THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Withdrawn, Substituted, and Refiled November 2, 2022)

Appellate Case No. 2022-001688

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

v.

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

BRIEF OF RESPONDENT

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland St.
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorney for Respondent

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   B. Whether the Court of Appeals correctly held that Michelin failed to prove the causal connection element of the Cooper v. McDevitt and Street defense;

   C. Whether the Court of Appeals erred in finding substantial evidence supported the first two element of the Cooper v. McDevitt and Street defense when under the correct preponderance of the evidence standard, the evidence shows Brailey did not make a knowledgeable, wilful and material misrepresentation on his application for employment; that the reliance prong is not proven as Michelin relied on the physical examination clearing Brailey for work; and there is no evidence of a causal connection between any alleged misrepresentation and the ultimate work-related injury.

2. Whether the Court of Appeals correctly held that the Appellate Panel erred as a matter of law 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.

3. Whether the Court of Appeals correctly held substantial evidence did not support the Appellate Panel's finding that Isaac Brailey failed to meet his burden of proof that he suffered a compensable injury by accident arising out of his employer.

STATEMENT OF THE CASE

This appeal from the Workers' Compensation Commission arises out of job-related injuries suffered by the Respondent, 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. Petitioners 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].

Respondent 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].

Respondent timely filed his Notice of Appeal to the Court of Appeals on March 29, 2019. Oral argument was held on February 9, 2022. In its initial opinion, the Court of Appeals reversed and remanded, holding: (1) substantial evidence did not support the Commission's finding that Michelin proved the causal connection between Brailey's alleged misrepresentation and the injury under the third prong of Cooper; (2) the Commission's order did not contain sufficient findings of fact and conclusions of law relating to Capers; (3) the Commission erred as a matter of law in finding the claim was barred by the wilful intent to injure provision of § 42-9-60; and (4) that the Commission erred in denying the claim base on credibility as under Crane "Brailey's credibility as to his prior workers' compensation claim and prior back injury in 1997 is not a reasonable and meaningful basis for the Commission's determination that he did not suffer an accidental injury arising out of his employment at Michelin in 2017." Brailey v. Michelin North America (US7), Op. No. 5906 (Ct. App. filed April 27, 2022).

Michelin timely filed a Petition for Rehearing on May 12, 2022. The Court of Appeals denied rehearing but issued a withdrawn, substituted and refiled opinion on November 2, 2022. Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022). In the refiled Opinion, the court amended its holding on Capers. The court reversed the Commission's application of Capers in its entirety, finding "the circumstances of the present case differ from Capers and render the case inapplicable [because] Brailey recovered from his 1997 back injury, and there is no indication in the record that he could have expected to have similar back problems at Michelin in 2017." Id. at 89, 882 S.E.2d at 179.

Michelin timely filed its Petition for Writ of Certiorari on December 2, 2022. The Court issued the Writ on August 10, 2023.

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 office 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

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[1]Brailey 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

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[2]Michelin'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

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[3]This 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].

[4]The 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 had 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

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[5]The 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 paracental 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 Petitioners 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. This appeal followed.

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[6]Petitioners 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 Respondent withdrew his previous objection to reconvening the deposition – at which time Petitioners 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

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

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

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

Michelin argues "[t]he Court of Appeals did not properly apply the standard of review it relied upon in its opinion – the substantial evidence standard." [Brief of Petitioners, page 13]. To be clear, the standard of review applicable here is *not* substantial evidence; it is preponderance of the evidence.

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

employer to avoid paying benefits to the employee. Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993).

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

A. The *Cooper* defense must be reviewed under a preponderance of the evidence standard.

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

"The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury." Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004). The existence of the employer-employee relationship is a jurisdictional question and one of law.[7] Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App. 2007). When deciding questions of law, the appellate court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence.

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[7]This rule and the accompanying standard of review have been applied by this Court from virtually the instant the Workers' Compensation Act was enacted. See Knight v. Shepherd, 191 S.C. 452, 4 S.E.2d 906 (1939)("It is suggested that we are bound by the fact finding of the South Carolina Industrial Commission, which held that it lacked jurisdiction. It is true that as to disputed facts which do not go to the jurisdiction, we are bound by the finding of the Commission, but where the only question presented is whether or not the jurisdictional fact exists entitling the claimant to be heard before the Commission, we have a right to review the action of the Commission, even to the extent of finding the fact to be other than the Commission found it.").

Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

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

Jones – relied on by Petitioner – applied the substantial evidence standard of review rather than the correct preponderance of the evidence standard. Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003). There are a handful of cases which have done the same – including the case *sub judice*. Jones was decided in 2003. However, four years after Jones, this Court clarified the standard of review in Brayboy v. WorkForce, 383 S.C. 463, 464, 681 S.E.2d 567, 567 (2009). The Court held that when reviewing an employer's attempt to void the employment relationship under Cooper, the appellate courts review the Appellate Panel's findings on the relationship's existence according to its own view of the preponderance of the evidence. Id. See also Rabon v. Arrow Exterminating Inc., 393 S.C. 510, 713 S.E.2d 347 (Ct. App. 2011)(relying on Brayboy's pronouncement on the standard of review to find "because [employer] never asked Rabon if he had any current or prior injuries, and regardless of his injuries, Rabon was physically able to do all the jobs [employer] hired him to do, we find Rabon did not knowingly and willfully make a false

representation as to his physical condition.").

Other opinions, both before and after Brayboy, have confirmed that these cases are to be reviewed under the *preponderance of the evidence* standard. See, e.g., Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997); Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993); Givens v. Steel Structures, Inc., 279 S.C. 12, 13, 301 S.E.2d 545, 546 (1983); Cooper v. McDevitt & St. Co., 260 S.C. 463, 466, 196 S.E.2d 833, 834 (1973); Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971); Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (S.C. App. 1983). Indeed, even the author of the Jones opinion stated so in her influential treatise on appellate practice. See Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 233 (3d ed. 2016) ("Because an employment relationship is critical to the Commission's authority to order or approve an award, the existence of absence of an employment relationship is a jurisdictional fact, and the reviewing court has the power and duty to review the entire record and decide the jurisdictional facts in accordance with the preponderance of the evidence.").

Michelin had the legal right to collaterally attack the Commission's subject matter jurisdiction by pleading and attempting to prove it could void the employee/employer relationship under Cooper. While Michelin was successful before the Commission, those findings carry no weight on appeal.

Under the preponderance of the evidence standard, the appellate court makes findings of fact based on its own view of the evidence. No deference is given to the Commission's findings, as the appellate court "has both the power and the duty to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission."

Watson v. Wannamaker &. Wells Inc, 212 S.C. 506, 48 S.E.2d 447 (1948). As such, Michelin's argument that "the Court [of Appeals] improperly weighed the evidence" fails as a matter of law.

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

The Court of Appeals held "*Substantial evidence* supports the Commission's findings that Brailey willfully and knowingly made false statements as to his physical condition to Michelin on his employment application." Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022). As the Court of Appeals reversed on the causal connection element, it did not engage in detailed analysis of this issue. Nonetheless, it is apparent the Court of Appeals misapprehended this issue by applying the incorrect standard of review. This Court should reexamine the evidence and find that Michelin failed to prove that Brailey made a knowing and wilful misrepresentation about his physical condition

Michelin introduced a *Confidential Health Questionnaire for Post-Offer Examination* completed by Brailey on March 2, 2017. The questionnaire asked "Do you have problems with, or have you ever had medical attention for any of the following?" Brailey checked "no" to the 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 back problems or pain in over twenty years, he did have a back injury twenty years prior in 1997. He did have back pain, did receive medical attention and, at the time, it briefly affected his ability to work.

Brailey checked "no" to the question "Are you presently being treated for any condition that may inhibit your ability to work?" His response to this question – the only relevant one – was true

and accurate. He had not been treated for back pain for over twenty years. Indeed, the required element is a "false statement about his [current] physical condition;" not whether he *previously* had back pain, a back injury, or a workers' compensation claim. Cooper at 469, 196 S.E.2d at 835.

The other questions were: "Do you have problems with, or have you ever had medical attention for any of the following?" As Brailey did not have problems with his back *at the time he completed the questionnaire*, his "no" answer on that portion was true.

While Brailey admittedly had medical treatment for back pain *twenty years* prior to answering the question, a failure to disclose a short course of treatment for a minor back injury from two decades ago, without more, does not rise to the level of a *knowing and wilful* false statement intended to deceive Michelin into hiring him. See Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(noting Commission found two-year old medical record to be "stale" and not indicative of claimant's current work status).

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

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

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

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.[8] 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.

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

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

In its recitation of the facts, the Court of Appeals stated the safety manager at Michelin, Mark

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[8]Brailey also left off his address, phone number, emergency contacts and family doctor. [R.P. 176].

