . . . cannot now be used as the basis for denying [an injured worker’s] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

The Cooper defense (also known as the “fraud in the application” defense) is a common law doctrine whereby the employment relationship can be voided by the employer under certain conditions. The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers’ Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. It is South Carolina’s policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964).

ARGUMENT

1. Brailey met his burden of proof by showing by medical evidence that he suffered a compensable injury by accident.

The Single Commissioner found as a fact that “I find the claimant was unable to return to work after June 24, 2017 due to a *separate* incident.” [R.P. 23; Finding of Fact 10 (emphasis added)]. The Appellate Panel *sua sponte* modified this finding – without explanation – to state “We find the claimant was unable to return to work after June 24, 2017 due to a *previous* incident.” [R.P. 45, Finding of Fact 10 (emphasis added)]. It is not clear what the Appellate Panel meant by this change, as the Appellate Panel nonetheless acknowledges in the same finding that there was a “June 24, 2017, incident.”

It appears likely that the Appellate Panel was referring to the previous doctor visits for work-related back pain in the weeks prior to the June 24, 2017 “incident.”⁷ If those episodes are the beginning of Brailey’s back injury – with the June 24, 2017 accident culminating in the herniated disc – then the Commission would be bound to find a compensable injury. Those doctors uniformly opined the back pain was the result of heavy lifting on a new job, albeit not yet rising to the level of a compensable injury. Conversely, if as anticipated to be argued by Respondents, the current low back herniated disc relates back to the mid back strain from 20 years ago, then the Appellate Panel’s decision is not supported by substantial evidence. It would be rank speculation to assume or conclude that this injury was merely a continuation of the back strain from 20 years ago. Brailey had

⁷On June 11, 2017, Brailey went to Urgent Care where he reported “doing some heavy lifting at work prior to the onset of pain.” [Claimant’s APA pages 13-15]. On June 13, 2017, Brailey went to his family doctor who noted he had a new job at Michelin moving heavy stuff and diagnosed him with “likely strained muscles due to heavier work load at new job.” [Claimant’s APA page 11].

no back problems and had received no treatment for back pain for *twenty years*. He worked a physical job at Westinghouse for 16 years with no problems. He only developed back pain when he had been working at Michelin for a number of weeks – and even then he had never suffered from radiculopathy (consistent with a herniated disc) until June 24, 2017. Furthermore, not one doctor who saw him from his time at Michelin until June 24th took him out of work or place restrictions on his work activities. In short, the amendment to the Single Commissioner's finding is of no significance.

While the Appellate Panel found “ the June 24, 2017, incident is not compensable,” the finding confirms Brailey proved that he had injured his back while working at Michelin on June 24, 2017. He has therefore met his burden of proof on showing he suffered an injury by accident arising out of and in the course of his employment. S.C. Code Ann. § 42-1-160 (2007).

The fact Brailey had back pain from his new job prior to the accident does not change this analysis (although it does mean that if the injury began on or about June 11, 2017, then he has proven an injury on that date and the Commission should be reversed). When Brailey went to Urgent Care and his family doctor, he had back pain but *no radicular signs or symptoms*. It was not until the June 24, 2017 work accident that he developed radiculopathy.

This is dramatically demonstrated by the pain diagram he filled out for Dr. Izard on June 26, 2017. [R.P. 82]. Every medical report from that time on consistently shows left sided radiculopathy – a symptom notably absent from the June 11th and 13th examination (and absent from the 1997 medical records).

Clear *objective proof* of the new injury is shown by the July 29, 2017 MRI. The MRI showed a large extruded disc fragment measuring 13 x 12 x 14 millimeters (about ½ an inch) compressing

the L4-5 nerve roots. [R.P. 110]. Dr. Boyd opined this was proof of causation.

There is no medical evidence showing a different incident nor is there medical evidence that the radiculopathy and herniated disc existed before the June 24, 2017 work accident. Despite this, the Appellate Panel found that "the claimant has failed to carry his burden of an accident being sustained on June 24, 2017, due to his lack of credibility,⁸ due to the lack of sufficient medical evidence to support the allegations, and moreover, due to medical evidence to the contrary." [R.P. 45, Finding of Fact 10]. This is patently wrong. There is *no* contrary medical evidence – other than perhaps the misdiagnosis of a urinary tract infection by Dr. Izard. See McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Furthermore, Brailey reported the June 24, 2017 work accident the same day it happened, as documented by Troy Lowman and Nurse Sirois. As medical was closed early Saturday morning, he went to the emergency room for immediate treatment where the doctors recorded the history of his work accident.

Brailey most specifically proved his injury by accident by the reports and testimony of Dr. Scott Boyd. Dr. Boyd opined specifically that the work accident of June 24, 2017 caused the herniated disc.⁹ [R.P. 125, 344, line 8-p. 346, line 4].

⁸Credibility is addressed later in this brief at Issue 5, page 31-36.

⁹Dr. Boyd testified to a reasonable degree of medical certainty that:

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. 345, line 15-p. 346, line 4].

The Commission “found causation is not provided in the medical records because Dr. Boyd had no knowledge of the extent of claimant’s prior back issues.” [R.P. 44, Finding of Fact 5]. This is belied by the deposition testimony. Dr. Boyd was examined in detail on Brailey’s previous records from Urgent Care, the emergency room, and Dr. Izard. Brailey had told Dr. Boyd’s PA about the previous doctor visits when he first presented to Dr. Boyd’s office. After reviewing those records and Brailey’s deposition testimony, Dr. Boyd testified “It sounds like he was getting a sore back from the work he was doing at Michelin since according to his testimony, it began after he started doing the physical work at Michelin.” Dr. Boyd confirmed that at this point (prior to June 24, 2017), there was nothing that would warrant a referral to a neurosurgeon. [R.P. 337, lines 3-10].

If this finding is supposed to imply that Dr. Boyd’s opinion can be rejected because he was not shown medical records from twenty years ago, this would be error as it is entirely speculation on the part of the Commission. Those stale medical records have no probative value. Not only that, but the twenty year old records describe pain to an entirely different part of the back, explicitly rule out radiculopathy, and show no evidence of a herniated disc. [Supp. R.P. 1-2]. Dr. Boyd specifically based his causation opinion on “the first evidence of radicular symptoms down the left leg” on the June 26, 2017 doctor visit with Dr. Izard two days after the work accident. [R.P. 345, line 15-p. 346, line 4].

It is rank speculation for the Commission to presume that twenty year old records which rule out radicular symptoms would have changed Dr. Boyd’s opinion. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(where a finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence). If the Commission

truly believed the old records had dispositive value, then the Single Commissioner or Appellate Panel should have ordered Dr. Boyd's deposition to be reconvened.

Furthermore, Dr. Boyd had knowledge that Brailey had an episode of back pain roughly twenty-five years prior. [R.P. 309, line 24-p. 310, line 2; Claimant's App page 58]. Respondents had every opportunity to question him about this history. Moreover, they had the opportunity to reconvene Dr. Boyd's deposition, but – presciently – withdrew their motion at the hearing when they (as did Respondent's counsel) perceived correctly from Commissioner Wilkerson's demeanor and aggressive challenging of Brailey that Michelin was likely to prevail without reopening the deposition.

Whether the accident is not compensable because Michelin proved one or more of its affirmative defenses is a separate issue. The Commission's finding of an "incident" at Michelin on June 24th that took Brailey out of work is confirmation that he actually proved his prima facie case. Proof is amply supplied by Dr. Boyd's expert medical testimony. There is no substantial evidence to support a finding that he did not injure his back in an accident arising out of and in the course of his employment at Michelin on June 24, 2017 or one of the earlier dates when he sought medical treatment for non-radicular back pain. Therefore, the Court should reverse and find that Brailey met his burden of proof.

2. Respondents cannot prove the elements of the fraud in the application defense.

At the hearing, the Commission held Respondents proved the so-called "fraud in the application defense" adopted in Cooper v. McDevitt & St. Co., 260 S.C. 463, 196 S.E.2d 833 (1973).

[If an employer proves the Cooper defense, it can then void the employment relationship. If there

is no employment relationship, the Commission has no subject matter jurisdiction over the claim to award benefits.¹⁰

As an affirmative defense, three elements must be proven by an employer to bar a workers' compensation claimant from receiving benefits when he makes false statements in an employment application: "(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 record shows there is insufficient evidence for Respondents to have proven all elements of the *fraud in the application* defense.

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

The Appellate Panel found:

We find based on the greater weight of the evidence, there is clearly fraud in the application. . . . The claimant with knowledge falsely stated he never had prior back issues. [FC Order, Finding of Fact 7, page 20].

Respondents introduced a *Confidential Health Questionnaire for Post-Offer Examination* completed by Brailey on March 2, 2017. In the questionnaire, was asked "Do you have problems with, or have you ever had medical attention for any of the following?" Brailey checked "no" to the

¹⁰The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009).

questions about “Back injury, headache or pain” and “Have you ever experienced a medical problem that affected your ability to work?” [R.P. 176].

Strictly speaking, Brailey’s responses to these two questions were untrue because, although Brailey had not had any back problems or pain in over twenty years, he previously had a back injury in 1997 for which he had medical attention and that affected his ability to work for 2 ½ weeks. He also 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 – which seems to be the most germane – 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 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. Indeed, one might note that the questions are so broad as to be meaningless. Is there anyone alive who has *never* had a headache or pain?

Furthermore, there is no evidence that Brailey’s failure to disclose a minor back injury from twenty years ago could rise to the level of a *knowing and wilful* false statement intended to deceive Michelin. The Commission has previously held that “stale” medical records have no probative value. Medical records from twenty years prior showing nothing more than lumbar strain are about as stale as can be. They cannot be considered probative of anything relevant to Brailey’s current condition. 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).

The seminal case on the “fraud in the application” defense is instructive. The claimant in that case, Jimmy Cooper, had suffered a “serious injury to his back, a ruptured disc” in a previous

workers' compensation claim. He was out of work for thirteen months following that injury and "was given a fourteen per cent disability to the lumbar spine." Two years later, Cooper applied for a job as a welder with McDevitt & Street. The employer required him to fill out a pre-employment questionnaire wherein he was asked "Have you now or have you ever had . . . back trouble?" His answer was "no."

Cooper admitted he purposefully deceived the employer to get a job, knowing he would be fired off the job if the employer knew about it. Referencing Cooper's testimony, our supreme court stated "Admittedly, the foregoing answer of the appellant was false, intentional and a material misrepresentation." Cooper at 467, 196 S.E.2d at 835.

The difference here is that Cooper knew he would get fired if the employer knew about his 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. He was specifically 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.

Although Safety Manager Mark Gross testified on direct that Michelin would probably not offer Brailey a different job within the plant had he not been cleared to be a PAP Operator after the physical examination – even if Michelin had known about the back pain from 1997 – he also testified that if the doctors cleared Brailey to work full unrestricted duty, Michelin had "what you needed to know" and they "were good to go." [R.P. 778, lines 14-24; p. 776, lines 19-24].

And this is the point. Unlike Jimmy Cooper, Brailey's omission of the 1997 workers' compensation claim was minor. The Cooper court required the statement to be "false, intentional

and a *material* misrepresentation.” Cooper at 467, 196 S.E.2d at 835 (emphasis added). There was no reason for him to intentionally and wilfully hide it from Michelin because it would not have made a lick of difference. The existence of a 20-year old back strain is not a material fact in this litigation. Whether or not he got hired turned on whether he passed the physical exam – which of course he did. [R.P. 831]. In fact, not only did he pass the physical exam, he was cleared to work by two more doctors on June 11th and June 13th even after he developed back pain from getting used to his new job. And *Michelin’s own doctor*, Doctor Izard, cleared him for work even *after he had been injured* on June 24th and been taken out of work by the emergency room doctor.

It is entirely too easy to paint people with a broad brush and assume that because someone rushes through a broadly worded questionnaire, that person must *ipso facto* be committing fraud.¹¹ Brailey was simply looking for a new career at a place he wanted to ultimately retire from. He already had a track record of being a long standing loyal employee at Westinghouse, and he gave up a good job at DJJ to work at Michelin. He is not a fraud. He did not try to put his initial onset of back pain on Michelin. He never even attempted to file a workers’ compensation claim until he was written out of work and referred to a neurosurgeon.

There is simply no evidence of a wilful intent to materially mislead Michelin. On this question, the Court can take its own view of the evidence. The Court should find Michelin failed to prove that Brailey wilfully and intentionally made a false representation about a material fact to induce Michelin to hire him. Therefore, the Commission should be reversed on this issue.

¹¹Brailey also left off his address, phone number, emergency contacts and family doctor. [R.P. 176].

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

The second part of the Cooper test requires that “employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.” See Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009). The Appellate Panel found “the defendant-employer relied on the claimant’s misrepresentation on his post-hire medical questionnaire,” thus finding Respondents proved the second element. [R.P. 44, Finding of Fact 7]. Ordinarily, reliance is the easiest element to prove as it should only require testimony of the person who hired the employee, along with proof that the hiring was based solely on the questionnaire when no physical examination was done. However, when a company doctor performs a physical examination and clears the employee for full duty work, the reliance issue becomes more complex.

For the reliance prong, Michelin presented testimony from Mark Gross, the Safety Manager, that Michelin relies on the questionnaire in hiring employees. Notably, the actual person who hired Brailey did not testify.

Gross testified that he “rel[ied] on the answers that [my] employees give [me] on those documents.”¹² [R.P. 775, lines 3-5]. Superficially, this might be enough – except for the fact that

¹²One might presume Michelin would comply with the Americans with Disabilities Act wherein it would obtain *post-offer* medical clearance to make *placement* decisions; not *hiring* decisions. See Small v. Oneita Indus., 318 S.C. 553, 554-55, 459 S.E.2d 306, 306-07 (1995) (noting an agent of the employer testified Small's prior injury would affect job placement decisions, not hiring decisions, and affirming the denial of workers' compensation benefits due to a false representation on an employment application). See, also Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009) (“Had Brayboy given truthful information, Workforce would have been able to give him suitable assignments, which would not have included heavy lifting.”). Apparently the ADA is not a concern for Michelin. Gross testified had the doctor not given Brailey clearance to do the PAP Operator job on which he was injured, Michelin would “probably not” offer Brailey “other jobs potentially he could perform.” [R.P. 776, lines 19-24].

Dr. Tomarchio did a thorough physical examination and cleared Brailey for work at Michelin.¹³ When asked about the work clearance from Dr. Tomarchio, Gross testified Michelin had “what you needed to know” and they “were good to go.” [R.P. 778, lines 14-24; p. 776, lines 19-24].

The fact is Michelin did not really rely on the questionnaire – they relied on Dr. Tomarchio do to a complete physical exam. 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].

At trial, Michelin argued that Dr. Tomarchio’s physical examination must have been unreliable due to the alleged misrepresentation on the post-offer questionnaire. Over objection from Appellant, Respondents’ counsel elicited testimony from Nurse Sirois that if someone “wants a job bad enough, can they fake symptoms . . . even when they’re not physically capable or if they – they’re not physically able to do that, can they pass the physical . . . If they do not tell the truth . . .” [R.P. 754, lines 2-25].

The exchange prompted multiple objections from Respondent as to speculation and as to Nurse Sirois giving an expert opinion when she was not qualified as an expert. [R.P. 775, line 1-p. 761, line 19]. During the exchange, the Hearing Commissioner stated:

Those [two Michelin employees who testified to the thoroughness of the examination on the back] were lay-persons as you would be a lay-person to a doctor; I would be a lay-person. She is testifying as a medical person and as she is a medical person.

¹³The two employees (Brailey and Lemon) who had first hand knowledge of the post-employment physical exam both testified it was a thorough examination of the back, testing whether somebody can lift, bend, twist, stoop, squat and so forth. [R.P. 624, line 15-p, 626, line 1; p. 683, line 23-page 684, line 20]. Gross agreed with the description and conceded he could not dispute it. [R.P. 777, lines 20-24; page 778, lines 4-13]. Nurse Sirois was not present during Brailey’s examination but she “would assume” Dr. Tomarchio does a very thorough physical exam. [R.P. 746, lines 2-5].

Her testimony is that of a Nurse and what does dealing with doctors. *She would be in a better position to determine what medical is than anybody sitting in this room.* [R.P. 390, line 21-p. 759, line 9].

The commissioner went on to state 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. 760, lines 1-4].

The commissioner’s description of Sirois’s testimony as a “medical person” virtually mirrors the requirements in the evidentiary rules which must be satisfied to present expert testimony. Rule 702, SCRE states: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Before admitting expert testimony, the judge or commissioner must make three inquiries: (1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter, and (3) whether the substance of the testimony is reliable. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). “Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

It was error of the commissioner to effectively qualify Sirois as an expert witness with no motion to so qualify her as such nor any foundation other than her testimony that she has a B.S. degree in Nursing. Indeed, Respondents even conceded “her answers were not as an expert witness — her answers were as a medical person.” [R.P. 760, lines 5-10]. A mere *medical person* is not

automatically an expert and cannot give a medical opinion as to whether a doctor's physical examination would be reliable or unreliable. For her to do so when she admittedly was not present is complete complete and utter speculation. Furthermore, to presume Brailey misled the doctor in the examination room is equally speculative. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(a conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages."). Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence).

To satisfy their burden, Respondents could have presented testimony from Dr. Tomarchio – who could have been qualified as a medical expert. Had Dr. Tomarchio testified that he would not have qualified Brailey for full unrestricted duty had he known about the back strain from 20 years ago, then Respondents would have made a prima facie case on the reliance issue.¹⁴ Here, where the only evidence is that Dr. Tomarchio supplied Michelin with "what [they] needed to know," the only conclusion is that Brailey was "good to go."

¹⁴Another point is the fact that at the time of his accident, Brailey had not been given work restrictions by either Urgent Care or the emergency room – even though he was reporting back pain from the exertions of being new on the job at Michelin. Dr. Izard, Michelin's company doctor, returned Brailey to full duty *even after his work injury*. It therefore seems likely that Brailey's minor back injury from twenty years ago would not have resulted in any restrictions from Dr. Tomarchio. Without any evidence to the contrary from Dr. Tomarchio, his full duty clearance must stand.

C. There must have been a causal connection between the false representation and the injury.

The third prong of Cooper is “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). In this case, there is *no evidence* of a causal connection between the false representation and the injury. At the time of the June 24, 2017, work accident, Brailey was under no work restrictions. In fact, he had been to two doctors for back pain related to getting used to his new job and was given no work restrictions. [R.P. 61-69]. Even after the accident, Dr. Izard still “assigned no work restrictions at this time.” [R.P. 86]. If he was under no restrictions before the accident from doctors who knew he was having back pain from his new job, then there was nothing for the employer to change or accommodate about his job. And Michelin insisted he go back to work as a PAP Operator *after* seeing Dr. Izard for the work injury. Ergo, there is no causal connection.

A second factor showing the lack of causal connection is that the previous back strain occurred *twenty years* ago. In Givens, the claimant settled a workers compensation for a low back injury. Less than a month later, he applied for a new job where he knowingly and wilfully made false representations that he had no physical defects nor prior injuries. He filed a new claim for a back injury five months later – an injury determined to be one of disc degeneration reflecting the cumulative effect of successive injuries (unlike Brailey’s injury which was a new injury by accident to a completely different part of the back). Givens v. Steel Structures, 279 S.C. 12, 301 S.E.2d 545 (1983). The supreme court held his case was properly denied under Cooper.

Conversely, in McLeod, the employee “lied about” a birth defect (spina bifida), two car accidents (one of which caused him to miss 6-8 weeks of work and settled in tort for \$2,600.00) and

a work accident where he missed 5-6 days of work due to back pain. "McLeod completely recovered from all three accidents." This Court found there was no casual connection between the false representation and the injury. The Court reasoned:

McLeod had worked for three years for Piggly Wiggly lifting many sixty pound boxes per day without any injury. Prior to that, McLeod had performed heavy labor for other employers over a ten year period with only one minor injury. He also completely recovered from back injuries sustained in two separate car accidents. McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 40 (Ct. App. 1983)

The facts in McLeod are similar to this case. Brailey had a previous low back injury twenty years earlier from which he completely recovered. He worked in medium to heavy labor for Westinghouse for 15-16 years with no injuries, nor did he have any other accidents or episodes of back pain .. The only timeframe differences are that McLeod worked for Piggly Wiggly for three years before his accident, whereas for Brailey it was about two months. On the other hand, McLeod had injuries in 1969, 1973 and 1974 – the most recent only three years before his 1978 work injury at Piggly Wiggly.

Ultimately, the burden is on the employer to prove the causal connection. It is not enough to merely show that an employee made a misrepresentation about a previous back injury and then later injured his back on the new job. See Vines v. Champion Bldg. Products, 315 S.C. 13, 431 S.E.2d 585 (S.C., 1993) ("There is no evidence [employee's] previous injury [requiring back surgery contributed to the occurrence of the accident . . . even though there was evidence indicating [employee] was predisposed to back injuries because of his previous injury and surgery . . .").

The cases finding a causal connection involve relatively recent injuries which required surgery or resulted in some degree of permanent impairment; not remote injuries from which there was a complete recovery. See, eg., Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463

(2009)(employee failed to disclose 20-40% service related disability and 5% impairment to same part of back injured in later work accident with new employer); Small v. Oneita Industries, 459 S.E.2d 306, 318 S.C. 553 (1995)(25% impairment rating due to back injuries suffered in prior employment); Givens v. Steel Structures. Inc., 279 S.C. 12, 301 S.E.2d 545 (1983)(employee “awarded workmen's compensation benefits in a substantial amount for this injury and the resulting permanent partial disability” less than one month before misrepresentation to new employer); Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973)(out of work for thirteen months and 14% disability to the lumbar spine); Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009)(expert medical testimony from surgeon that “preexisting disc herniation was the same disc herniation for which he treated her following her October 18, 2005 work accident.”). Unlike the instant case, these cases involved serious previous injuries with new injuries occurring to the same area of the back as the preexisting condition.

The causal connection prong is the most difficult Cooper element to prove. Here, the proof fails. There is no causal connection shown by any qualified expert testimony that the 20-year old back strain played any role Brailey’s injury with Michelin. He received no surgery and had no permanent impairment from the previous injury He made a full recovery from the previous injury. Brailey had no back problems or other injuries for the next twenty years. His previous back strain was to a different part of his back than the herniated disc suffered in the Michelin work injury.

Therefore, the conclusion that Respondents proved the Cooper defense should be reversed and the June 24, 2017 accident should be ruled to be a compensable injury.

3. Respondents cannot prove the elements of *Capers v. Flautt*.

In the Conclusions of Law, the Commission made the conclusory statement that "Moreover the claim would be barred by *Capers v. Flautt*. [FC Order, page 22, Conclusion of Law 4]. Such a brief conclusory statement without accompanying findings of fact is defective and must be reversed as a matter of law. See, e.g. *Baldwin v. James River Corp.*, 304 S.C. 485, 405 S.E.2d 421 (Ct App. 1991)(Generalized, conclusory, or incomplete findings will not suffice as findings of fact.).

Equally important, *Capers* is inapplicable to this case. In *Capers*, the claimant was a dishwasher. He developed contact dermatitis from contact with the dishwashing detergent while working at Fort Jackson. Based on the opinion of his doctor, Capers claimed he was permanently and "totally disabled from work which involved exposure to soap, detergents, and /or water." *Capers v. Flautt*, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991). Two years later, Capers filed an *identical* claim for contact dermatitis from exposure to detergent and water from working as a dishwasher at Holiday Inn.

The Court of Appeals affirmed the Commission's finding that "Capers did not sustain an accidental injury as contemplated within S.C.Code Ann. Section 42-1-160 (1976)." Id. 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.

This is an entirely different circumstance than the instant case. Capers was allergic to detergent. He knew with certainty that he would develop contact dermatitis every time he was exposed to detergent. He also knew that the contact dermatitis would resolve when the exposure ended.

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. At most, Brailey knew that he had once suffered back strain twenty years earlier working in a brick plant. The back strain resolved and he had no problems for the next twenty years – including 15 years working at Westinghouse.

While Brailey did suffer back pain (without radiculopathy) after working at Michelin for about 6 weeks, he reasonably believed that this was normal back pain to be expected for someone unaccustomed to that level of physical labor. His trainer had told him back pain was normal and expected for new employees. His family doctor even told him he needed to “exercise to lose weight and need for strengthening of core muscles and proper lifting techniques.” [R.P. 65]. No doctor told him not to work at Michelin or put him under work restrictions even though he was reporting back pain from working at Michelin.

If no doctor believed he needed to be under work restrictions in 2018, then he can hardly have been expected to request light duty or lay out of work. He could not have known nor expected that he would herniate a disc at work on June 24, 2017. Therefore, the legal conclusion that Capers bars this claim should be reversed.

4. Brailey did not intentionally and willfully cause injury to himself.

The Commission concluded as a matter of law that “the claimant intentionally and willfully [sustained an injury by accident] by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same.” [R.P. 46, Conclusion of Law 5]. As this finding is made with no corresponding finding of fact, it too is facially defective. See, e.g. Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct App. 1991)(Generalized, conclusory, or incomplete findings will not suffice as findings of fact.).

More importantly, it is just plain wrong. The applicable statute bars compensation for an injury “occasioned by the . . . wilful intention of the employee to injure or kill himself . . . S.C. 42-9-60 (2007). The courts define “willful intention” as a deliberate or formed intention to injure or kill oneself. Youmans v. Coastal Petroleum Co., 333 S.C. 195, 508 S.E.2d 43 (Ct. App. 1998). The clearest example of this involved a police officer who voluntarily engaged in a shoot-out with a fellow officer. Ziegler v. S. C. Law Enforcement Division, 250 S.C. 326, 157 S.E.2d 598 (1967).

Brailey was not playing the fool or engaging in dangerous conduct. He was simply doing his job. In fact, even when he started having back pain, he did not make a fuss or try to gin up a workers’ compensation claim. He simply went to the doctor, got some medication and got cleared to return to work. If he has been medically cleared to work full duty after reporting back pain from the job, then there can be no willful intention to suffer injury. This Conclusion of Law should be reversed.

5. The Commission’s vague credibility findings do not bar this claim from being compensable under the Act.

The Appellate Panel found Brailey was not a credible witness. [R.P. 43-44, Finding of Fact 2]. Appellant acknowledges that South Carolina traditionally holds a determination of credibility is solely for the appellate panel and could not be reversed by the appellate courts. However, even credibility findings must be supported by substantial evidence.. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)(“This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court.” (emphasis added)). Cf. Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)(“How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked

out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.”); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998)(“Although the general proposition that the jury determines credibility issues is a correct one, there is no issue for the jury when the evidence as a whole admits of only one reasonable inference”).

More importantly, a negative credibility finding is only one piece of the puzzle. When the evidence supports a finding of compensability notwithstanding a credibility finding, then the Court can disregard the credibility finding. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(declining to address credibility issue because Appellate Panel’s factual findings were based on the single commissioner’s own medical opinion unsupported by medical evidence in the record). This is particularly so when the credibility finding is tainted by other findings, by a witnesses manner of speaking, or by excessive participation in cross-examination by a trial judge or commissioner.

In this case, the Commission explained its reasons for the credibility finding in Finding of Fact 2. The first example given is a purported similarity between the 1997 workers’ compensation claim and the instant claim. The specific comparison is that “At Richtex, as in the current claim, instead of following the treating doctor’s orders, the claimant sought treatment at Doctors Care.” [R.P. 43-44, Finding of Fact 2]. As anyone with any experience in the workers’ compensation arena knows, company doctors are often biased towards the employer. Even when doctors are neutral and fair, injured workers understandably fear bias and reasonably seek second opinions at their own expense.

In this case, Brailey appears to have ample reason for seeking a second opinion. The 1997

reports from Dr. Norris show the patient and doctor plainly distrust each other – as well as showing that Dr. Norris was beholden to Richtex. Under those circumstances, there was nothing nefarious from Brailey seeking a second opinion. Moreover, although not in the record, there is no evidence that the second opinion doctor diagnosed Brailey with anything more serious than Dr. Norris's diagnosis of back strain.

As to Dr. Izard, it is a bit much for the Commission to describe him as the “treating doctor.” Dr. Izard not only offered no treatment; he misdiagnosed Brailey with a UTI; returned him to work with no restrictions despite a herniated disc (which Dr. Izard missed); and told him not to follow the orders of the emergency room doctor. Conversely, the emergency room doctor (Dr. Brenner) prescribed medications; took him out of work for three days and recommended no heavy lifting thereafter; and referred him to a neurosurgeon. And of course, Dr. Brenner was ultimately proven right when the neurosurgeon (Dr. Boyd) ordered an MRI which showed a herniated disc requiring back surgery. The fact is it would have been a huge mistake for Brailey to go back to work and risk further *much more serious* injury. And it was irresponsible of Dr. Izard and Nurse Sirois to order Brailey to go back to work, not to take prescribed medications, and not to go to the neurosurgeon. Under these circumstances, on this point, the Commission's credibility finding is not supported by substantial evidence. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)(“This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court.” (emphasis added)).

The Commission's second reason for not finding Brailey credible is because he “omitted information about a prior employer – an employer for which he had a workers' compensation claim

for a back injury – from his employment application for Michelin.”¹⁵ [R.P. 43-44, Finding of Fact 2]. With all due respect to the Commission, sometimes we have to deal with reality. And while it would be ideal for all employees to list every single employer they have ever worked for on their employment applications, that expectation is just not realistic. Leaving off a single employer one worked for twenty years ago *for two weeks* is not a crime nor is it uncommon. This is not to say it cannot be a scintilla of evidence supporting a credibility finding; only that it cannot rise to the level of substantial evidence, particularly when the witness openly discussed the employment and his workers’ compensation claim at Richtex under oath at the hearing and his deposition.¹⁶

The third rationale for finding Brailey not credible is concerning. The Commission found him not credible because his answers were “confusing . . . vague [and] rambling.” [R.P. 43-44, Finding of Fact 2]. Throughout the hearing transcript, there are numerous examples of Brailey being interrupted and not being permitted to answer a question. Sometimes by counsel, but often by the hearing commissioner. And while a hearing commissioner has broad authority to ask a witness to clarify an answer, a commissioner exceeds that authority when the commissioner becomes an advocate for one side or the other and virtually engages in cross-examination. A commissioner can question a witness; a commissioner cannot challenge a witness. A commissioner must remain neutral.

The best example of this occurs in a long exchange beginning with questions about the length

¹⁵Although identified and reviewed by Brailey at the hearing, the employment application itself was not admitted into evidence nor, apparently, was it provided to Brailey’s attorney in discovery.

¹⁶Brailey disclosed his previous employment with Richtex and the details of his 1997 work injury, treatment and settlement in his deposition taken September 25, 2017. [R.P. 249, line 25-p. 253, line 22].

of the probationary period at Michelin. It then devolves into Brailey attempting to explain why he filed a workers' compensation claim for June 24th and not June 11th.¹⁷ Throughout this exchange, the hearing commissioner repeatedly interrupts and chastises Brailey. [R.P. 630-637]. The purpose here is not to impugn the commissioner. Only to illustrate how difficult it is for a witness to maintain his composure and coherently answer questions delivered rapid fire from a trial judge or commissioner. When evaluating a credibility finding, the mode of questions and the person asking them weigh into the equation.

At the end of the day, Appellant recognizes that the Court must be deferential to the Commission's credibility findings. As these findings are so vague and Brailey was not impeached on inconsistent statements under oath (Appellant recognizes the previously discussed issues over the questionnaire), the credibility findings here are not dispositive.

Brailey proved his case by the documentary evidence along with the totality of evidence. The underlying facts of this case are not in serious dispute; only the legal conclusions following those facts. No one disputes Brailey strained his back twenty years ago resulting in a workers' compensation claim he settled for the nominal amount of \$2,500.00. Brailey had no further back problems for the next twenty years. Brailey did not disclose the 1997 injury on Michelin's post-

¹⁷From a legal standpoint, the claim was filed by counsel with a date of June 24, 2017 because that was the date the actual injury by accident occurred – as confirmed by Dr. Boyd. [R.P. 142]. The date coincides with the development of radiculopathy associated with the herniated disc from stretching rubber. In the alternative, Appellant requested a finding of June 11, 2017, but that date was not Appellant's primary position because there was minimal evidence of an actual injury; only nonspecific non-radiating pain from getting used to a new job. See Jackson v. Fayetteville Area System of Transp., 337 S.E.2d 110, 78 N.C.App. 412 (N.C. App. 1985) ("The Commission's finding that plaintiff experienced pain as a result of what occurred while she was performing her duties on 13 December 1982 is not sufficient as pain is not in and of itself a compensable injury.).

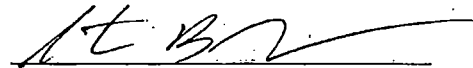
employment questionnaire, yet he was cleared to full duty by Dr. Tomarchio. Brailey developed back pain from his new job at Michelin; went to the doctor on his own on June 11th and 13th; was not placed on work restrictions; and did not report the doctor visits to Michelin. Brailey reported injuring himself on June 24, 2017 stretching rubber. According to Dr. Boyd's uncontradicted medical opinion, this injury resulted in a herniated disc requiring surgery and preventing him from working.

Even if the Commission (or Court) does not like the fact Brailey did not disclose his previous back strain when he was hired, he still proved his case by the totality of the evidence. A vague credibility finding does not change that essential point. Therefore, the Decision and Order of the Commission should be reversed. Brailey should be awarded workers' compensation benefits.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed. 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.

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January 30, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1708221

Appellate Case No. 2019-000556

Isaac D. Brailey, Claimant, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b),
SCACR.

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JAN 30 2020

SC Court of Appeals

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SC Court of Appeals

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COUNTERSTATEMENT OF ISSUES

1. Whether the preponderance of the evidence supports the Full Commission finding Appellant vitiated the employer-employee relationship pursuant to Section 42-1-130 of the South Carolina Code Ann. (2015) and *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), where Appellant repeatedly made informed, willful, and material misrepresentations on his employment documents for Michelin and prior employers; Michelin relied upon his responses on the documents; and the evidence demonstrated a causal connection between the misrepresentations and the alleged injury.
2. Whether substantial evidence supports the Full Commission finding that pursuant to Section 42-1-160 of the South Carolina Code Ann. (2015), Appellant failed to meet his burden of proof where there is no evidence Appellant suffered a compensable injury by accident arising out and in the course of his employment with Michelin on June 24, 2017.
3. Whether substantial evidence supports the Full Commission finding this case is barred pursuant to *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), where the evidence demonstrates Appellant knew he could injure his back performing his job at Michelin.
4. Whether substantial evidence supports the Full Commission finding Section 42-9-60 of the South Carolina Code Ann. (2015) barred this claim as a matter of law where in 1997 a doctor restricted Appellant from performing heavy lifting until he was evaluated by an orthopedic surgeon, but Appellant never visited an orthopedic surgeon and instead continued to work jobs which required a significant amount of heavy lifting and thereafter failed to alert or notify Michelin he was allegedly suffering from ten out of ten pain for at least four weeks prior to June 24, 2017, and sought medical treatment on his own without any knowledge of Michelin due to Appellant's failure to provide notice.
5. Whether the Full Commission's credibility finding was clear and unambiguous and substantial evidence supports finding Appellant's lack of credibility supported barring compensability under the South Carolina Workers' Compensation Act.

STATEMENT OF THE CASE

This is a workers' compensation appeal by Isaac Brailey (Appellant) from the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel (the Full Commission), filed on February 28, 2019, which unanimously upheld the Decision and Order of the Hearing Commissioner, Commissioner Avery B. Wilkerson, Jr. (Commissioner Wilkerson).

On October 4, 2017, Appellant filed a claim against Respondents Michelin North America, Inc. (US7) and Safety National Casualty Corp. (collectively, "Michelin"), alleging that on June 24, 2017, he sustained an injury by accident to his back, arising out of and in the course of his employment with Michelin. Michelin denied the claim as compensable. Commissioner Wilkerson found that 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), Appellant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits under the South Carolina Workers' Compensation Act (the Act). (R. 23-24). Commissioner Wilkerson also found pursuant to Section 42-1-160 of the South Carolina Code, Appellant did not sustain a compensable injury to his low back while under the employ of the Michelin on June 24, 2017, as Appellant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented and *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) barred this claim. (R. 23-24). Commissioner Wilkerson further found that pursuant to Section 42-9-60 of the South Carolina Code, even assuming Appellant actually sustained an injury by accident to his low back on June 24, 2017, Appellant intentionally and willfully did so by (1) 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 (2) seeking medical treatment on his own without any knowledge by Michelin due to Appellant's failure to provide notice. (R. 24). The Full Commission

considered the issues briefed, unanimously found Commissioner Wilkerson's Decision and Order was supported by the greater weight of the evidence, and affirmed the Decision and Order in its entirety with minor amendments. (R. 25-26).

STATEMENT OF FACTS

A. Appellant's Employment Application and Prior History

Among other companies, Appellant worked for Jannock LTD D/B/A Richtex Brick and Westinghouse prior to his employment with Michelin. (R. 166, 407). His position at Richtex entailed lifting and loading heavy bricks onto a monorail. (R. 407-08). In December 1997, shortly after he began working for Richtex, Appellant filed a workers' compensation claim against Richtex for a low back injury and began treating with Thomas Norris, III, MD. (R. 143, 158-59, 166-75, 408-09). In the medical report for Appellant's first visit on December 4, 1997, Dr. Norris noted Appellant had been "*working for Richtex for three weeks and of note he has had back pain for three weeks*. This has been worsening over the past couple of days since a possible injury while lifting some bricks on Tuesday of this week." (R. 158-59) (emphasis added). Dr. Norris instructed Appellant not to complete any heavy lifting and to return to the clinic in one week. (*Id.*). The medical record from the visit further stated as follows:

I also discussed with [Appellant] in no uncertain terms if he has been having back pain for three weeks, the entire time he has been working for Ric[h]tex, if he does not respond very well and very fast to some conservative treatment it might be in his and Ric[h]tex's best interest for him to find new employment.

(*Id.*).

Appellant met with Dr. Norris again on December 11, 1997. Dr. Norris's medical notes from that appointment stated as follows:

[Appellant] *had noted back pain and soreness for three weeks. Then he reported this vague episode of lifting some bricks and he felt that he may have injured himself* at that time although he denied any

significant change at the time of this incident. *Of note, three days after he saw me, he was at Doctors Care wanting a second opinion, although he was not following my instructions.*

(*Id.*) (emphases added). Further, Dr. Norris stated as follows:

[Appellant] mentions that he knows something is wrong with his back and he wants to go to a back specialist. It seems today that [Appellant] and I have a very difficult time communicating and I certainly feel that with him having only been an employee three weeks at Richtex, and mentioning a back specialist after he had been improving on the therapy I had recommended, he may very well be in a litigation thought process. . . . I believe it certainly would be prudent for both myself and Richtex bricks to send him to an orthopaedic surgeon.

(*Id.*).

Finally, Dr. Norris stated the following:

[I]t seems he wants to be evaluated by a back specialist. I feel like Dr. Bethea at Moore Clinic would certainly put this to rest most expediently, however, as stated above, I don't feel that Richtex nor myself need to undertake any liability with *this young man who, in my opinion, is unable to perform the job required at Richtex* and he was even told this the very first day. I restated that today. *I will place him on no heavy lifting until he sees the surgeon.*

(*Id.*). (emphases added). Thereafter, Appellant settled the workers' compensation claim against Richtex, *did not* get evaluated by a back specialist as ordered, and never returned to work at Richtex following the claim. (R. 410-11).