Gross, "verified that Michelin relies on the answers give by employees on hiring forms." Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022). At no point did Gross testify that this reliance had anything to do with the actual hiring process; only that Michelin would investigate further. And if the information came back *from the physical exam* showing the employee could not do the PAP job, Michelin would "probably not" look for other jobs the employee potentially could perform. [R.P. 777, lines 19-24].

Even if this nonspecific testimony could – without more – establish the reliance prong, Michelin's proof fails because Gross further testified that "if [Dr. Tomarchio] cleared him; [we] were good to go."[9] [R.P. 778, lines 14-24; p. 776, lines 19-24]. Gross admitted that "No doctor that [Brailey] saw after he came to work at Michelin had [put him under restrictions]." [R.P. 781, line 15-p. 782, line 8]. Gross also testified he expected new employees to be sore, but wanted to make sure the soreness was not an injury. When asked whether he would know anything different had he been informed that Brailey had gotten the new job soreness taken care of and been cleared to work by a doctor. He responded "Probably not, no." [R.P. 778, line 25-p.781, line 1].

The fact is Michelin did not really rely on the questionnaire – they relied on Dr. Tomarchio to do a complete physical exam.[10] By all accounts this is exactly what he did. And once Dr.

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

[10]Michelin argues their nurse, Nurse Sirois, explained that if a job applicant wanted the job at Michelin bad enough, as Respondent claimed he did, then applicants could provide false information in order to pass the physical examination." [Petition for Rehearing, page 3]. Nurse Sirois testified she did not do the physical exams and medical questionnaires that the new

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

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

3. The Court of Appeals correctly held failed to prove a causal connection between the allegedly false representation and the injury.

The third prong of Cooper is "a causal connection between the false representation and the injury." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973). Applying a substantial evidence standard of review, the Court of Appeals held Michelin failed to prove this

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employees fill out. [R.P. 737, lines 8-11]. She had no personal knowledge of how thorough the exams actually were. [R.P. 763, lines 7-20] She only knew the company doctor would examine the new employee and clear him or her to work at Michelin. [R.P. 745, line 11-page 278, line 5].

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

element finding "[t]he record contains no medical evidence that Brailey's 1997 back injury somehow contributed to the June 24 injury or that he was predisposed to back injury." Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022). This holding is correct. Michelin's arguments to the contrary should be rejected.

The crux of Michelin's argument is that "in reaching its decision, the Court of Appeals ignored the fact that Brailey admitted he did not tell Dr. Boyd about previously being placed under restrictions because of his back or his prior back injury." [Brief of Petitioners, page 18]. Michelin wants this Court to believe that Brailey had been under restrictions for twenty years merely because he had not seen "Dr. Bethea at Moore Clinic [who] would put this to rest most expediently . . ." [R.p. 159]. This argument fails because Brailey was cleared for full duty work by three separate doctors (Drs. Tomarchio, Marom and Donato) in the weeks prior to his June 24, 2017 accident. [R.P. 61-69, 778]. Moreover, there is no evidence Brailey had any back problems nor received any treatment for back problems in the interim between 1997 and 2017.

Michelin states "Brailey had documented back problems to his low/middle back prior to employment with Michelin – which he specifically denied to Dr. Boyd – and claims he injured his low/middle back while working for Michelin. The inquiry stops there." [Brief of Petitioners, page 18]. Not only does the inquiry *not* stop there, but Michelin misrepresents the fact that Brailey specifically reported his prior episode of back pain directly to Dr. Boyd the first time he saw him. This is confirmed by Dr. Boyd who testified Brailey "also stated 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].

Dr. Boyd was extensively cross-examined on his opinions. Michelin claims Dr. Boyd had

only "false information." He reviewed the available medical records including the two doctor visits prior to the accident where Brailey was diagnosed with muscle pain from not being used to the work at Michelin. He confirmed his opinion that "based on [Brailey's] history and in his records, that it was related to his work at Michelin in the continuum with some event on or about June 24th that made things worse." [R.P. page 354, lines 2-9].

Michelin complains that Dr. Boyd did not know more details about the 1997 episode of back pain. However, Michelin had the opportunity to reconvene Dr. Boyd's deposition to cross-examine him with newly obtained medical records from 1997. At the close of trial, Michelin withdrew its pending "motion to depose or reconvene the deposition of Dr. Boyd." [R.P. 803, lines 1-3]. Michelin cannot now complain about the sufficiency of Dr. Boyd's testimony.[11] See Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011)(party bound by its own tactical decision to postpone deposition of doctor).