Instead of getting evaluated by an orthopedic specialist as ordered by Dr. Norris, Appellant began working at Westinghouse in a position he alleged required lifting pellet containers and pushing carts of pipe wrenches and steel rods weighing up to 800 pounds. (R. 411, 413). During the hiring process for Westinghouse, Appellant completed the company's "Medical History and Examination Form (Post-Offer/Pre-Placement)." (R. 177-81). When shown the form at the hearing before the Single Commissioner, Appellant denied ever seeing the document prior to the

hearing, but admitted his name, address, and signature were handwritten on the form. (R. 412). Appellant also admitted he checked the box for “No” on the Westinghouse form when asked if he had any recurrent low back pain. (*Id.*). On the Westinghouse form, despite the recent workers’ compensation claim at Richtex, Appellant denied ever having had a work-related injury or having been restricted medically from doing any part of his job. (R. 179).

As with the false statements Appellant made on Westinghouse’s medical history form, Appellant admitted that he also falsely denied any prior workers’ compensation claims on Westinghouse’s “HealthWorks Questionnaire and Physical” form. (R. 180-81, 415-16, 606-10, 613-24). Specifically, Appellant checked the boxes for “Never” when asked “Any pain, numbness, limited motion, injury or surgery of the back” and “Have you ever had a work injury, Workers’ Compensation claim, been given an impairment rating or disability rating, applied for or received any type of disability or pension (including military VA), received an award or settlement for any injury, accident, or disease or other disorder?” (*Id.*). He denied any permanent restrictions or limitations. (*Id.*). He also denied having had a previous job with similar physical demands. (*Id.*). Appellant knowingly made these false statements. Appellant claimed he quickly completed the form; however, he admitted that he took the time to include hypertension/high blood pressure; pain, numbness, limit of motion, injury or surgery of the hip, knee, leg, ankle, foot; and “knee pain with weather.” (*Id.*).

Following Westinghouse, Appellant began working for Respondent Michelin. (R. 417). The medical records indicate Appellant was “on disability” following his job at Westinghouse and before beginning employment with Michelin. (R. 58). His position at Michelin involved making “big” tires, which Appellant testified could cause sharp pain in a person’s back when stretching the rubber in the tires. (R. 423, 427). During the hiring process at Michelin, he completed training,

a physical exam, and the “Michelin Confidential Health Questionnaire for Post-Offer Examination” (the Michelin Questionnaire). (R. 176, 419-21). On the Michelin Questionnaire, as with the Westinghouse forms, despite his prior workers’ compensation claim and restriction from a doctor of no heavy lifting until he was evaluated by an orthopedic surgeon, Appellant again falsely denied any prior back injury, backache, back pain or having ever experienced a medical problem that affected his ability to perform work. (*Id.*; *see also* R. 461, 601-05). Specifically, the Michelin Questionnaire asked, “Do you have problems with, *or have you ever had medical attention for any of the following: . . . 13. Back injury, backache or pain . . . 21. Have you experienced a medical problem that affected your ability to perform your work . . .*”, to which Appellant checked the box for “NO.” (*Id.*). (emphases added). Likewise, Appellant never told his trainer at Michelin, Jermaine Lemon, that Appellant previously had to leave a job because of his back issues or that the doctor told Appellant to meet with an orthopedic surgeon before he could perform any heavy lifting. (R. 666). Appellant executed the Declaration and Authorization portion of the form which states “I understand and agree that any false, misleading or incomplete information will make me subject to disqualification from employment or subject to dismissal at any time.” (R. 176, 419-21, 830).

B. Alleged Injury and Reporting

Similarly to his claim at Richtex, shortly after beginning employment at Michelin, on June 11, 2017, Appellant went to a doctor complaining of “back pain after lifting at work.” (R. 67). He complained the low back pain had persisted for the past several days and that he was doing heavy lifting at work prior to the onset of the pain. (*Id.*). The doctor prescribed cyclobenzaprine and tramadol. (R. 68). Appellant did not report this doctor’s visit and back pain allegedly due to heavy lifting at work to any person at Michelin.

A few days later, on June 13, 2017, Appellant returned to a doctor complaining of lower back pains for the past two weeks after heavy lifting at work. (R. 61). Under history of present illness, the medical record from the visit states,

having left lower back pains for the past 2 weeks
has had new job at Michelin, moving heavy stuff-there now for about
2 weeks
pain is 10/10 w/certain movements
says feels sharp
no radiation into legs . . .
never had pain there in the past
no recent injury or trauma . . .
o/w^[1] still due initial screening c-scope. referred at last appt. did not
make appt - says cousin unexpectedly passed away
and he had to help support family.

(*Id.*) (emphases added). Back pains for the two weeks prior to June 13, would have meant he had pains since the end of May 2017. He was taking cyclobenzaprine, hydrochlorothiazide, and tramadol, among other medications. (*Id.*). Appellant's treating physician, Dr. Scott Boyd,² testified that "[p]roper application of that scale, [ten out of ten] should be the worst pain you could experience." (R. 322). Appellant again did not report this medical visit or ten out of ten back pain allegedly due to heavy lifting at work to any person at Michelin.

On June 24, 2017, at 9:07 a.m., Appellant went to Lexington Medical Center Emergency Room (Lexington ER), complaining of lower back pain "since he was working last night, states does a lot of lifting/pulling and started hurting then." (R. 70). In consultation with the hospital social worker, Appellant had questions about a possible workers' compensation claim. (R. 71,

¹ In the context of the medical report, it appears "o/w" means "out of work."

² Prior to the hearing before the Single Commissioner, Michelin moved to reconvene the deposition of Dr. Scott Boyd. (R. 154-55). Appellant *opposed* the motion. (R. 182-87). During the hearing, Michelin withdrew its motion to reconvene the deposition. (R. 675, 803). After Michelin withdrew its motion, Appellant then moved to reconvene the deposition even though he initially requested the Single Commissioner to deny Michelin's motion. (R. 676-83, 803). Following the hearing, the Single Commissioner denied Appellant's motion. (R. 803-04).

76). Appellant reported to the doctor that the pain “[d]oes not radiate” and there was no numbness in the extremities. (R. 72). The physician opined the neuro exam was normal, and Appellant was negative for gait problems and had a normal range of motion. (R. 73-74).

By all accounts, including Appellant’s own testimony, no person at Michelin was aware that Appellant visited Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, claiming he was injured at work, and Appellant’s alleged pain was not reported before June 24, 2017. (R. 335-36, 414-15, 463-65, 469-71, 474, 490-92, 618, 638, 706-07, 720, 738, 743, 767-68). When Appellant finally spoke with plant nurse for Michelin, Nurse Christie Sirois, on June 24, 2017, she scheduled him an appointment with Michelin’s plant doctor, Dr. Stephen Izard, for the following business day, June 26, 2017. (R. 737).

Immediately prior to the visit with Dr. Izard, Appellant completed Michelin’s “HealthWorks Post-Injury Questionnaire,” claiming he injured his lower back on June 24, 2017, while he was stretching rubber and moving bobbins. (R. 80-82). When asked under the history of *present illness* section, “Have you ever injured this part of your body before,” Appellant checked the box for “No.” (*Id.*). As with his prior medical visits, Appellant alleged his back pain was ten on a scale of one to ten. (*Id.*). Under the *previous illnesses* section, when asked “Do you now have *or have you ever had*: (if so, list the date it occurred or you were diagnosed) . . . Back injuries or problems” Appellant checked the box for “now” and wrote the date as “6/24/17 Lexington Emergency.” (*Id.*). (emphasis added). Following an evaluation, Dr. Izard opined Appellant presented a significant degree of symptom amplification and magnification. (R. 84). Dr. Izard ordered Appellant to follow-up with him two days later, on June 28, 2017. (R. 85).

Instead of revisiting Dr. Izard as specifically instructed, on the following day, June 27, 2017, Appellant returned to Lexington ER complaining of back pain and urinary retention. (R.

87-89). The report from the visit stated “here on Saturday for the same. Did not recognize numbness until he was reading discharge instructions.” (R. 87). The doctor noted he had a normal gait. (R. 89). An X-ray of the lumbar spine showed no fracture subluxation. (R. 91). Thereafter, Appellant still did not return to Dr. Izard on June 28, 2017, as ordered. (R. 738). In fact, Appellant *never* returned to Michelin to follow-up with Dr. Izard or complete the investigation or accident report. (R. 719-20, 771-72). Safety manager, Mark Gross, offered to provide Appellant with transportation when Appellant told Gross he could not return for the appointment with Dr. Izard or complete the accident report or investigation because he did not have transportation. (R. 772-73). According to Gross, Appellant responded, “you need to talk to my lawyer” and hung up the phone. (R. 773). Appellant admitted that he was offered transportation to the appointment with Dr. Izard, and that he refused the offer. (R. 577).

Instead of ever returning to Michelin’s medical providers, on June 30, 2017, Appellant went to Doctors Care, complaining of lower back pain. (R. 99, 102, 537). He did not answer the questions on the intake form addressing whether the injury was a workers’ compensation claim. (R. 98). The doctor told Appellant he “really didn’t have much to offer” Appellant as Appellant was already taking NSAIDs, muscle relaxers, and pain medications. (R. 99). The doctor referred him to an orthopedic specialist.

On July 24, 2017, Appellant met with Dr. Scott Boyd’s physician assistant, Luis Valdes, PA,³ at Lexington Brain and Spine Institute. Appellant claim the pain was “now radiating down LEFT leg.” (R. 106). Valdes ordered an MRI and physical therapy.⁴ (R. 109). During the

³ Valdes saw Appellant and would in turn report to Dr. Boyd. Dr. Boyd supervised Valdes and determined the medical treatment. (R. 304).

⁴ Appellant again did not answer the question on the physical therapy intake form asking whether the injury was related to a work accident. (R. 127).

September 14, 2017 appointment, Appellant claimed the pain radiated “from his back down his RIGHT leg.” (R. 117). The MRI showed a herniated disc; however, Dr. Boyd confirmed there was no way to tell from looking at the MRI how long the issue had been present. (R. 308, 326-27). Appellant reported to Dr. Boyd’s office that he “hasn’t had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment,” which was false. (R. 112). Dr. Boyd testified that his impression when his office first saw Appellant “was that he had an injury on June 24th and no problems before then.” (R. 54). After being shown medical documents from Appellant’s June 11, 2017 and June 13, 2017 medical visits, Dr. Boyd opined he could not “be certain” as to whether Appellant’s lower back problem was caused by an accident on June 24, 2017. (R. 328).

Michelin denied the claim in its entirety. Appellant filed a Form 50 Request for Hearing, claiming he sustained an injury by accident to his back out of and in the course of his employment with Michelin on June 24, 2017. Michelin argued Appellant’s back condition was unrelated to any work accident; rather, the wealth of evidence failed to support the existence of a work-related accident. Moreover, Michelin contended the medical evidence supported finding Appellant was complaining of problems prior to June 24, 2017, and he had a longstanding history of pre-existing back problems including evidence that he was previously restricted from doing the type of work he claimed caused his injury until he was seen by a surgeon and withheld that information from Michelin. Michelin asserted the defenses of Notice and Fraud in the Application for Employment. The Single Commissioner denied the claim and the Full Commission affirmed the denial. This appeal followed.

STANDARD OF REVIEW

“The South Carolina Administrative Procedures Act (APA) governs judicial review of

decisions by the Commission.” *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 622, 785 S.E.2d 194, 197 (2016). “An appellate court’s review is limited to the determination of whether or not the Commission’s decision is supported by substantial evidence or is controlled by an error of law.” *Id.* “In workers’ compensation cases, the Commission is the ultimate fact finder.” *Id.*

“Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner’s opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner.” *Muir v. CR Bard, Inc.*, 336 S.C. 266, 282, 519 S.E.2d 583 (Ct. App. 1999). “The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence.” *Id.* Appellate courts must affirm the Commission’s factual findings if they are supported by the evidence. *Holmes v. Nat’l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011).

“A court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency’s findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” *Muir*, 336 S.C. at 282, 519 S.E.2d at 591. “Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Id.* “[T]he substantial evidence test ‘need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment’; and a judgment upon which reasonable men might differ will not be set aside.” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (quoting *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel Cty.*, 273 Md. 245, 256, 329 A.2d 18, 25 (1974)).

Where a party asserts the concealment of information vitiated the employment relationship,

an appellate court reviews the Full Commission's findings on the relationship's existence according to its own view of the preponderance of the evidence. *See Fredrick v. Wellman, Inc.*, 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009) (noting our Supreme Court in *Brayboy v. WorkForce*, 383 S.C. 463, 681 S.E.2d 567 (2009) applied the preponderance of the evidence standard of review to an employer's assertion that the employment relationship had been vitiated by the employee's fraud in his employment application). "However, even under this broad standard of review, the final determination of witness credibility is usually reserved to the Appellate Panel." *Fredrick*, 385 S.C. at 16, 682 S.E.2d at 520.

ARGUMENT

- I. **The preponderance of the evidence supports the Full Commission finding Appellant vitiated the employer-employee relationship pursuant to Section 42-1-130 of the South Carolina Code Ann. (2015) and *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), where Appellant repeatedly made informed, willful, and material misrepresentations on his employment documents for Michelin and prior employers; Michelin relied upon his responses on the documents; and the evidence demonstrates a causal connection between the misrepresentations and the alleged injury.**

The relationship of employment is a jurisdictional issue for purposes of workers' compensation benefits. *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). This Court's review of the issue is governed by the preponderance of the evidence. *Givens v. Steel Structures, Inc.*, 279 S.C. 12, 13, 301 S.E.2d 545, 546 (1983). The burden rests on Appellant to show that the Full Commission's decision is against the preponderance of the evidence. *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649.

In order for provisions of the Act to be applicable, Appellant must have been an employee of Michelin as defined in Section 42-1-130 and an employer-employee relationship must have existed. In *Cooper*, our Supreme Court held a false statement in an employment application will vitiate the employer-employee relationship and bar workers' compensation benefits when (1) the

employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and the reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. 260 S.C. at 468, 196 S.E.2d at 835. The preponderance of the evidence shows Michelin proved each element of the Fraud in the Application defense outlined in *Cooper* and supports the Full Commission's findings.

The facts of this case are similar to the facts outlined in *Brayboy*, 383 S.C. at 464, 681 S.E.2d at 567. The claimant in *Brayboy* sustained a back injury in 2003. *Id.* *Brayboy's* employment application included disclaimers similar to those outlined in Appellant'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 Appellant 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*, Appellant 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. Just as our Supreme Court in *Brayboy*, this Court should be "firmly convinced" Michelin established all three factors of *Cooper*. *Id.*

A. The preponderance of the evidence supports finding Appellant knowingly and willfully repeatedly made false misrepresentations.

Appellant concedes in his brief that his responses on the Michelin Questionnaire were “untrue,” but dismisses the false statements because some years have passed and according to him, the prior injury was minor. (**App. Br. 19-20**). Appellant’s contentions imply that as time elapses, workers are free to lie on employment applications regarding their physical condition. Yet, despite Appellant’s contention otherwise, no matter how much time has elapsed, his failure to disclose his medical history rises to the level of knowing and willful because his medical history demonstrates he repeatedly failed to disclose prior back issues, treatment for his back, and prior workers’ compensation claims. Not only did Appellant fail to report the prior workers’ compensation claim with Richtex, he did not even list Richtex as a prior employer on his employment application for Michelin. (**R. 504-06**).

The Full Commission’s determination that Appellant knowingly and willfully made false representations is consistent with *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009), wherein this Court affirmed a determination of the Full Commission that a claimant was not entitled to benefits because she concealed her history of back problems when seeking employment with the respondent employer. Here, like *Fredrick*, the record as a whole supported the Full Commission finding that Appellant knew he was concealing the truth from the employers when he completed the questionnaires. The Michelin Questionnaire asked, “Do you have problems with, or have you ever had medical attention for any of the following: . . . 13. Back injury, backache or pain . . . 21. Have you experienced a medical problem that affected your ability to perform your work . . .”, to which Appellant responded “NO” to both questions. (**R. 420-21, 830**). *See id.* at 21, 682 S.E.2d at 522 (noting that the fact that the claimant “responded ‘NO’ to

the question ‘HAVE YOU HAD BACK TROUBLE OF ANY KIND?’” supported finding the claimant knowingly and willfully made a false representation as to her physical condition).

Further, Appellant noted on the Michelin Questionnaire that he took medication for high blood pressure; however, like in *Fredrick*, this was not sufficient to place Michelin on notice as to the prior back issues. *See id.* (“[N]one of the past injuries or illnesses that she, in fact, listed on the form could have reasonably alerted a prospective employer to any impact on her spine.”). Finally, here, as in *Fredrick*, there was no credible evidence in the record indicating Appellant had significant memory problems when he completed the questionnaires or that otherwise explained the appearance of deception on Appellant's part. *Id.*

B. The preponderance of the evidence supports finding Michelin relied upon Appellant’s false statements and the reliance was a substantial factor in the hiring.

Appellant’s contentions in this regard completely miss the mark on whether Michelin satisfied this element of the *Cooper* factors. Several Michelin employees testified regarding the company’s reliance on an employee’s accuracy and truthfulness in completing the Michelin Questionnaire and how that reliance impacted the hiring of Appellant.⁵

Appellant’s trainer, Jermaine Lemon, was a long-time employee of Michelin. (R. 657). Lemon confirmed Michelin relied on the Michelin Questionnaire answers and that it was important

⁵ Appellant’s references to and implications regarding the Americans with Disability Act (the ADA) are unwarranted and, more importantly, unpreserved as Appellant never even mentioned the ADA to the Single Commissioner or Full Commission. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); *Bazen v. Badger R. Bazen Co.*, 388 S.C. 58, 65, 693 S.E.2d 436, 440 (Ct. App. 2010) (noting only issues raised to and ruled upon by the Full Commission are cognizable on appeal). Moreover, even if the contentions were preserved, they are inappropriate and untrue. *See* Michelin’s Diversity and Inclusion Report, <https://jobs.michelinman.com> (discussing Michelin’s policy regarding individuals with disabilities, stating “Michelin recognizes the value of—and works to fully leverage—the unique talents and skills of individuals of all abilities. Michelin is currently developing a Business Resource Group for employees to support people of all abilities”).

to provide truthful responses because Michelin needed to know whether the employee could perform the job duties to prevent other employees from getting injured. (R. 665-69). Lemon explained that he wanted to know if a co-worker such as Appellant was physically capable of performing the job because if they were not, he could get injured as well. (R. 666-67).

Safety manager, Mark Gross, had been employed with Michelin for thirty-seven years. (R. 765). Gross described the safety training provided to all new employees and outlined the Michelin Questionnaire. (R. 766-67, 774-75). He also confirmed Michelin relied on the employees to be truthful in completing the questionnaire for the safety of all employees. (R. 775, 786). Further, he explained it was not possible for Michelin's plant doctors to conduct thorough investigations and examinations if an employee lies during the application process. (R. 787, 790-91, 796-97). Gross explained that if he had known about Appellant's prior issues, he would have been concerned. (R. 775-76).

Nurse Sirois,⁶ explained Michelin provides high-paying jobs and if an applicant wanted a job at Michelin bad enough, they could provide false information and still pass the initial physical medical examination. (R. 753-58). Thus, because Appellant did not admit he had prior back issues and a prior workers' compensation claim on the questionnaire, Michelin and its doctors were not able to investigate the extent of the prior injury and determine a position for Appellant that would not subject him to further deterioration and would prevent injuries to him and his co-workers. (R. 775). See *Fredrick*, 385 S.C. 8, 682 S.E.2d 516 (finding the reliance prong in *Cooper* was satisfied

⁶ Any alleged error of by the Single Commissioner in allegedly qualifying Nurse Sirois as an expert is not preserved for review as the issue was not presented to the Full Commission. See *Bazen*, 388 S.C. at 65, 693 S.E.2d at 440 (noting only issues raised to and ruled upon by the Full Commission are cognizable on appeal). Notwithstanding, even if the argument was preserved, whether the Single Commissioner admitted the nurse as an expert does not change the fact that substantial evidence supported finding Michelin relied upon Appellant's fraudulent answers on the Michelin Questionnaire as multiple members of management testified regarding the reliance.

where a staff nurse for the employer testified that if the claimant had revealed her history of treatment for lower back problems, the employer would not have cleared the employer to work the particular job without further investigation); *Jones v. Georgia-Pac. Corp.*, 355 S.C. 413, 418-19, 586 S.E.2d 111, 114 (2003) (holding the reliance prong in *Cooper* was satisfied where the employer presented evidence showing that had the employer known of the claimant's prior issues, the employer would have attempted to find a job for the claimant that would not subject a pre-existing physical impairment to further deterioration).

C. The preponderance of the evidence supports finding a causal connection existed between Appellant's injuries.

As an initial matter, Appellant's reliance upon *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1983) is misplaced. The instant case is distinguishable from *McLeod* because in *McLeod* the claimant injured his back *three years after* he began working for the employer. During those three years of employment, the claimant in *McLeod* had been lifting between sixty to 160 sixty-pound boxes, five days a week, eight hours a day without complaints of back problems and always met his production quota. *Id.* at 470, 313 S.E.2d 40. By contrast, Appellant allegedly injured his back within weeks of beginning his job with Respondent Michelin. He was "on disability" after he left Westinghouse and shortly before he started at Michelin. Moreover, Lowman testified that Appellant never successfully completed validation at Michelin, meaning Appellant never demonstrated the ability to safely perform the job alone, with good quality, and while developing speed. (R. 697-98). Other Michelin employees also testified that the area where Appellant worked was strenuous work and Appellant, in fact, had difficulty performing the job. (R. 659-663). Michelin employees explained that Appellant, who was told by a doctor that he could not perform heavy lifting, could not perform Appellant's job at Michelin. (R. 666-67). Thus, just as Dr. Norris explained Appellant could not perform the job at Richtex

because of his back issues, Appellant could not perform the job at Michelin because of his back issues. (R. 158-59). If anything, Appellant's back condition worsened over the years as he aged. See *Havird v. Columbia YMCA*, 308 S.C. 397, 400, 418 S.E.2d 329, 331 (Ct. App. 1992) (noting that continuing to work in pain and fatigue "often worsens [a person's] health").

This case is in line with *Givens*, 279 S.C. at 13, 301 S.E.2d at 546 and *Jones*, 355 S.C. at 418-19, 586 S.E.2d at 114, in which our Supreme Court held the record supported finding a causal connection between the claimant's injuries. In *Givens*, the claimant filed a workers' compensation claim for his back six months after he began with the company and had previously injured his back at a different employer. 279 S.C. at 13, 301 S.E.2d at 546. The Court noted, "Expert medical testimony clearly indicated that claimant's condition was one of disc degeneration reflecting the cumulative effect of successive injuries." *Id.* at 14, 301 S.E.2d at 547. Likewise, in *Jones*, the claimant failed to disclose prior back trouble, leg pain, and bursitis to the respondent employer and during her employment she repeatedly returned to her doctor complaining of back and leg pain. 355 S.C. at 415, 586 S.E.2d at 112. Our Supreme 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." 355 S.C. at 419, 586 S.E.2d at 114.

Here, substantial evidence indicated Appellant previously injured his back in a work accident, resulting in Appellant leaving the job. Because of that injury and his back issues the entire time he had the job, Appellant's treating physician warned him not to perform any heavy lifting until after he met with an orthopedic surgeon. The record includes evidence showing Appellant failed to disclose that prior injury, workers' compensation claim, employer where the injury occurred, or physician's opinion to Michelin during the application process and that

Michelin relied upon this information when hiring him. It is undisputed that Appellant's current alleged injury was causally related to the impairments to his back resulting from his prior back issues. Accordingly, the Full Commission did not err in applying the Fraud in the Application doctrine to bar Appellant's claim.

II. Substantial evidence supports the Full Commission finding that pursuant to Section 42-1-160 of the South Carolina Code Ann. (2015), Appellant failed to meet his burden of proof where there is no evidence Appellant suffered a compensable injury by accident arising out and in the course of his employment with Michelin on June 24, 2017.

As an initial matter, Appellant disputes the Full Commission's change in the finding from "separate" to "previous," but then concedes "the amendment to the Single Commissioner's finding is of no significance." (**App. Br. 13-14**). Because whether it was a "separate" incident or "previous" incident does not change the conclusion that Appellant did not suffer a compensable, work-related injury by accident on June 24, 2017, this Court need not decide whether the Full Commission erred in changing this language as there is no reversible error. *See Miles v. Miles*, 303 S.C. 33, 36, 397 S.E.2d 790, 792 (Ct. App. 1990) (recognizing an overriding rule that "whatever doesn't make any difference, doesn't matter"); *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.").

Furthermore, nothing in the Full Commission's Order "confirms [Appellant] proved that he had injured his back while working at Michelin on June 24, 2017," as Appellant would have this Court find. (**App. Br. 14**). To the contrary, the Order, which is supported by substantial evidence, confirms Appellant had issues with his back long before June 24, 2017, and yet never reported those issues to Michelin. The Commission correctly found that pursuant to Section 42-

1-160 of the South Carolina Code, Appellant did not sustain a compensable injury to his low back while under the employ of the Michelin on June 24, 2017, as Appellant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented.

Section 42-1-160 defines “injury” and “personal injury” as “only injury by accident arising out of and in the course of employment.” Thus, “[a] compensable injury under the Workers’ Compensation Act includes only an ‘injury by accident arising out of and in the course of employment.’” *Yates v. Life Ins. Co. of Georgia*, 291 S.C. 301, 304, 353 S.E.2d 297, 299 (Ct. App. 1987) (quoting S.C. Code Ann. §42-1-160). “The word ‘accident,’ as used in workers’ compensation, means an unlooked for and untoward event that the person who suffered the injury did not expect, design, or intentionally cause.” *Id.*

By Appellant’s own testimony and the record as a whole, any issue with his back on June 24, 2017, from heavy lifting was not an unlooked for or unexpected event. Appellant had back issues during the entire time that he worked for Richtex, and even filed a workers’ compensation claim for his back, which he never reported to Michelin. Likewise, he then had back issues the entire time he worked for Michelin. Appellant visited Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, claiming he was injured at work and the pain had persisted for several weeks. He never reported those visits or medical problems to Michelin and therefore, he never provided Michelin with the proper notice of any issues pursuant to South Carolina law and Michelin’s policies and procedures.

Appellant contends the record demonstrates he sustained a compensable injury on June 24, 2017, because he did not report any radicular signs or symptoms on June 11 or June 13, 2017, and “[i]t was not until the June 24, 2017 work accident that he developed radiculopathy.” (**App. Br. 14**). However, Appellant’s contention is a misstatement of the record. In fact, Appellant reported

to the doctor that the pain “[d]oes not radiate” and there was no numbness in the extremities at the June 24th visit. (R. 72). On his June 26, 2017 “HealthWorks Post-Injury Questionnaire” to Dr. Izard, he claimed the pain radiated down his left leg, but then at his June 27, 2017 medical visit to Lexington ER on the next day, he claimed the pain radiated to his right hip, right thigh, and right knee, and that he did not recognize numbness until after he read discharge instructions about numbness in the right leg. (R. 82, 87). On July 24, 2017, Appellant reported to Dr. Boyd’s office that the pain radiated down his left leg, but then on September 14, 2017, he claimed the pain radiated from his back to his “RIGHT leg.” (R. 106, 117). Therefore, the medical reports are directly contrary to Appellant’s claim in his brief to this Court that “[e]very medical report from that time on consistently shows left sided radiculopathy.” (App. Br. 14). Appellant’s inconsistent statements regarding any alleged radiating pain support the Full Commission finding Appellant lacked credibility.

Appellant relies heavily on Dr. Boyd’s testimony to prove causation; however, Appellant invests Dr. Boyd’s testimony on causation with more significance than it merits. Dr. Boyd testified that his impression when his office first saw Appellant “was that he had an injury on June 24th and no problems before then.” (R. 355). After being shown medical documents from Appellant’s June 11, 2017 and June 13, 2017 medical visits, Dr. Boyd testified he could not “be certain” as to whether Appellant’s lower back problem was caused by an accident on June 24, 2017. (R. 328-39). Dr. Boyd admitted the history of accident given to him was different than that given to Internal Medicine. (R. 320-21). Furthermore, when Appellant asked Dr. Boyd, “So is it reasonable, then, to say that something is different on June 24th as compared to June 11th and June 13th, in terms of what the treating doctor did at that time?” Dr. Boyd responded, “I think the symptoms are roughly similar to what he had reported before” (R. 338). Dr. Boyd confirmed the June 24,

2017 hospital report makes no mention of radiating pain. (R. 325). Dr. Boyd then testifies,

It sounds like he began having back problems with pain because of increased physical exertion with his new job at Michelin starting in April [2017], 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. 344-45).

To infer, as Appellant urges, that Dr. Boyd's testimony proves Appellant sustained an injury by accident on June 24, 2017, strains credulity. Dr. Boyd's wavering testimony does not change the fact that substantial evidence supports the Commission concluding Appellant did not sustain a compensable injury by accident on June 24, 2017, as any issue with his back on June 24, 2017, allegedly from heavy lifting was not an unlooked for or unexpected event as Appellant alleged significant back problems that he attributed to work long before that date. First, Dr. Boyd again notes Appellant had back pain that he attributed to work as early as April 2017. Dr. Boyd also confirmed ten out of ten pain as reported by Appellant on June 13, 2017, was the worst pain a person could experience. Next, Dr. Boyd stated he specifically relied on the questionnaire completed by Appellant, which the record shows Appellant falsely completed and as discussed later in this brief, the Full Commission correctly determined Appellant lacked credibility.

Dr. Boyd's causation testimony outlined above is similar to testimony relied upon by the claimant in *Jones v. Georgia-Pacific Corp.* In *Jones*, the claimant failed to include a prior back injury on her employment application. 355 S.C. at 416, 586 S.E.2d at 112. While she worked for the employer, she repeatedly returned to her doctor complaining of back pain. *Id.* The claimant

then alleged that on August 7, 1997, she was picking up large pieces of cardboard and felt something “pop” in her back. *Id.* The doctors who treated the claimant after her alleged injury on August 7, 1997, noted that the claimant had prior back problems, but opined the claimant had a “major problem” as of August 8, 1997, and the injury she reported on August 7th was the “straw that broke the camel’s back.” *Id.* at 417, 586 S.E.2d 113. Our Supreme Court held that although the doctors’ testimony was inconsistent as to whether the August 7, 1997 injury triggered the claimant’s subsequent back problems, there was substantial evidence presented upon which the Commission could conclude that the claimant’s injuries were not directly and causally related to the August 7, 1997 accident. *Id.*

Here, furthermore, Dr. Boyd had no knowledge of—and there was no testimony in Dr. Boyd’s deposition regarding—Appellant’s prior workers’ compensation claim for a back injury or the recommendation that Appellant meet with a surgeon before performing heavy lifting. The only mention of a prior injury was Appellant’s false statement to Dr. Boyd’s office that he had an issue that resolved without treatment. Appellant cannot now suggest in good faith that “[i]f the Commission truly believed the old records had dispositive value, then the Single Commissioner or Appellate Panel should have ordered Dr. Boyd’s deposition to be reconvened” (**App. Br. 17**) when Appellant, himself, originally opposed Michelin’s motion to reconvene Dr. Boyd’s deposition.

To further support his contention of an injury by accident on June 24, 2017, Appellant argues at great length as to how the pain on June 24, 2017, was different or worse than the pain he reported on June 11 and June 13, 2017. However, the argument is a distinction without a difference because it does not change the fact that his issues on the alleged date of accident—June 24, 2017, were not unlooked for or an untoward event. Appellant reported ten out of ten back pain that

persisted for several weeks prior on June 13, 2017, which his own treating physician stated was the “worse pain you could experience.” Appellant also alleged his back pain on June 24, 2017, was ten on a scale of one to ten. **(R. 80-82)**. Moreover, the only evidence that any of Appellant’s alleged pain, including the pain he reported on June 11 and June 13 was work-related was his statements to the doctors.⁷ As previously stated, and as addressed in more detail later in this brief, the Commission properly found Appellant lacked credibility. Appellant could have hurt his back in a variety of ways which were unrelated to work.

Appellant seems to suggest that because he alleged the back pain in the June 11 and June 13 appointments was attributed to work at Michelin, then the Commission should have found the June 24 allegation compensable because those prior “episodes” culminated into the herniated disc on the MRI scan. **(App. Br. 13)**. This reasoning is flawed for several reasons. First, Appellant only claimed an injury by accident on June 24, 2017. He did not claim a repetitive trauma injury, injuries on June 11, 2017, or June 13, 2017, or an aggravation of a preexisting injury. Moreover, even if he now argues a different date prior to June 24 or an aggravation of a preexisting injury, the assertions would not warrant reversal 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

⁷ Of note, Appellant’s allegation on June 24, 2017, was exactly the same as the reporting of his claim against Richtex. In that case, the doctor noted “had noted back pain and soreness for three weeks. Then he reported this vague episode of lifting some bricks and he felt that he may have injured himself at that time although he denied any significant change at the time of this incident.” **(R. 158-59)**. Here, he reported back pain and soreness for several weeks, then reported a vague episode of lifting on June 24, 2017, claiming he felt he may have injured himself at that time even though there was no significant change when the alleged incident occurred.

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.”).

Further, the treating physician on which Appellant based his arguments testified that there was no way to tell from looking at the MRI scan how long the herniated disc was present. It is plausible that the herniated disc could have been present long before Appellant even began working at Michelin. *See R. 58* (noting Appellant was “on disability” following his position with Westinghouse). Accordingly, the Commission did not err in concluding Appellant failed to meet his burden of proving an injury by accident on June 24, 2017.

III. Substantial evidence supports the Full Commission finding this case is barred pursuant to *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), where the evidence demonstrates Appellant knew he could injure his back performing his job at Michelin.

Not only was Appellant’s alleged pain on June 24, 2017, not accidental because Appellant alleged significant back pain for several weeks prior to June 24, but also because Appellant had been aware of his back problems for several years and left a job due to the same problem prior to working at Michelin. In *Capers*, 305 S.C. at 256, 407 S.E.2d at 661, this Court addressed whether a claimant sustained an injury by accident arising out of and in the course of his employment pursuant to Section 42-1-160. The Court reiterated that the “word ‘accident’ has been applied by our courts in the workers’ compensation context to mean an ‘unlooked for or untoward event that the injured person did not expect, design or intentionally cause.’” *Id.* The Court held there was substantial evidence in the record to support the conclusion that *Capers’* injury was not accidental because he had been aware of the situation for several years and had previously left a job due to the same problem. *Id.* at 257, 407 S.E.2d at 661-62.

Here, in arguing the Commission erred, Appellant initially contends the Full Commission's finding as to *Capers* is conclusory; however, the conclusion is supported by Findings of Facts No. 4 and No. 10. In Finding of Fact No. 4, the Commission found,

that on June 11, 2017, the claimant reported ten out of ten pain; however, he did not file a workers' compensation claim for any date but June 24, 2017. (H.T. 259-60). . . . Moreover, claimant never notified anyone at Michelin he had ten out of ten pain in his back which he felt was caused by his work, but instead he returned to the same work he felt was causing his problems unbeknownst to Michelin.

Additionally, in Finding of Fact No. 10, the 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.

In *Landry v. Carolinas Healthcare Sys.*, this Court relied upon *Capers* in holding substantial evidence supported the Full Commission finding a claimant did not suffer an injury by accident arising out of and in the course of her employment where the worsening of her bunion condition was not unexpected. 396 S.C. 149, 157, 719 S.E.2d 288, 292 (Ct. App. 2011). The Court noted the claimant continued to work in a job that required her to stand for long periods of time even though (1) she was aware of her physical condition and knew which activities would worsen her symptoms, (2) her doctor warned her that standing on her feet for prolonged periods of time would worsen her bunion conditions, and (3) she testified she was aware that the amount of standing in her occupation was hazardous to the condition of her feet. *Id.*

Similarly, in *Havird*, this Court concluded the claimant did not suffer an injury by accident within the meaning of the Act. 308 S.C. 397, 418 S.E.2d 329. The Court noted the claimant's vascular disease was not aggravated by unexpected or excessive exertion in the performance of his

duties or by unusual and extraordinary conditions in his employment. *Id.* at 400, 418 S.E.2d at 331. Instead, the worsening of his varicose veins was the natural and expected result of working in a job that was performed while standing. *Id.* This Court explained,

It is well known that prolonged standing is bad for people with varicose veins. Aggravation of the condition is the natural and expected result of standing in a limited area without much movement. Havird himself knew standing would worsen his condition over time and did his best to reduce further injury to his legs by elevating them when he could. The injury to his legs was real, but it was not injury by accident.

Id.; see also *Richardson v. Wellman Combing Co.*, 233 S.C. 454, 459, 105 S.E.2d 602, 604 (1958) (holding there was no proof of an injury by accident).

In the instant case, Appellant, like the claimants in *Capers*, *Havird*, and *Landry*, knew of his back condition and knew which activities, such as heavy lifting or bending, would worsen his symptoms. Appellant contends he did not expect that he would hurt his back while performing manual labor at Michelin. However, in his prior jobs, Appellant required treatment for back pain after heaving lifting at work. Appellant knew his doctor had restricted him from heavy lifting until he was evaluated by a surgeon. He repeatedly chose to ignore the doctor's orders. He did not get evaluated by a specialist and instead went directly to work at Westinghouse which according to Appellant's own testimony required lifting containers and pushing carts weighing up to 800 pounds and thereafter, following being on disability after his work at Westinghouse, Appellant began making "big" tires for Michelin, which Appellant stated could cause sharp pain in a person's back when stretching the rubber in the tires. (R. 58, 423, 427). A doctor previously warned him that "having back pain for three weeks, the entire time he has been working for Ric[h]tex, if he does not respond very well and very fast to some conservative treatment it might be in his and Ric[h]tex's best interest for him to find new employment" and that he was "unable to perform the

job required at Richtex.” (R. 158-59).

Despite the warnings, Appellant went to work for Michelin—a company where he knew he would be required to do the same type of manual labor after he provided Michelin false information regarding his medical history. Although Appellant had prior back problems and testified that he knew stretching the rubber could cause back problems (R. 423, 427), he filed this claim alleging he suffered a back injury at Michelin from “[s]tretching rubber for a tire.” (R. 47). Thus, Appellant knew the type of work he performed at Michelin could cause back problems and worsen his condition. *Havird*, 308 S.C. at 400, 418 S.E.2d at 331.

In fact, Appellant’s prior case and the instant case are almost identical. At Richtex, Appellant filed a workers’ compensation claim only weeks after he started the job. (R. 158-59). He claimed he had back problems the entire time he worked at the job, then reported a “vague” episode of lifting which caused an injury. (*Id.*). At Michelin, he complained of back pain for nearly the entire time he worked for the company, then was “vague” in describing the alleged injury to Nurse Sirois. (R. 735, 741). In the Richtex claim, he went to Doctors Care for a second opinion without following the treating physician’s, Dr. Norris, orders. (R. 158-59). Similarly, here, he went to the emergency room and to Doctor’s Care instead of following the treating physician’s, Dr. Izard, orders to return Dr. Izard for a follow-up evaluation. (R. 84, 88, 99). At Richtex, Dr. Norris described Appellant as being in “a litigation thought process” shortly after beginning medical treatment, just as in the instant action against Michelin, Appellant told Gross to “talk to my lawyer” when Gross offered transportation to Appellant for him to continue with the company’s investigation of the claim. (R. 158-59; 772-73).

Although Appellant attempts to distinguish the area of the back in the prior workers’ compensation claim and the current claim, the prior records and reports demonstrate the alleged

issue involved the same part of Appellant's back—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). Appellant'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, Appellant 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[r]ly can move can't been (sic) down.” Likewise, the medical record from the December 11, 1997 visit with Dr. Norris Appellant reported “the pain is in the *middle of his back*, hurts sometimes when . . . he bends.” (R. 159) (emphasis added). When he saw Dr. Marom on June 13, 2017, weeks prior to reporting this workers' compensation claim, Dr. Marom diagnosed him with acute *low back pain*. (R. 65). Furthermore, in the forms in which Appellant repeatedly falsely denied any prior claims or back injuries, the questions ask about issues with any part of the back.

Accordingly, Appellant knew the lifting restriction was intended to prevent exactly the type of injury that occurred. Any alleged resultant back injury was a predictable consequence of Appellant's voluntary defiance of the lifting restriction. Just as in *Capers*, there is substantial evidence in the record to support the conclusion that any back issue experienced by Appellant on June 24, 2017, was not accidental. Appellant had been aware of the situation for several years and had previously left a job due to the same problem caused by heavy lifting. Therefore, the back problem “was not an unlooked for event which [Appellant] did not expect. It was, in fact, an event which [Appellant] could anticipate given his past experience.” *Id.* at 256, 407 S.E.2d at 662.

Because Appellant knew the requirements of the position with Michelin and the restrictions placed upon him by his treating physician as a result of the prior injury to his back, Appellant's injury was not unexpected and thus, was not compensable. *Id.*

South Carolina law does not provide compensation benefits for injuries the employee voluntarily inflicted. Appellant's injury was the expected result of repeated activities which violated the doctor's specific restrictions and therefore does not constitute an injury by accident. Therefore, substantial evidence supports the Full Commission's finding *Capers* barred this claim and Appellant's back condition on June 24, 2017, was not a compensable injury by accident.

IV. Substantial evidence supports the Full Commission finding Section 42-9-60 of the South Carolina Code Ann. (2015) barred this claim as a matter of law where in 1997 a doctor restricted Appellant to no heavy lifting until he was evaluated by an orthopedic surgeon, but Appellant never visited an orthopedic surgeon and instead continued to work jobs which required a significant amount of heavy lifting and thereafter failed to alert or notify Michelin he was allegedly suffering from ten out of ten pain for at least four weeks prior to June 24, 2017, and sought medical treatment on his own without any knowledge of Michelin due to Appellant's failure to provide notice.

The Commission correctly determined that even if Appellant sustained an injury by accident on June 24, 2017, Appellant intentionally and willfully did so by failing to alert or notify Michelin he was allegedly suffering from ten out of ten low back pain for at least four weeks prior to June 24, 2017, and seeking medical treatment on his own without Michelin's knowledge of any issues. (R. 45-46).

"Generally, the fault of an employee in a workers' compensation claim has no bearing on the employee's right to recover." *Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008). However, Section 42-9-60 of the South Carolina Code makes an exception to this general rule, stating "No compensation shall be payable if the injury or death was occasioned by the . . . wilful intention of the employee to injure . . . himself or another."

“[T]he term ‘wilful intention,’ as used in the statute, means a deliberate or formed intention.” *Zeigler v. S. C. Law Enft Div.*, 250 S.C. 326, 329, 157 S.E.2d 598, 599 (1967). In *Zeigler*, a person was considered to have willfully intended an action when the act “was not impulsive or instinctive, but deliberate” and “[t]he circumstances were such that the parties were charged with the knowledge and reasonable expectation that the act would result in serious injury.” *Id.* at 331, 157 S.E.2d at 600.

As previously outlined, Appellant fraudulently failed to notify Michelin of his prior back issue and workers’ compensation claim for his back during the application process. Then, after beginning manual labor at Michelin, Appellant failed to inform any member of management at Michelin that he was experiencing significant back pain during almost his entire tenure with the company. No person at Michelin was aware that Appellant visited Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, complaining of back pain for the prior several weeks and claiming he was injured at work. (R. 335-36, 414-15, 463-65, 469-71, 474, 490-92, 618, 638, 706-07, 720, 738, 743, 767-68). Appellant’s alleged pain was not reported before June 24, 2017. (*Id.*). As safety manager, Mark Gross was supposed to be notified of any actual or potential workers’ compensation claims and Gross confirmed no person in management at Michelin had any idea Appellant was claiming to have back problems since around the end of May 2017 that he attributed to working at Michelin. (R.766-67). Gross testified that he was first informed of Appellant’s alleged injury late in the afternoon on June 24, 2017. (R. 770).

Training manager, Troy Lowman, first became aware Appellant was filing a workers’ compensation claim on June 24, 2017, around lunchtime. (R. 701). Appellant called Lowman and told him he was at a hospital for a work injury and Lowman believed Appellant had already been seen by a doctor when Appellant called him. (R. 701-02, 714). Lowman asked Appellant to

report the accident to Michelin security, which in turn would have generated an accident report and investigation. (R. 717). Appellant never returned Lowman's repeated phone calls after that initial call in the hospital. (R. 720, 724). Similarly to Lowman and Gross, Nurse Sirois testified that she first learned of Appellant's alleged issue on June 24, 2017, when she received a call from the shop manager asking her if she knew anything about Appellant's alleged injury and she did not. (R. 732-33). She contacted Appellant and asked him about the alleged incident and told him he did not follow the proper protocol in seeking medical treatment. (R. 733-35).

Michelin trained Appellant to follow specific protocol for reporting injuries, which he did not follow. This is elucidated in the testimony of Lowman, who was a thirty-six-year employee responsible for on-boarding new employees and insuring training occurred and was properly conducted. (R. 697). Lowman and other managers confirmed training at Michelin included a discussion on workers' compensation and reporting claims. (R. 699, 768-71). The training provided to all new employees—including Appellant—provided that the proper protocol for reporting any work injury was for Appellant to notify the shift manager and safety spoke and complete an accident investigation form. (R. 700, 768-71). Appellant's trainer, Jermaine Lemon, trained Appellant to go to the medical department at Michelin and, if the medical department was closed, go directly to Michelin security because Michelin's security officers are trained Emergency Medical Technicians. (*Id.*). Lemon trained Appellant *not* to go to Michelin's family health center for work-related injuries. (*Id.*). Yet, Appellant never reported the June 11, 2017 and June 13, 2017 visits and claimed that before he went to the emergency room on June 24, 2017, he went to Michelin's nurse's station and family health center, but could not find assistance so he went to Lexington ER. (R. 440-48).

As demonstrated by hearing testimony, the proper procedure would have been for

Appellant to report the June 11, 2017 and June 13, 2017 appointments to a manager or safety spoke. (R. 704-05, 768). Moreover, Appellant should have reported *any* back pain that hindered his ability to do his job, but he did not. (R. 710-11). Furthermore, Nurse Sirois confirmed that if, as here, a Michelin employee goes to any doctor or hospital or anywhere else and claims to be having ten out of ten back pain and relates the pain to the job at Michelin, that is something that should have been reported immediately to Michelin. (R. 737). In fact, Appellant admitted ten out of ten level pain is not minor and is in fact the worst pain a person could have. (R. 623, 640). As the Michelin employees testified, Appellant had ample opportunity to notify Michelin of any alleged work injury but failed to do so. (R. 705-06).

Michelin needed to know of Appellant's back pain because of its impact on the safety of Appellant, Michelin, Appellant's co-workers, and other members of Appellant's team. (R. 705-06, 720-22, 782). Nurse Sirois opined it was not safe for Appellant to continue his job if he had ten out of ten pain in his back as Appellant alleged. (R. 736-37). Michelin management explained that if Appellant had reported the prior back pain, the nurse would have brought him in for an assessment and immediately referred him to the plant doctor for treatment and further evaluation to determine whether he could continue to safely perform his job. (R. 721-22, 737). *See Mintz v. Fiske-Carter Const. Co.*, 218 S.C. 409, 63 S.E.2d 50, 52 (1951) (explaining that notice to the employer of an accident affords the employer an opportunity to furnish medical care to the employee and minimize the disability and resulting liability).

Despite not reporting the ten out of ten pain, Appellant continued to work in the same position which he alleges caused the pain. The June 13, 2017 report demonstrates Appellant forced himself to work knowing he had issues and should not have been working according to his own doctor. *See Havird*, 308 S.C. at 400, 418 S.E.2d at 331 (noting that continuing to work in pain

and fatigue "often worsens [a person's] health"). Accordingly, the Full Commission properly denied the claim as Appellant's alleged injury on June 24, 2017, was not unexpected and was instead willful as his failure to notify Michelin of the prior history and medical visits in which he reported ten out of ten pain demonstrated circumstances such that Appellant is charged with the knowledge and reasonable expectation that the act would result in serious injury. *Zeigler*, 250 S.C. at 331, 157 S.E.2d at 600.

V. The Full Commission's credibility finding was clear and unambiguous and substantial evidence supports finding Appellant's lack of credibility supported barring compensability under the Act.

As an initial matter, this issue is not preserved. Appellant never raised the issue, briefed it, nor argued regarding credibility to the Full Commission. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [Full Commission] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Under our preservation rules, a "losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id.*

Even if the issue was preserved, substantial evidence supports affirming the decision. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." *Sharpe*, 336 S.C. at 160, 519 S.E.2d at 105. Despite Appellant's contention otherwise, this Court cannot disregard the credibility findings of the Commission when those findings were used to

support the finding that the claimant did not suffer a work-related injury. *See id.* at 159-160, 519 S.E.2d at 105 (holding the findings of the workers' compensation commission that a claimant did not suffer a work-related injury was supported by the evidence where the Commission based its decision on the lack of credibility of the claimant and on the credibility of the employer's witnesses).

The Full Commission found Appellant failed to carry his burden of proof of sustaining an injury by accident on June 24, 2017, due in part to his lack of credibility. (R. 45). *Id.* When considered as a whole, the record is replete with evidence of Appellant's lack of credibility. First, as noted in the Full Commission's findings of fact, Appellant repeatedly provided false information to employers. At the hearing, he denied ever seeing Westinghouse's medical history form, but then admitted his name, address, and signature were hand-written written on the form. (R. 412-13). On the Westinghouse forms, despite the prior workers' compensation claim at Richtex, Appellant denied ever having had a work-related injury or having been restricted medically from doing any part of his job. (R. 177-81). He falsely stated he never had any pain, numbness, limited motion, or injury of the back. (R. 414-15, 180-81). He also falsely denied any prior work injury, prior workers' compensation claims, or receiving a settlement for any work injury. (R. 180-81, 414-16, 606-10, 613-24). He denied any permanent restrictions or limitations. (R. 180-81, 414-15). He also denied having had a previous job with similar physical demands. (*Id.*).

Moreover, on the Michelin Questionnaire, as with the Westinghouse forms, despite his prior workers' compensation claim and restriction from a doctor of no heavy lifting until he was evaluated by an orthopedic surgeon, Appellant again falsely denied any prior back injury, backache, back pain or having ever experienced a medical problem that affected his ability to

perform work. (*Id.*; R. 420-21, 461, 601-05). Appellant reported to Valdes that he “hasn’t had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment,” which was false. (R. 112).

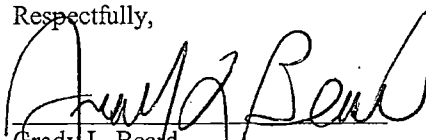
Appellant completed a “HealthWorks Post-Injury Questionnaire,” and when asked under the history of present illness section, “Have you ever injured this part of your body before,” Appellant checked the box for “No.” (R. 80-81). Further, under the previous illnesses section, when asked “Do you now have or have you ever had: (if so, list the date it occurred or you were diagnosed) . . . Back injuries or problems” Appellant checked the box for “now” and wrote the date as “6/24/17 Lexington Emergency” without any indication of the prior medical visits for his back issues. (*Id.*).

Furthermore, Dr. Izard opined Appellant presented a significant degree of symptom amplification and magnification. (R. 84). See *Fishburne v. ATI Sys. Int’l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009) (holding the Commission’s finding that a claimant lacked credibility was supported by the evidence where “she exaggerated her symptoms and made inconsistent statements at the hearing and to her treating physicians”). Both Gross and Lemon testified they did not believe any of Appellant’s allegations in this claim. (R. 663, 669, 785). Appellant admitted that he falsely told his family doctor that he had never had prior back pain and he falsely told Dr. Izard that he had never had any prior back problems or prior knee surgery. (R. 486, 522-23). Accordingly, Appellant’s recurrent false statements to employers and medical professionals sufficiently supported the Commission’s findings regarding his credibility. See *Porter v. Labor Depot*, 372 S.C. 560, 574, 643 S.E.2d 96, 103 (Ct. App. 2007) (finding the record supported finding the claimant lacked credibility where the claimant’s testimony conflicted with medical evidence provided in EMS reports, emergency room records, and prior medical histories).

CONCLUSION

This Court should affirm the Full Commission's order denying Appellant's claim in its entirety. Appellant vitiated the employer-employee relationship when he fraudulently denied any prior back issues and Michelin relied upon the denial. Appellant failed to meet his burden of proof under Section 42-1-160 to show he sustained an injury by accident on June 24, 2017, and the claim fails under Section 42-9-60 and *Capers v. Flautt*, where the record demonstrated any back issues on June 24, 2017, were not unexpected or an untoward event and instead were expected and willful given his prior work history and his medical visits that he did not report to Michelin in the weeks prior to June 24, 2017. Finally, Appellant's lack of credibility overlays every issue decided by the Full Commission and makes any medical report Appellant submitted insufficient to support his claim. For these reasons, Michelin respectfully submits that the decision of the Full Commission should be affirmed.

Respectfully,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1708221

Court of Appeals Case No. 2019-000556

Isaac Brailey, Claimant.....Appellant,

v.

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

CERTIFICATE OF COUNSEL

Counsel certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

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JAN 30 2021
SC Court of Appeals

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SOUTH CAROLINA
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Isaac D. Brailey, Claimant, ... Appellant,

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Michelin North America, Inc., (US7), Employer,
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ARGUMENT

1. Brailey met his burden of proof by showing by medical evidence that he suffered a compensable injury by accident [In Reply to Brief of Respondent, pages 23-30].

To qualify for benefits under workers' compensation, the employee must prove an "injury by accident arising out of and in the course of employment . . ." S.C. Code Ann. § 42-1-160 (A) (2007). Respondents argue there was no injury by accident because "any issue with [Brailey's] back on June 24, 2017, from heavy lifting was not an unlooked for or unexpected event." Respondents base their theory on the allegation that Brailey "had back issues during the entire time that he worked for Richtex . . . he then had back issues the entire time he worked for Michelin." [Respondents' Brief, page 25].

These factual allegations miss the important point. Brailey *did indeed* have back pain for the roughly two weeks he worked for Richtex – *twenty years ago in 1997*. However, that episode of back pain resolved. He then worked a physical job at Westinghouse for 16 years where he "lift[ed] pellet containers and push[ed] carts of pipe wrenches and steel rods weighing up to 800 pounds." [Respondents' Brief, page 8]. Brailey had no back pain, no back injuries, no workers' compensation claims and no difficulty working for the next twenty years – *not until he injured his back at Michelin*. Respondents would have this Court believe Brailey had continuous ongoing back problems beginning in 1997 and never stopping. This is simply not so.

The issue of whether an employee sustained an "injury by accident" within the South Carolina Workers' Compensation Act is a question of law. As such, this Court has authority to review whether the Appellate Panel's determination that the "June 24, 2017 incident is not compensable" is an error of law. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App.

1996).

Respondents posit that an injury by accident requires “an unlooked for or unexpected event.” [Respondents’ Brief, page 25]. This is not the law. In Pee, our Supreme Court explicated that “some jurisdictions . . . held there must be some unusual or unlooked-for mishap resulting in injury to constitute an accident; other jurisdictions held *no mishap was required for an accident so long as there was an unexpected injury occurring while the employee was performing his usual duties in his customary manner*. We chose the latter definition, focusing on the unexpected nature of the injury rather than requiring that the event causing the injury be unexpected.” Pee v. AVM, INC., 352 S.C. 167, 573 S.E.2d 785 (2002)(“Employer’s contention that the cause of the injury must be unexpected is incorrect. ”)(emphasis added).

The Court further added that “the injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing. Therefore, if an injury is unexpected from the worker’s point of view, it qualifies as an injury by accident.” Id. In Pee, the Court specifically noted that, as in the instant case, “there is no evidence Claimant intended or expected to be injured as a result of her . . . work activity.” Id.

We know Brailey had no intention or expectation of being injured not merely because of his testimony, but primarily because of the medical evidence. Prior to joining Michelin, Brailey had no problems with his back since the brief episode of back pain in 1997. He started work at Michelin around April 17, 2017. Before starting work, he was cleared for full unrestricted duty by Dr. Tomarchio, Michelin’s company doctor. [R.P. 831].

The “heavy lifting at work” on his new job caused low back pain “for the past several days” resulting in a visit to the emergency room on June 11, 2017. He was diagnosed with lumbar strain

and given a muscle relaxer and pain medication. He was again cleared for full duty work. [R.P. 67-69].

Two days later, on June 13, 2017, Brailey was still feeling sore, so he went on his own to his family doctor (as instructed by the ER). Dr. Marom “discussed likely strained muscles due to heavier work load at new job. no emergent signs/symptoms. . . . need for strengthening up of core muscles and proper lifting techniques.” [R.P. 61-65]. Dr. Marom cleared him for work.

Brailey consulted with three doctors – two of whom saw him when he was having back pain from his new job. All three doctors cleared him for full duty work with Michelin. He could not have been more diligent.¹ If you have been told by multiple doctors that you have no increased risk of injury and have been cleared to work in a new job whose physical demands make your back hurt, then you cannot intend or expect to suffer an injury from that job. No reasonable person could have such an intent or expectation on such evidence. Brailey proved that the June 24, 2017 “incident” was in fact a compensable injury by accident.

Respondents then turn to searching for perceived inconsistencies in Brailey’s left-sided radiculopathy symptoms. Each example cited by Respondents is either not an inconsistency or is

¹Respondents find fault with Brailey because “he never reported these visits or medical problems to Michelin and therefore, he never provided Michelin with the proper notice of any issues pursuant to South Carolina law and Michelin’s policies and procedures.” [Respondents’ Brief, page 25]. Brailey did tell his trainers his back hurt. He never told them he was going to the doctor because he was told “your back going to be hurting. It just take time to get used to it.” [R.P. 261, lines 12-21]. Brailey had no intention of making a workers’ compensation claim. He merely wanted to make sure he was okay to keep working – which was confirmed by his doctors.

Moreover, it is not as if Michelin would have provided treatment, changed his job or taken him out of work. When Brailey went to Michelin’s company doctor *after* the accident, Dr. Izard told him not to take the pain medication and “not to follow up with the neurosurgeon.” He was told his “recommended work status is Regular Duty. . . . The employee is given no work restrictions at this time.” [R.P. 84-86].

easily explainable. The June 24, 2017 report does indeed state “does not radiate” and “no numbness in extremities. However, he does report “lower back pain to left side.” [R.P. 72]. The absence of documented radiculopathy is explained in the follow-up report three days later where it states “here on Saturday for the same. Did not recognize numbness until he was reading discharge instructions.” [R.P. 87].

The reference to *numbness in his right leg* on the June 27, 2017 report appears to be a typographical error as Brailey was diagnosed with *left sided sciatica*. When asked about the reference to right leg numbness, Dr. Boyd testified “I believe that could be either a patient reporting error or a physician recording error, as everywhere else in the records at other – it seems to be left-sided.” [R.P. 341, lines 15-18]. Dr. Boyd added “I just want to say that it seems like he’s been pretty consistent her. One other thing I want to say is if I ask a patient, Does your pain radiate, they may not fully understand that, what that means, and so may not know how to respond. Admittedly, though, the physician [in the June 24, 2017 report] did not note any sort of radicular symptoms, but he did feel like it was appropriate to refer to neurosurgery.” [R.P. 348, line 23-p. 349, line 6]. As to a report of radiation down the right leg in September 14, 2017 report for an injection, Dr. Boyd again testified “I think that could be a typographical or recording error.” [R.P. 349, lines 16-24].

The critical fact here is the diagnosis. Dr. Boyd testified the MRI scan showed “The most prominent finding was a large paracentral disk extrusion at L4-5 with a large superiorly migrated extruded fragment likely compressing the nerve next to it.” [R.P. 308, lines 9-17]. He added the radiating pain “should be on the left side, the same side as the disk herniation.” [R.P. 327, lines 3-9]. This is a diagnosis and opinion which can only be made by Dr. Boyd. It is error for the Commission to disregard his opinion on this point. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C.

417 (Ct. App. 2012)(where a finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence).

Tellingly, Respondents claim “Appellant invests Dr. Boyd’s testimony on causation with more significance than it merits.” They assert Dr. Boyd’s:

wavering testimony does not change the fact that substantial evidence supports the Commission concluding Appellant did not sustain a compensable injury by accident on June 24, 2017, allegedly from heavy lifting was not an unlooked for or unexpected event as Appellant alleged significant back problems that he attributed to work long before that date.

[Respondents’ Brief, page 26].

There is no need to disparage Dr. Boyd. His testimony did not waver. He listened to the questions from the attorneys, he reviewed documents, and he gave complete concise answers. Respondents may not like his opinions, but they cannot argue with them, for he consistently testified to a reasonable degree of medical certainty that the work accident of June 24, 2017 caused the herniated disc. [R.P. 125; p.344, line 8-p. 346, line 4]. Dr. Boyd added “I believe that, more likely than not, he injured his lumbar spine at his employment including some episode on June 24th.” [Boyd R.P. 345, line 15-p. 346, line 4]. And of course, the argument on an “unlooked for or unexpected event” is simply not the law.

Respondents argue Dr. Boyd’s testimony is “similar to testimony relied upon by the claimant in *Jones v. Pacific Corp.*” Respondents go on to argue that the claimant lost her case in Jones because “the *doctors’* testimony was inconsistent.” [Respondent’s Brief, page 27 (emphasis added)]. Jones is easily distinguishable. In Jones, the claimant 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).

In Jones, five different doctors offered conflicting opinions as to causation. The Court was bound to defer to the Commission's weighing of the evidence. Here there is nothing to weigh. The only medical testimony comes from Dr. Boyd. There is no conflicting testimony. 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 was also a misdiagnosis, yet is at least consistent with a work-related injury as stated by every other doctor. [R.P. 80-82].

Finally, Respondents speculate that Dr. Boyd might have opined differently had he been shown the two reports from 1997 authored by Dr. Norris. This is pure speculation. Respondents suggest the 1997 records are similar to the June 11 and June 13, 2017 reports. If so, then they have no additional probative value, as Dr. Boyd reviewed the two June 2017 reports. His opinion remained that the herniated disc occurred in the work accident of June 24, 2017.

Brailey proved that the June 24, 2017 incident was a compensable injury by accident. The Court should reverse the findings and conclusions of the Appellate Panel.

2. Respondents cannot prove the elements of the fraud in the application defense [In Reply to Respondents' Brief at pages 16-23].

The parties agree as to the three elements which must be proven by the employer to render the employment relationship voidable. This Court has authority to take its own view of the evidence – a review which will show Respondents do not meet their burden.

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

Respondents argue the facts in this case are similar to those in Brayboy. This is not really accurate, as Brayboy is quite different in the material points. Respondents first allege that “Brayboy’s employment application included disclaimers similar to those outlined in Appellant’s post-hire questionnaire.” [Respondents’ Brief, page 17]. Both do indeed contain disclaimers. However, the Michelin Declaration and Authorization is neither specific nor conspicuous. Conversely, the disclaimer in Brayboy is boldfaced with an explicit warning that a workers’ compensation claim will be barred by a misrepresentation as to :

If I do not give accurate and truthful information on this Medical History Questionnaire, which forms the second and final part of my employment agreement, the entire employment agreement shall be considered null and void.

MISREPRESENTATIONS AS TO PREEXISTING PHYSICAL OR MENTAL CONDITIONS MAY CAUSE FORFEITURE OF YOUR WORKERS' COMPENSATION BENEFITS.

Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009)(capitalization, bold and italics in original).

Workforce put its employees on notice of the potential consequences of a misrepresentation. This shows Workforce intended its employees to understand what they were signing. If there were

a later injury resulting from putting an employee into a job he could not physically, Workforce could void the employment relationship with a clear conscience.

Conversely, Michelin gave no such notice to its employees. Brailey and other Michelin employees only learn that a misrepresentation or omission – even one as minor as a lumbar strain twenty years ago – will bar a workers' compensation claim after they have been injured. Workforce wanted its employees to make informed decisions *before* they got injured; Michelin wanted to trap its employees *after* they suffered injuries.

The conspicuousness of a disclaimer is not a minor issue. The Cooper defense is a common law defense drawn not from workers' compensation, but from employment law. If certain conditions are met, the employer can void the employment relationship. Employment law contains an extensive body of caselaw on disclaimers which can alter the employment relationship. The courts require disclaimers to be conspicuous to ensure that employees are making informed decisions. Slipping a disclaimer into an employment document is disfavored, as it deprives the employee of free will and can result in the type of "gotcha" we have in the instant case.

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 616 S.E.2d 694 (2005). If an employer wishes to issue policies or documents without altering the at-will relationship, the employer must insert a conspicuous disclaimer into the document. The South Carolina Supreme Court "has held that a disclaimer appearing in bold, capitalized letters, in a prominent position, is conspicuous."² Id. It cannot be gainsaid that Michelin's disclaimer fails this

²The legislature codified this rule in 2004:

It is the public policy of this State that a handbook, personnel manual, policy,

test.

No one disputes Michelin's authority to terminate its at-will employees. The issue here is that Michelin seeks to *retroactively* void an employment relationship solely to evade liability for a workers' compensation claim. Before allowing that extraordinary step, the Court should require a conspicuous disclaimer as a matter of fundamental fairness and straight dealing. Cf. Simpson v. Msa of Myrtle Beach, Inc., 644 S.E.2d 663, 373 S.C. 14 (2007) ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

Michelin also seeks to equate Brailey's omission with Brayboy's far more consequential omissions. Brayboy's preexisting conditions included a back injury in the Navy resulting in a 20% disability rating; and a prior work accident resulting in a 5% permanent impairment rating. The court stated "Notably, since the 1970s, Brayboy has received benefits from the Department of Veterans' Administration (VA).". Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009)(emphasis added). The court added "The willful nature of Brayboy's false responses pervades the record." Id.

On the other hand, Brailey omitted a minor back injury from twenty years prior for which he received some physical therapy, two doctor visits, and a nominal settlement of \$2,500.00. Unlike

procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

S.C. Code Ann. § 41-1-110 (2004).

Brayboy, Brailey had no permanent impairment, received no ongoing compensation, and had no problems with his back until his injury at Michelin. Moreover, as Brailey had been cleared to work, his omission was immaterial.

Respondents argue "Appellant's contentions imply that as time elapses, workers are free to lie on employment applications." [Respondents' Brief, page 18]. Appellant argues no such thing and is improper for Respondents to make such inflammatory statements. The fact is we are dealing with momentous issues here. While in the overall scheme of law this is merely one case out of many, for Isaac Brailey, the issues in this case of whether he receives back surgery and compensation for his injuries determine whether he can keep his home and provide for his family. Trivializing his plight should not be countenanced.

There is no evidence Brailey intentionally misled Michelin into hiring him by hiding some sort of major preexisting disabling condition. When he filled out the medical questionnaire, no one told him it would be later used against him. His testimony that he rushed through it is borne out by the fact he never filled in his address and emergency contacts. [R.P. 176]. Surely if the questionnaire was so critical to Michelin they would have required it to be completed in full and instructed the employee to its purpose. And, if it was truly important to get detailed responses, then the questions would be narrowly tailored to the important information Michelin needed to know.³

The only reason Michelin even knows of the previous workers' compensation claim is because Brailey voluntarily disclosed his previous employment with Richtex and the details of his 1997 work injury, treatment and settlement in his deposition taken September 25, 2017. [R.P. 249,

³The single question relevant to hiring and placement is "Are you presently being treated for any condition that may inhibit your ability to work?" [R.P. 176]. Brailey truthfully answered *NO* to this question.

line 25-page 253, line 22]. At this point in time, neither Brailey nor his attorney had any idea that the Cooper defense was a reason for denial. And in fact, based on the prehearing brief filed by Respondents on January 25, 2018, it was not Respondents reason for denying the claim.

Michelin argues “the record as a whole supported the Full Commission finding that Appellant knew he was concealing the truth from the employers when he completed the questionnaires.” [Respondents’ Brief, page 19]. This allegation is unsupportable. Brailey omitted mentioning back strain from twenty years earlier. He had no reason to believe he would not be hired had he mentioned it, nor did he have any reason to believe it would bar a future workers’ compensation claim. Michelin wants to set this up as if Brailey had a major ongoing disability which he knew would disqualify him from the job; which he knew would result in injury; yet proceeded with the lie to set up a workers’ compensation claim.⁴ All of which is based on *stale evidence* of a minor back injury from two decades ago which Brailey barely remembered. The suggestion beggars belief.⁵

The Commission’s finding that Brailey “knowingly and willfully made a false misrepresentation as to his previous back condition” should be reversed.

⁴Brailey’s trainer, Jermaine Lemon, testified Brailey seemed like a hard worker, always showed up on time, and had no difficulty doing the job. He testified he would have expected Brailey “with being new at the job to have some pain.” [R.P. 663, line 1, p. 664, line 3].

⁵Our appellate courts have repeatedly observed that medical evidence grows stale over time as a person’s physical condition improves or worsens, even going so far as to order a new trial when two year old medical evidence was deemed to be stale. See, Smith v. S.C. Dep’t of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)(reversing and remanding for taking of additional evidence when “[m]uch of the medical evidence upon which the single commissioner relied was more than two years old at the time of the hearing.”)(emphasis added). Cf. Johnson v. Renta-A-Center, Inc., 730 S.E.2d 857, 398 S.C. 595 (2012)(noting Commission found medical release more than a year old was “stale.”).

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

Michelin argues that the testimony of its witnesses (Lemon, Gross and Sirois) is sufficient to meet its burden of showing that Michelin “relied upon the false representation and this reliance must have been a substantial factor in the hiring.” See Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009). This argument is misplaced for several reasons.

None of these witnesses hired Brailey, nor are they even involved in the hiring process.

Jermaine Lemon was not a supervisor or manager. Nonetheless, he was allowed to testify – over objection and in response to leading questions – that he agreed “whether or not Michelin relies upon the answers that people give on those questionnaire as to whether or not they can perform the job.” [R.P. 667, line 12-p. 669, line 2]. Lemon may have been able to relate his personal experience in being hired, but he could not bind Michelin and could not testify to Michelin’s hiring process.

Nurse Sirois is not involved in the hiring process in any respect. She cannot testify to reliance on Michelin’s part. 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].

Respondents cite Fredrick for the proposition that “the reliance prong in *Cooper* was satisfied where a staff nurse for the employer testified that if the claimant had revealed her history of treatment for lower back problems, the employer would not have cleared the employee to work the particular

job without further investigation.” [Respondents’ Brief, page 21]. Fredrick is distinguishable for two important reasons. Firstly, the Court noted that the questionnaire itself stated: “The results of this medical examination will not be used to exclude an employee from his or her particular position **unless the results reveal the employee does not satisfy the employment criteria for the position**, and Wellman, Inc. can only provide a reasonable accommodation which will allow the employee to perform the essential functions of the job.” Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009)(emphasis added by court). This Court found this statement showed “Wellman’s reliance on the medical history form was undoubtedly a substantial factor in hiring Fredrick for the specific position in which she was placed.” Id. Michelin included no such disclaimer. [R.P. 176].

Wellman also presented testimony from its Human Resources Representative as to what Wellman would have done for placement or accommodation had Fredrick revealed her back problems. The testimony of the staff nurse was cumulative to this testimony, stating that Wellman would not have cleared Fredrick to work without further investigation. Id. Conversely, Michelin presented no testimony from an HR representative. Nurse Sirois never testified to hiring or placement; she simply acknowledged that Dr. Tomarchio completed paperwork cleared Brailey to work after a physical examination.

Despite her complete lack of firsthand knowledge, Sirois was allowed to testify over Appellant’s objection as to her *opinion* as a “medical person” on the reliability of a physical examination done by Dr. Tomarchio. Respondents 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 Respondents’ 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 third Michelin witness was Mark Gross, the Safety Manager. Gross testified that the purpose of the questionnaire is “To find out if there’s any concerns, health-wise, physical – any physical concerns.” He agreed he would “rely on the answers that your employees give you on those documents.” [R.P. 774, line 22-p. 775 line 5]. At no point did Gross testify that this reliance had anything to do with the actual hiring process; only that they would investigate further. And if the information came back showing the employee could not do the PAP job, they would “probably not” look for other jobs the employee potentially could perform. [R.P. 777, lines 19-24].

Even if this nonspecific testimony could establish the reliance prong, Michelin’s proof fails because Gross went on to testify that “if [Dr. Tomarchio] cleared him; [we] were good to go.” [R.P. 778, lines 14-24; p. 776, lines 19-24]. Gross went on to admit 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. He was asked if Brailey had gotten the pain taken care of and was cleared to work by a doctor, whether he would know anything different if he had been given that information. 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. 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]. The further fact that Gross

admitted all he needed to know was that Brailey was cleared to work even after going to see two doctors for back pain from his new job showed that there was no true reliance on the questionnaire. The reliance was on making sure the employee had medical clearance to safely work – which Brailey undoubtedly did. As such, the Court should find Michelin failed to prove the reliance prong.

C. There must have been a causal connection between the false representation and the injury.

The third prong of Cooper is “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). In this case, there is *no evidence* of a causal connection between the false representation and the injury.

Respondents cite Givens for the proposition that “Expert medical testimony clearly indicated that claimant’s condition was one of disc degeneration reflecting the cumulative effect of successive injuries.” Givens v. Steel Structures, 279 S.C. 12, 301 S.E.2d 545 (1983). It is a curious choice, for Givens provides no support for Michelin’s theory of the case. Givens “was awarded workmen’s compensation benefits in a substantial amount for [an injury to his lower back] and the resulting permanent disability.” Less than one month later, he applied for a new job, “knowingly and wilfully made false representations that he had no physical defects or prior injuries,” and suffered a new injury to the same part of his back six months later.

Givens is no help to Respondents because while Brailey did have a workers’ compensation claim twenty years prior, it was a minor injury to a *different* part of the back which settled for a *nominal* amount. Most importantly, Brailey’s injury was not one of disc degeneration from the cumulative effect of successive injuries. Dr. Boyd opined specifically that the work accident of June

24, 2017 caused a herniated disc. [R.P. 125, p. 344, line 8-p. 346, line 4].

There is no medical evidence to support the causal connection prong. The Appellate Panel based this finding on its own lay medical opinion. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider must be reversed as unsupported by substantial evidence). Michelin’s proof fails and the Appellate Panel should be reversed.

3. Respondents cannot prove the elements of *Capers v. Flautt*.

In the Conclusions of Law, the Commission made the conclusory statement that “Moreover the claim would be barred by *Capers v. Flautt*. [R.P. 46, Conclusion of Law 4]. Respondents argue that this nonspecific finding is supported by other findings of fact. This argument fails.

Respondents first note the Appellate Panel found “Moreover, claimant never notified anyone at Michelin he had ten out of ten pain in his back which he felt was caused by his work, but instead he returned to the same work he felt was causing his problems unbeknownst to Michelin.” [R.P. 44, Finding of Fact 4]. This finding has nothing to do with the elements set forth in Capers. Brailey had been cleared to work by those doctors on June 11th and 13th. Neither doctor thought he had an actual injury, merely pain from getting used to a new job. “[P]ain is not in and of itself a compensable injury.” Jackson v. Fayetteville Area System of Transp., 337 S.E.2d 110, 78 N.C.App. 412 (N.C. App. 1985).

The second finding relied on by Respondents is merely a catch all conclusory finding which also has nothing to do with Capers. That finding is unsupported by substantial evidence because, as previously argued, all doctors opined Brailey injured his back at Michelin, with Dr. Boyd opining

to a reasonable degree of medical certainty that Brailey suffered a herniated disc working at Michelin on June 24, 2017.

At no point does the Commission make a finding *based on medical evidence* that Brailey “expected or designed” with substantial certainty that stretching rubber on June 24, 2017 would result in a herniated disc in his back. To the contrary, Brailey exercised due diligence to avoid injury by going to two doctors to ensure the pain he was feeling from his new job was neither an actual injury nor exposed him to increased risk of an actual injury. It would turn the Act on its head if he were to be punished for his diligence, particularly when those doctors (as did Michelin’s doctors) cleared him for work. Given that he had been medically cleared, the accident was “an unlooked for and an untoward event which is not expected or designed by” Brailey. Yates v. Life Ins. Co. of Georgia, 291 S.C. 301, 353 S.E.2d 297 (Ct.App.1987). See, also Linnen v. Beaufort County Sheriff’s Dept., 408 S.E.2d 248, 305 S.C. 341 (Ct. App. 1991)(“Furthermore, an accident is an event not within one’s foresight and expectation and may be due to purely accidental causes or may be due to oversight and negligence, carelessness, fatigue, or miscalculation of the effects of voluntary action.”).

Capers has specific elements which must be proven. Capers was a dishwasher. He had previously made a claim for workers compensation benefits based on contact dermatitis from exposure to dishwashing detergent. In the first claim, his doctor “considered Capers totally disabled from work which involved exposure to soap, detergents, and/or water.” Two years later Capers took a dishwashing job with a different employer. He again developed contact dermatitis for which he filed a second workers’ compensation claim. His second claim was denied. This Court affirmed the denial, reasoning “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.” Capers v. Flautt, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991).

In the other two cases cited by Respondents, the employees did not suffer accidents. Each had longstanding problems (varicose veins in Havird; bunions in Landry) which they knew *from their doctors* would continue to worsen as they continued prolonged standing over time. See Havird v. Columbia YMCA, 418 S.E.2d 329, 308 S.C. 397 Ct. App. 1992)(“Aggravation of [varicose veins] is the natural and expected result of standing in a limited area without much movement.”); Landry v. Carolinas HealthCare Sys., 396 S.C. 149, 719 S.E.2d 288 (Ct. App. 2011)(“doctor. . . warned her that her [preexisting bunion\ condition would worsen if she continued to stand on her feet for long periods of time.”);

None of these cases remotely compare to Brailey’s situation. Brailey had a brief episode of back pain twenty years earlier. He had a new onset of back pain with his new job at Michelin. He was cleared to work by Michelin’s physician before he started working and cleared by two other physicians before the June 24, 2017 accident. Unlike the claimants in Capers, Havird, and Landry, Brailey’s doctors told him he could work without certain injury. Therefore, the Commission’s finding that Respondents proved Brailey sustained no accident under Capers should be reversed.

4. Brailey did not intentionally and willfully cause injury to himself [In Reply to Respondents’ Argument at pages 35-39].

The Commission concluded as a matter of law that “the claimant intentionally and willfully [sustained an injury by accident] by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same.”

[R.P. 46, Conclusion of Law 5]. The essence of Michelin's argument on this issue is that, because Brailey did not inform Michelin that he had gone to the doctor for back pain on June 11th and June 13th, he must have intentionally and willfully injured himself.

Michelin gives itself too much credit. Michelin seeks to accuse a new employee of failing to follow its reporting procedures, as if Michelin would have prevented the June 24, 2017 accident if they had the same information Brailey obtained from the two doctors. Michelin would have done no such thing and they know it. The Safety Manager, Mark Gross, was asked this very question; he responded "Probably not, no." [R.P. 776, line 19-p. 781, line 1]. He admitted that the key information was knowing that Brailey had been medically cleared for work.

We already know Brailey told his coworkers and trainers that his back was hurting. When he was told this was normal and expected for new employees (as confirmed by Gross), he sought an evaluation on his own – not to file or set up a workers' compensation claim, but to make sure he had nothing to worry about.

What would have changed if Brailey had told Michelin about the two mid-June doctor visits? First, Michelin would have obtained those records – which would confirm back pain due to a new job; no actual injury; and no work restrictions. Second, Michelin would have obtained their own evaluation from Dr. Izard. Because Michelin sent Brailey to Dr. Izard *after* the June 24, 2017 work accident (with a newly herniated disc) and Dr. Izard specifically stated "no work restrictions", we can safely say that Dr. Izard would have also cleared him to work before he herniated the disc. *Nothing* would have changed; nothing would have been different. Brailey would have been returned to work and suffered the exact same injury by accident on June 24th.

The circumstances in which an injury can have been intentionally inflicted are very specific.

For there to be a deliberate or formed intention to injure or kill oneself, there really must be a situation as obvious as engaging in a shootout with a fellow police officer. Ziegler v. S. C. Law Enforcement Division, 250 S.C. 326, 157 S.E.2d 598 (1967)(injury in voluntary shootout with fellow officer manifested intent to injure or kill). It is not something that can be bootstrapped out of an alleged violation of a reporting requirement. The Appellate Panel must be reversed

5. The Commission's vague credibility findings do not bar this claim from being compensable under the Act [In Reply to Respondents' Arguments at pages 39-42].

Respondents argue the credibility issue is not preserved. Appellant disagrees, as the issue was raised and ruled upon by the Appellate Panel. In the Order, the listing of grounds of appeal includes: "Whether the Single Commissioner erred as a matter of fact and law in finding Claimant's testimony was not credible." [R.P. 27]. The Appellate Panel went on to make its *own* finding of fact that "We find the claimant is not credible." Confirming that this was an independent finding, the Appellate Panel added that the finding was based on "The Hearing Commissioner's observations of the claimant at the hearing." [R.P. 43-44, Finding of Fact 2]. As the issue was raised and ruled upon, it has been preserved for appellate review.

Respondents miss the mark as to Appellant's argument. There are two points. The first is that the Appellate Panel's findings are so vague and tenuous that there really is no discernable basis for them. More specifically, the Commission never states which specific testimony on which specific issue they found not believable. Instead, they simply find he is not credible and deny his claim accordingly. This then is not a credibility finding. It is a *character* finding being used as a proxy for a *credibility* finding.

The distinction is an important one. Under current law, a credibility finding cannot be

reversed by this Court (unless there is no substantial evidence to support it). See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)(“This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court.” (emphasis added)) Conversely, a character finding is inherently arbitrary and capricious – and must reversed. The Commission can weigh conflicting evidence based on the credibility of witnesses. It cannot simply ignore evidence and deny a claim merely because it dislikes a person. Cf. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168 (1988)(“The contrast of appellant’s character with that of other criminal defendants being prosecuted in Lancaster County is deleterious in that the solicitor offered his personal opinion--devoid of evidentiary basis--of appellant’s character.”)(Finney, A.J., dissenting).

The mode of questioning from the Hearing Commissioner appears to demonstrate a bias against Brailey. A trial judge “has the right, in his discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth.” Williams v. S.C. Farm Bureau Mutual Ins. Co., 251 S.C. 464, 163 S.E.2d 212 (1968). “In exercising discretion to question a witness, the trial judge must do so in an impartial manner that does not indicate the trial judge's opinion as to any fact or ‘have an unintended prejudicial effect.’” Day v. Kilgore, 444 S.E.2d 515, 314 S.C. 365 (1994), *quoting Fowler v. Laney Tank Lines, Inc.*, 211 S.E.2d 231, 263 S.C. 422 (1975). While it is true that in the absence of a jury, a commissioner may be given more latitude in questioning witness, there is nonetheless a prejudicial effect when questioning the witness “may lead [the trier of fact] out of their normal role of passive finders of fact and into the role of advocate.” Id.

It appears that happened here, for the only way for the Appellate Panel – the ultimate trier of fact – to discern “The Hearing Commissioner’s observations of the claimant at the hearing” would be to note the aggressive and sometimes hostile questioning of Brailey by the Hearing

Commissioner. This mode of questioning appears to have injected an improper element of bias against Brailey into the proceeding, such that material evidence was disregarded in place of a simple dislike of the employee.

And this is the second point. Whether or not the Commission liked Brailey; whether they thought the omission of the twenty-year old episode of back pain was deliberate or innocent; whether or not they thought Brailey should have told Michelin he was going to the doctor in mid-June 2017 for back pain – regardless of all those things, the actual events of this case are not in serious dispute. And, once Brailey established that he had been cleared for work only to suffer a herniated disc in the June 24, 2017 accident, then the Commission was bound to find this a compensable claim. Because that is where the evidence takes you.

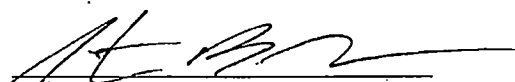
It is far too easy to paint Brailey with a broad brush and say he is of bad character for omitting a minor injury and minor workers' compensation claim from twenty years ago from the questionnaire. Is it really fair to punish people for innocent acts and technical violations when, in the final analysis, that omission made no difference whatsoever to the events of 2017? There is no evidence Brailey tried to set up a workers' compensation claim or even concealed a disability to get a job. It is only because Michelin was able to make Brailey appear to be a bad witness – aided by the Hearing Commissioner stepping into the role of inquisitor.

The credibility findings cannot outweigh the compelling evidence of a compensable injury by accident resulting in a herniated disc. The Decision and Order below should be reversed.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed. 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 30, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1708221

Appellate Case No. 2019-000556

RECEIVED
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SC Court of Appeals

Isaac D. Brailey, Claimant, ... Appellant,

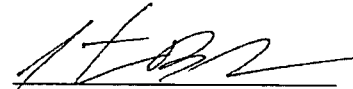
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b),
SCACR.

Respectfully Submitted,



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January 30, 2020



The South Carolina Court of Appeals

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April 27, 2022

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Re: Isaac D. Brailey v. Michelin N.A.
Appellate Case No. 2019-000556

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen

CLERK

cc: Amy Bracy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Isaac D. Brailey, Claimant, Appellant,

v.

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

Appellate Case No. 2019-000556

Appeal From The Workers' Compensation Commission

Opinion No. 5906

Heard February 9, 2022 – Filed April 27, 2022

REVERSED AND REMANDED

Stephen Benjamin Samuels, of Samuels Reynolds Law
Firm LLC, of Columbia, for Appellant.

Grady Larry Beard and Jasmine Denise Smith, both of
Robinson Gray Stepp & Laffitte, LLC, of Columbia, for
Respondents.

WILLIAMS, C.J.: Issac D. Brailey appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission) denying his claim for benefits against Michelin North America, Inc. Brailey contends the Commission erred in finding (1) he failed to prove he sustained a compensable injury; (2) his claim was barred by the fraud in the application

defense under *Cooper v. McDevitt & Street Co.*;¹ (3) Michelin proved the elements of *Capers v. Flautt*;² and (4) he intentionally and willfully caused injury to himself. We reverse and remand, finding Brailey's injury is compensable under South Carolina's workers' compensation law.

FACTS/PROCEDURAL HISTORY

Brailey was hired by Michelin on April 17, 2017. He passed a physical during Michelin's hiring process and was cleared for full duty. He trained as a rubber stretcher for very large mining tires. In his deposition, Brailey denied being trained in the correct procedures for filing workers' compensation claims or for reporting injuries at work. He said his back started bothering him when he began the physical work at Michelin, but his supervisor and the Michelin nurse told him it was normal to have back pain when stretching rubber. Brailey went to the emergency room (ER) on June 11, 2017, for back pain. He did not tell anyone at Michelin, and he was not ordered out of work. The ER doctor prescribed Flexeril for the back pain. Brailey stated he saw his family doctor for minor back pain on June 13. The medical records from the visit with his family doctor showed Brailey described pain that was a "ten out of ten" and showed that Brailey had been having back pain for two weeks prior to the visit. He did not disclose the June 13 doctor's visit to Michelin, and he was not ordered out of work by the family doctor on June 13.

On Saturday, June 24, 2017, Brailey suffered sharp back pain while stretching rubber at Michelin. He tried to see the Michelin nurse but the office was closed. He went to the ER and was prescribed multiple pain medications and restricted from work for three days. Brailey claimed he called his supervisor during the ER visit and the supervisor told him to see the Michelin nurse. Brailey told him the nurse's office was closed, and the supervisor told him to wait until Monday. The Michelin nurse called Brailey and told him to relax, take Aleve, and see the Michelin doctor on Monday morning.

Brailey saw Michelin's doctor, Dr. Stephen Izard, on Monday, June 26. Dr. Izard told him to take Ibuprofen and Flexeril, to not follow up with a neurosurgeon, and to return to work on June 27 with no restrictions. Despite instructions from his Michelin supervisors to follow up with Dr. Izard, Brailey missed his follow up appointment because he did not want to drive while taking pain medicine and refused transportation offered by Michelin. He did not return to work at Michelin

¹ 260 S.C. 463, 196 S.E.2d 833 (1973).

² 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991).

after June 24. He went back to the ER on June 27 because he was feeling "terrible." He received an x-ray and a shot and was restricted from work for three days.

The ER referred Brailey to Dr. Scott Boyd, a neurosurgeon. Dr. Boyd ordered an MRI and physical therapy in July 2017. Dr. Boyd filled out a medical questionnaire that stated it was his opinion to a reasonable degree of medical certainty that, more likely than not, Brailey injured his lumbar spine at his employment on June 24, 2017. Dr. Boyd stated in his deposition that Brailey had a herniated disk and there was no way to tell how long it had been present. Dr. Boyd recalled that Brailey told him he injured his back on June 24 stretching rubber at Michelin and he had previous back problems twenty-five years ago that resolved without treatment.

During his deposition, Dr. Boyd reviewed Brailey's medical records from his June 11 and June 13 doctor's visits. Dr. Boyd stated that Brailey's complaints and symptoms of back pain on June 11 and 13 were similar to what he reported on June 24 but were perhaps more severe on June 24. Under cross-examination, Dr. Boyd stated he was uncertain about the exact date of Brailey's injury. 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."

At the hearing before the single commissioner, Brailey testified about his prior work history. He recalled that he experienced middle-back pain three weeks after beginning work at Richtex Brick in 1997.³ Brailey was placed under a no-heavy-lifting restriction in 1997 until he saw a surgeon. He did not see a surgeon and settled a workers' compensation claim with Richtex Brick for \$2,500.⁴ Brailey then worked at Westinghouse for sixteen years before being laid off. Brailey indicated he did not suffer from back pain while working at Westinghouse.

Brailey testified that during training at Michelin in 2017, he filled out a form that asked if he had ever had medical attention for back injury, backache, or back pain. He answered "no" on the form. Brailey did not list Richtex Brick as a previous employer on his Michelin employment application.

³ Brailey claimed his current pain was in a different area of his back.

⁴ The doctor at Richtex Brick noted that Brailey was probably not physically able to perform the work at Richtex Brick and may have had a "litigation thought process."

The safety manager at Michelin, Mark Gross, testified that all incoming employees are trained in safety and workers' compensation protocol. Gross verified that Michelin relies on the answers given by employees on hiring forms. Gross stated that he called Brailey in June 2017 to offer to send a taxi to pick him up for the follow-up visit with Dr. Izard. Brailey told him to talk to his lawyer and hung up on him.

Brailey filed a workers' compensation claim that Michelin denied in July 2017. After a hearing, the single commissioner denied the claim. In affirming the single commissioner's denial of benefits to Brailey, the Commission found Brailey was not credible based on his testimony and the single commissioner's observations of him. The Commission found Brailey was not clear about the date of injury and found the medical records were inconsistent with his testimony. The order noted that Brailey had a "very similar incident" at Richtex and omitted information about Richtex on his Michelin employment application. The Commission found that Brailey

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 [single] [c]ommissioner throughout the proceeding, the claimant provided vague responses when questioned by defense counsel. He would not answer defense counsel's questions, rambling through responses.

The Commission's order stated "causation [was] not provided in the medical records because Dr. Boyd had no knowledge of the extent of claimant's prior back issues." The order noted Dr. Boyd opined on the medical questionnaire that "[Brailey] injured his lumbar spine at Michelin on June 24, 2017, the injury resulted in radiculopathy down [his] left leg, . . . and [Brailey] had not reached maximum medical improvement." The order further stated that Dr. Boyd opined in his deposition that "more likely than not, [Brailey] injured his lumbar spine at Michelin, including 'some episode on June 24.'"

The Commission found Brailey committed fraud in the application for employment with Michelin because he knowingly and willfully made a false representation as to his prior back condition on a Michelin medical questionnaire and Michelin relied on those false answers.

The order stated,

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. We find the June 24, 2017, incident is not compensable based upon the greater weight of the evidence and the other reasons stated within this finding.

The order stated Brailey "did not sustain compensable injury to his low back while under the employ of [Michelin] on June 24, 2017, as alleged." The order also stated,

Under § 42-9-60, assuming [Brailey] actually sustained an injury by accident on June 24, 2017 . . . [he] intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same.

This appeal followed.

ISSUES ON APPEAL

- I. Did the Commission err in finding Michelin proved the elements of the *Cooper v. McDevitt & Street* defense?
- II. Did the Commission err in finding the claim was barred by *Capers v. Flautt*?
- III. Did the Commission err in finding Brailey's claim was barred by section 42-9-60 of the South Carolina Code (2015)?
- IV. Did the Commission err in finding that Brailey did not meet his burden of proof to show he injured his back in an accident arising out of his employment at Michelin?

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); *see also* S.C. Code Ann. § 1-23-380 (Supp. 2021). "An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law." *Clemmons v. Lowe's Home Ctrs., Inc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017). This court "may reverse or modify the [Commission's] decision if substantial rights of the appellant have been prejudiced because the [Commission's] findings, inferences, conclusions, or decisions are . . . affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Frampton v. S.C. Dept. of Nat. Res.*, 432 S.C. 247, 256, 851 S.E.2d 714, 719 (Ct. App. 2020) (final alteration in original) (quoting § 1-23-380(5)(d), (e)).

In workers' compensation cases, the Commission is the ultimate fact finder, and its findings are presumed correct and will not be set aside unless unsupported by substantial evidence in the record. *Holmes v. Nat'l Serv. Indus.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011). "'Substantial evidence' is not a mere scintilla of evidence[,] nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached . . . in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)). When evidence conflicts, either in testimony given by different witnesses or by the same witness, the Commission's factual findings are conclusive. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492–93, 541 S.E.2d 526, 528 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Liberty Mut. Ins. v. S.C. Second Inj. Fund*, 363 S.C. 612, 620, 611 S.E.2d 297, 301 (Ct. App. 2005). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Commission]." *Brunson v. Am. Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011).

LAW/ANALYSIS

I. Fraud in the Application Defense

Brailey argues the Commission erred in finding Michelin proved the elements of fraud in the employment application under *Cooper v. McDevitt & Street Co.* We agree.

The *Cooper* court set forth the following factors that must be present before a false statement in an employment application will bar benefits:

(1) The employee must have knowingly and wil[l]fully 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. (3) There must have been a causal connection between the false representation and the injury.

Cooper, 260 S.C. at 468, 196 S.E.2d at 835. "All factors must be present for the employer to avoid paying benefits." *Vines v. Champion Bldg. Prods.*, 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993).

Here, the Commission made the following findings of fact with regards to the *Cooper* defense:

We find Dr. Boyd provided restrictions of no heavy lifting. However, we find causation is not provided in the medical records because *Dr. Boyd had no knowledge of the extent of [Brailey's] prior back issues*. This finding is based upon the greater weight of the evidence in the record, the deposition testimony of Dr. Boyd, and the testimony of [Brailey].

We find [Brailey] knowingly and willfully made a false misrepresentation as to his prior back condition. We find [Michelin] relied on the claimant's misrepresentations on his post-hire medical questionnaire. *We find a causal relationship exists between [Brailey's] prior back problems and the subsequent back problems arising from his alleged work-related accident*. This finding is based upon the testimony of all witnesses and the medical evidence in the record.

(emphases added). The Commission concluded as a matter of law that all three *Cooper* elements were met in this case.

While substantial evidence supports the Commission's findings that Michelin met the first two *Cooper* elements,⁵ Michelin has not proven a causal connection between the false representation and the injury. See *Corbin v. Kohler Co.*, 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) ("Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion."); *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record.").

The Commission found Dr. Boyd was not aware of "the extent" of Brailey's 1997 back injury. However, the record contains no evidence that the 1997 injury did not resolve, and the record does not indicate the "extent" of the injury. In the medical notes from 1997, the Richtex doctor noted that Brailey had been improving.

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. The 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. Indeed, Brailey worked at Westinghouse for sixteen years without a back injury. See *Vines*, 315 S.C. at 16, 431 S.E.2d at 586 ("There is no evidence Vines' previous injury contributed to the occurrence of the accident. Additionally, 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."); cf. *Givens v. Steel Structures, Inc.*, 279 S.C. 12, 14, 301 S.E.2d 545, 547 (1983) (finding the claimant's condition was one of disc degeneration reflecting the cumulative effect of successive injuries). Here, because the medical testimony is the only competent evidence in the record relating to a causal connection, or lack thereof, between Brailey's false representation of the 1997 back injury and the 2017 injury, the Commission erred in finding Michelin proved its fraud in the application defense. See *Burnette v. City of Greenville*, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012) (stating that when the Commission bases its finding on its own medical opinion, rather than

⁵ 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. Further, Michelin proved it relied on those statements and they were a substantial factor in hiring Brailey.

the opinion of a medical provider, the finding is unsupported by substantial evidence in the record). Therefore, we reverse this finding.

II. *Capers v. Flautt*

Brailey contends the Commission erred in finding his claim was barred by *Capers v. Flautt*. We agree.

The Commission's order does not contain sufficient findings of fact and conclusions of law relating to *Capers*. "The findings of fact of the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine (1) whether the law has been properly applied to those findings and (2) whether the findings are supported by the evidence." *Sanders v. Wal-Mart Stores, Inc.*, 379 S.C. 554, 559–60, 666 S.E.2d 297, 300 (Ct. App. 2008). Here, the order merely states that "moreover, the claim would be barred under *Capers v. Flautt*." The Commission did not apply the law to its findings or indicate which findings were applicable to *Capers*. Therefore, we reverse this finding.

III. Section 42-9-60

Brailey argues the Commission erred in finding his claim was barred by section 42-9-60. We agree.

In pertinent part, section 42-9-60 provides:

No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee *or by the wil[l]ful intention of the employee to injure or kill himself or another*. In the event that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.

(emphasis added). The record contains no evidence that Brailey deliberately intended to injure himself as described in this section, and the Commission's finding is not supported by substantial evidence. The application of section 42-9-60 is limited to "only . . . those cases where it is shown that the acts of the employee are so serious and aggravated as to evince a wil[l]ful intent to injure." *Zeigler v. S.C. Law Enft Div.*, 250 S.C. 326, 329, 157 S.E.2d 598, 599 (1967). The facts of this case do not rise to the level of "serious and aggravated." The record contains no evidence Brailey began working at Michelin with the willful intention to injure his back. Further, he was not placed on work restriction after having back pain in the weeks before June 24, 2017, and there is no evidence in the record that

his conduct was of such a serious nature as to evidence a willful intent to injure himself. *Cf. id.* at 331, 157 S.E.2d at 600 (finding a "fatal altercation was voluntarily entered into, and the conduct of the deceased was of such a grave or serious nature as to evidence a wil[l]ful intent on his part to injure his fellow employee, thereby barring any right to benefits"). Therefore, we reverse this finding.

IV. Brailey's Back Injury

Brailey argues the Commission erred in finding he did not injure his back in an accident arising out of his employment at Michelin. We agree.

"In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward the end of providing coverage rather than noncoverage in order to further the beneficial purposes for which it was designed." *Shealy v. Aiken Co.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Id.* at 455–56, 535 S.E.2d at 442.

The Commission specifically grounded its findings on Brailey's lack of credibility and his "vague" and "rambling" responses. Our supreme court has noted it has affirmed the factual findings of the Commission based on credibility determinations when credibility constituted a "reasonable and meaningful basis" for the Commission's decision. *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 645, 842 S.E.2d 349, 353 (2020); *see also Shealy*, 341 S.C. at 455–56, 535 S.E.2d at 442 ("In cases in which we affirmed factual findings of the commission based on its credibility determination, we did so because it made sense for the commission to use credibility as the dispositive factor in deciding the particular issue."). Here, 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. Rather, 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. *See Frampton*, 432 S.C. at 256, 851 S.E.2d at 719 (noting the court "may reverse or modify the [Commission's] decision if substantial rights of the appellant have been prejudiced because the [Commission's] findings, inferences, conclusions, or decisions are . . . affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." (final two alterations in original)). Therefore, we reverse the Commission on this issue.

CONCLUSION

Based on the foregoing, the Commission's order is reversed and the matter is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

KONDUROS and VINSON, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAY 12 2022

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION **SC Court of Appeals**

WCC File No.

Court of Appeals Case No. 2019-000556

Isaac D. Brailey, Claimant.....Appellant,

v.

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

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Respondents submit this Petition for Rehearing to correct an apparent misunderstanding of the facts and misapplication of the law, and to prevent a gross miscarriage of justice resulting from the Court's Opinion dated April 27, 2022. For the reasons set forth below, the Court should grant Respondents' Petition, withdraw the original Opinion, and substitute a new Opinion affirming the Full Commission's Order concluding (1) Appellant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits; (2) Appellant failed to prove he sustained a compensable injury to his low back while under the employ of Michelin on June 24, 2017; and (3) assuming Appellant sustained an injury by accident on June 24, 2017, Appellant intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten back pain at least four weeks prior to that date. In addition to making its own credibility findings, the Court overlooked pertinent facts and misapprehended and misapplied the applicable law and standard of review in this case.

I. FRAUD IN THE APPLICATION DEFENSE UNDER *COOPER V. MCDEVITT & STREET CO.*, 260 S.C. 463, 196 S.E.2D 833 (1973).

The Court misapprehended the facts and failed to appropriately apply the substantial evidence standard of review in holding Michelin did not prove a causal connection between the false representation and the injury to satisfy the third element of *Cooper* because (1) "the record contains no evidence that the 1997 injury did not resolve, and the record does not indicate the 'extent' of the injury" to support the Commission's conclusion related to Dr. Scott Boyd, (2) the record does not contain medical evidence that Appellant's 1997 back injury contributed to the injury at Michelin or that Appellant was predisposed to back injury, and (3) "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 April 27, 2022) (Howard Adv. Sh. No. 15 at 20).

A. The Court misapprehended and misapplied the standard of review.

As acknowledged by the Court, in South Carolina, 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). Respectfully, instead of looking for what in the Court’s view should have been included in the record, the Court’s sole duty under the applicable standard of review was to consider whether what is in the record supports the Commission’s decision. The Court did not do that.

This Court further misapprehended the facts and misapplied the law that in workers’ compensation cases, the Full Commission is the ultimate fact finder and makes the final determination of witness credibility and the weight to be accorded evidence. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986); *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of this Court to weigh the evidence as found by the Full Commission. *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981). Again, the Court acknowledged this standard of review, but failed to properly apply the standard. In direct contradiction to the standard, the Court improperly weighed the evidence in Appellant’s favor despite the Full Commission’s findings of fact as the ultimate fact finder.

For example, the Court relied on the fact that Appellant “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 Appellant claimed he did, then applicants could provide false information in order to pass the initial physical examination. (R. 753-758) As noted by this Court, substantial evidence supports the Commission’s findings that Appellant “willfully and knowingly made false statements as to his

physical condition to Michelin.” Thus, the fact that Appellant “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 Appellant lied to doctors when necessary to get what he wanted—i.e., to get a job.

Respondent takes exception to the Court applying Appellant’s testimony to support its Opinion reversing the Full Commission. The Court’s sua sponte findings as to Appellant’s credibility are problematic because the Full Commission is the sole fact finder on issues of credibility. Furthermore, the Court’s credibility findings bleed into its decision that the Full Commission’s decision is not supported by substantial evidence.

Indeed, despite the Full Commission’s credibility findings to the contrary, the Court appears to have accepted Appellant’s testimony in reversing the Full Commission. The Court accepted, for example, Appellant 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 Dr. Izard “because he did not want to drive while taking pain medication” when in fact Appellant denied the transportation offered and lied to the Single Commissioner regarding his reasons for not attending the follow up appointment. More importantly, the Court appears to have accepted Appellant’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.

Respectfully, the Court did not properly apply the standard of review and improperly weighed the evidence in its Opinion, and these errors controlled the analysis which led to finding in favor of Appellant. The lens through which this Court viewed the facts to reach its conclusion to reverse the Commission erroneously relied on Appellant’s testimony even though the Commission, as the ultimate finder of fact, determined Appellant lacked credibility.

B. The Court overlooked and misapplied *Jones v. Georgia-Pacific Corp.* 355 S.C. 413, 586 S.E.2d 111 (2003).

This Court overlooked *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003). In *Jones*, when determining whether an employer proved the third element of *Cooper*, our Supreme 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.” That is exactly the case here. Appellant had documented back problems prior to employment with Michelin and claims he injured his back while working for Michelin. The inquiry stops there. Respectfully, instead of properly applying *Jones*, the Court went further and continuously overstepped the bounds of the substantial evidence standard of review.

1. The Court overlooked the fact that Appellant’s prior injury and the current Injury are the same claims.

The Court overlooked the fact that Appellant’s claims in the instant action are the exact same claims which led to a workers’ compensation injury and settlement in 1997. Indeed, the prior medical records and reports demonstrate the alleged issue involved the same part of Appellant’s back—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). Appellant’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, Appellant 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[r]ly can move can’t been (sic) down.” Likewise, the medical record from the December 11, 1997, visit with Dr. Norris Appellant reported “the pain is in the *middle of his back*, hurts sometimes when . . . he bends.” (R. 159) (emphasis added).

The Court further overlooked the fact that exactly like the prior injury, within three weeks after starting the physical aspect of his job,¹ Appellant reported low back pain and did not follow the instructions of the treating physician, and instead sought care by Doctors Care. The treating physician at Richtex Bricks, Dr. Norris, directly informed Appellant 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. The treating physician instructed him to see a specialist for his “low back injury.” Dr. Norris’ medical records provide that Appellant “mention[ed to Dr. Norris] that he knows something is wrong with his back and he wants to go to a back specialist.” Finally, the Court failed to note Dr. Norris’ last medical instruction to Appellant that, “I will place him on no heavy lifting until he sees the surgeon.” Appellant **never** visited a specialist.

¹ The first two weeks of Appellant’s job at Michelin was classroom training.

Accordingly, the Court overlooked the fact that the claims are the same and Michelin proved a causal connection under *Jones*.

- 2. The Court overlooked and misapprehended that evidence that the prior injury contributed to the current injury or that Appellant had a predisposition to back injury is not required under the law to find a causal connection and even it was, the record includes the evidence.**

First, the Court erred in applying the standard of review by suggesting that some medical evidence of predisposition to back injury or that the prior injury contributed to the current injury was necessary. *Jones* informs us that that is not necessary for finding the causal connection is supported by substantial evidence. But even if it was necessary, Dr. Norris' notes provide the medical evidence. Dr. Norris opined that if Appellant does a job he is "unable to perform," he can injure his back. Jermaine Lemon, who trained Appellant, testified Appellant had difficulty doing his job at Michelin. Training manager, Troy Lowman, testified Appellant never successfully completed validation and could not do the job safely. Furthermore, Michelin employees explained that Appellant, who was previously told by a doctor that he could not perform heavy lifting, could not perform Appellant's job at Michelin. (R. 666-667)

- 3. The Court misapprehended the facts related to Dr. Scott Boyd.**

This Court misapprehended the facts supporting the Commission's conclusion related to Dr. Boyd's testimony when it held "The Commission found Dr. Boyd was not aware of 'the extent' of Brailey's 1997 back injury. However, the record contains no evidence that the 1997 injury did not resolve, and the record does not indicate the 'extent' of the injury." The Court overlooked the fact that Appellant 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, Appellant told Dr. Boyd that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment," which was false because Appellant reported 10/10 back pain

only weeks prior to the appointment with Dr. Boyd. In fact, Dr. Boyd testified that, “[p]roper application of the scale, [ten out of ten], should be the worst pain you could experience.” (R. 322) Further, the Court overlooked the fact that Appellant did not tell Dr. Boyd that Appellant told Dr. Norris that Appellant “knows something is wrong with his back and he wants to go to a back specialist” 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 Appellant did not inform the company of prior back issues and the prior workers’ compensation claim. 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 Appellant’s injury did “resolve.” In any event, the evidence is not necessary for a finding that the Full Commission’s decision is supported by substantial evidence.

4. The Court misapprehended and misapplied Appellant’s work at Westinghouse.

The Court also improperly weighed the evidence by placing great weight on the fact that Appellant worked at Westinghouse in the time between his employment with Richtex and Michelin. The Court overlooked the fact that Appellant lied on his Medical History and Examination Form for his position at Westinghouse. When Appellant 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). In other words, Appellant lied to Westinghouse about his medical history. Thus, this Court inappropriately relied on Appellant’s testimony that he allegedly worked without issue at Westinghouse to conclude there was no causal connection between Appellant’s false representation and the alleged injury.

First, even if Appellant's testimony was true, this Court does not know if Appellant was able to safely "perform the job" at Westinghouse without issue whereas the record is clear that Appellant could not perform his job at Richtex or Michelin. Second, and 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. Furthermore, during the hearing before the Single Commissioner, Appellant alleged his position at Westinghouse required he lift pallet containers and push carts of wrenches and rods weighing up to 800 pounds. (R. 411, 413) However, in his deposition testimony, Appellant testified regarding his job at Westinghouse that, "It was not too much physical demand on that job. It was just basic. It was really light." (R. 247) The record does not include testimony from any Westinghouse representative and the Commission correctly found Appellant's testimony lacked credibility.

Accordingly, the Court misapprehended the facts related to Westinghouse and misapplied the standard of review in weighing the evidence to conclude that fact supported finding there was no causal connection. *See Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003) ("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").

II. APPELLANT'S ALLEGED BACK INJURY ON JUNE 24, 2017

A. The Court misapprehended and misapplied the facts and the applicable workers compensation law.

The Court acknowledges Appellant went to the doctor on June 11, 2017, and June 13, 2017, but again improperly weighed the evidence by minimizing the impact of these visits and Appellant's inconsistent testimony regarding the visits on the Full Commission's decision.

The Full Commission found as fact

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. We find the June 24, 2017, incident is not compensable based upon the greater weight of the evidence and the other reasons stated within this Finding.

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.”

This Court misapprehended and overlooked 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. Although there is record of Appellant visiting a medical facility on June 24, 2017, there are equally probative records evidencing similar complaints from weeks prior. Moreover, Dr. Izard noted the cause of Appellant’s condition was not known at the time. (R. 84) Appellant, thereafter, failed to return to Dr. Izard as instructed. Finally, Appellant admitted during his hearing testimony that his June 24, 2017, medical report shows he was in less pain then then he had been on June 13, 2017. (R. 516) Also, Appellant 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 Appellant has only alleged injury for Jun 24, 2017, it was reasonable for the Full Commission to find Appellant 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).

Although Appellant claimed there is no medical evidence showing a different incident or that the radiculopathy and herniated disc existed before the June 24, 2017, the Court overlooked the evidence of Appellant 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 Appellant to two different doctors earlier in June 2017. Importantly, Dr. Boyd testified he could not "be certain" as to whether Appellant's lower back problem could be caused by an accident on June 24, 2017. (R. 328-339) Dr. Boyd further testified the history given to him was different than the history given to Internal Medicine. (R. 320-321) Finally, Dr. Boyd testified he could not be certain about a date of accident and the questionnaire he executed for Appellant should now say he was uncertain about the date. (R. 328-329) See *Brunson v. American Koyo Bearings*, 395 S.C. 450, 718 S.E.2d 755 (2011) (affirming the 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 misapplied *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020).

The Court overlooked or misapprehended that this case is distinguishable from *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020). 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.* Our Supreme 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 (2021), this Court 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 this Court affirmed the Full Commission.

This 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. This Court 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 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, this Court misapprehended that in this case, like in *Rummage*, credibility was a substantial issue that was “reasonably and meaningfully” related to whether Appellant 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 Appellant was untruthful in his self-reporting of symptoms, the dates he reported the symptoms, and the cause of the injury.

Furthermore, the Court misapplied the law in holding that the expert medical evidence in this case establishes causation. 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, this Court overlooked and misapprehended Dr. Boyd’s testimony that he had no way of knowing how long Appellant’s herniated disc had been present. Dr. Boyd confirmed that his opinion was based 100% on the history Appellant 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 Appellant provided to him and as addressed throughout this brief, the Single Commissioner (who observed Appellant testify) and Full Commission (the ultimate finder of fact) found Appellant lacked credibility.

Moreover, the Court misapprehended the Commission's credibility finding. The Commission's credibility finding was based on more than Appellant's "vague" and "rambling" responses. 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).

Here, the record is replete with evidence demonstrating Appellant'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 Appellant

- 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

Indeed, this Court concluded Appellant willfully and knowingly made false statements. Appellant lied to his employers, he lied to doctors, and provided inconsistent testimony between his deposition and hearing testimony.

Accordingly, the Court overlooked and misapprehended facts and misapplied the law in holding the Commission erred in finding Appellant did not injure his back in an accident arising out of his employment at Michelin.

III. *Capers v. Flautt*

If the Court does not affirm the Full Commission, the Court should withdraw its Opinion and substitute a new Opinion, remanding with instructions for the Commission to make its own findings of fact and conclusions of law regarding *Capers v. Flautt*. If it is the Court's opinion that the Commission's Order does not contain sufficient findings of fact and conclusions of law relating to *Capers*, then the Commission should have the opportunity to make those finding and conclusions before a determination can be made as to whether Appellant proved a compensable injury by accident. In fact, that is exactly what our Supreme Court did in *Cooper v. McDevitt & Street Company*, 260 S.C. 463, 196 S.E. 2d 823 (1973), when the Court remanded the case to the Commission for the taking of testimony on the third element of the fraud in the application defense and for the making of a finding of fact on that issue, 260 S.C. 469.

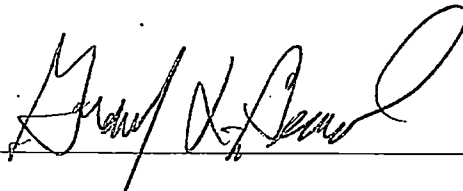
CONCLUSION

Based upon the forgoing, the Court should grant the present Petition for Rehearing, withdraw the April 27, 2022 Opinion, and issue a substituted Opinion affirming the Full Commission's Order concluding (1) Appellant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits; (2) Appellant failed to prove he sustained a compensable injury to his low back while under the employ of Michelin on June 24, 2017; and (3) assuming Appellant sustained an injury back accident on June 24, 2017, Appellant intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten back pain at least four weeks prior to that date. In fact, public policy dictates that an employee who alleges a job is causing them ten out of ten back pain, or any body part pain, for as long as four weeks requiring multiple medical visits, should have an affirmative duty to notify his employer of same before it becomes too late, both for the employee's and the employer's protection. Moreover, a failure to do so is an extremely serious act by the employee which could, and likely will, severely prejudice his employer evidencing a willful intent to disregard the employer and thereby likely to result in injury or more severe injury.

In the alternative, this Court should grant this Petition for Rehearing, withdraw its Opinion, and issue a substituted Opinion remanding to Full Commission to make its own findings of fact and conclusions of law related to *Capers v. Flautt* before a determination can be made as to whether Appellant proved a compensable injury by accident.

Signature page follows

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Grady L. Beard", is written over a horizontal line.

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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1708221

Court of Appeals Case No. 2019-000556

Isaac Brailey, Claimant.....Appellant,

v.

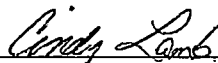
Michelin North America, Inc., (US7), Employer,

and Safety National Casualty Corp., Carrier Respondents.

PROOF OF SERVICE

I certify that I have caused Respondents' Petition for Rehearing to be served on Appellant via email and by depositing a copy of it in the United States Mail, postage prepaid, addressed to Stephen Samuels, Esquire, 1320 Richland Street, Columbia, SC 29201; The Honorable Jenny Abbott Kitchings, Clerk of Court, 1220 Senate Street, Columbia SC 29201 via hand delivery; and Ms. Amy Bracy, Judicial Director, South Carolina Worker' Compensation Commission, 1333 Main Street, Columbia, SC 29201 (via U.S. mail and e-mail).

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


Cindy Lamb

Columbia, South Carolina
May 12, 2022



**ROBINSON
GRAY**

Litigation + Business

GRADY BEARD

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May 12, 2022

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
1220 Senate Street (29201)
Post Office Box 11629
Columbia, SC 29211

RECEIVED
MAY 12 2022
SC Court of Appeals

RE: Isaac Brailey v. Michelin North America, Inc. US7
WCC No.: 1708221
Court of Appeals Case No. 2019-000556
DOI: 06/24/2017
Claim No.: 002550-080240-wc-01
Our File No.: 6555/8068

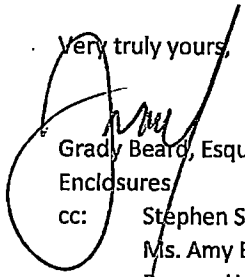
Dear Ms. Abbott Kitchings:

Enclosed please find the original and one (1) copy of the Respondents' Petition for Rehearing and proof of service in support of our position on behalf of the employer/carrier in the above-referenced matter. A check in the amount of Fifty and no/100 (\$50.00) is also enclosed for the filing fee. We are filing the original and retaining a clocked-in copy via our courier.

With a copy of this letter, we are hereby serving a copy of the Respondents' Petition for Rehearing on counsel for the claimant.

With kindest personal regards, I remain

Very truly yours,


Grady Beard, Esquire

Enclosures

cc: Stephen Samuels, Esquire
Ms. Amy Bracy (e-mail and first class U.S. Mail)
Rexann Huneycutt (via email)
Tim Riddle (via email)
Melissa Interdonato (via email)