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

Michelin devotes much of its argument to Jones v. Georgia-Pacific Corp., as if Jones were some sort of silver bullet requiring the Court to blindly accept their allegations regardless of the actual evidence. Michelin argues "Brailey had documented back problems to his low/middle back prior to employment with Michelin . . . and claims he injured his low/middle back while working

[11]Michelin mischaracterizes the testimony of its own witnesses – seeking to have this Court infer Brailey was physically unable to do the work. Michelin states "Brailey's trainer testified Brailey had difficulty doing his job." [Brief of Petitioners, page 18]. When asked "Did he have any difficulty doing the job that you observed," the trainer responded "Only just with what to do, kind of, like the steps." [R.p. 663, lines 1-18]. Similar comments in Petitioner's brief about never successfully completing validation go to this mental ability to learn the new job; not evidence of preexisting back problems.

for Michelin. The inquiry stops there." [Brief of Petitioners, page 16]. Alas for Michelin, it is not so simple. Cooper requires Michelin to prove the elements of its affirmative defense; Michelin cannot rely on rhetoric.

To begin with, as discussed *supra* at pages 4-6, Jones erroneously applied the substantial evidence standard of review rather than the correct preponderance of the evidence standard. As to Jones itself, the Court reviewed conflicting opinions from multiple doctors – again through the lens of looking for substantial evidence to affirm the decision below. Jones was seen by Dr. Poole, Dr. Hodge and three other doctors. The Court observed "Claimant saw many doctors after her accident on August 7, 1997, and there is *conflicting testimony* as to whether the *doctors* believed that the accident caused Claimant's subsequent back problems." Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003)(emphasis added). The Court ultimately deferred to the Commission's weighing of this conflicting evidence under the substantial evidence standard.

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

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

1. The Court of Appeals did not impose additional elements on Michelin.

Michelin argues:

> The Court of Appeals opinion conflicts with this Court's decision in Jones by adding requirements that the record contain evidence (1) that the prior injury contributed to the alleged current injury, (20 the claimant was predisposed to the current injury, (3) the prior injury did not resolve, and (4) of the extent of the prior injury.

[Brief of Petitioners, page 15].

The crux of Michelin's argument is that – having failed to prove the causal connection with evidence – they seek to water down their burden to the point that any undisclosed prior back pain or back injury – no matter how trivial – will allow them to avoid paying workers' claims regardless of the evidence. This is not a search for truth. This is confirmation that Michelin never intended to use the questionnaire for legitimate hiring and placing purposes. It has always been about setting a trap for employees who might make claims for work injuries in the future.

Michelin makes this argument because the Court of Appeals correctly analyzed the evidence when it reversed the Appellate Panel on the causal connection element. The Court wrote:

> 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.

Brailey v. Michelin North America, Inc., 438 S.C. 77, 88, 882 S.E.2d 172, 178 (Ct. App. 2022). The court added "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." Id.

These are not new legal elements. This is merely the analysis that shows Michelin failed to adduce evidence to support its defense. Indeed, the Court of Appeals supported its analysis with citation to case law, most particularly Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d

585, 586 (1993)("There is no evidence Vines' previous injury contributed to the occurrence of the accident. Additionally, although there was evidence indicating Vines was predisposed to back injurie4s 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."). The court correctly concluded "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." Brailey at 88, 438 S.E.2d at 178.

Michelin further argues "[t]he Court of Appeals ignored the fact that Brailey's claims in the instant action are the same claims which led to a workers' compensation injury and settlement for the prior back injury." [Brief of Petitioners, page 16]. The evidence shows otherwise.

Michelin points out that the medical note from December 4, 1997 states "back exam shows tenderness to palpation of the *intervertebral space at L2-3* . . . . There is tenderness and muscle spasm in the *bilateral lumbar region* . . . ." They argue this record "demonstrate[s] the current issue involves the same part of Brailey's back as the prior issue . . ." [Brief of Petitioners, page 16, citing R. 158 (emphasis added by Petitioners)].

This argument fails. The 1997 injury was at L2-3; the 2017 injury is at L4-5. Dr. Boyd diagnosed Brailey with "Low back pain with LEFT lumbar radiculopathy L4." His 2017 MRI showed a "Left paracentral disc extrusion at L4-5." The same MRI shows L2-L3 as "unremarkable." [R. P. 114]. Brailey's testimony that he injured a different part of his back is borne out by objective medical evidence. [R. P. 408-410]. Furthermore, the fact the MRI shows his L2-3 disk was unremarkable some twenty years after his prior back strain confirms he did indeed fully heal from

that episode (as the Richtex doctor predicted). The Court of Appeals correctly held the 2017 injury was to a different part of the back.

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

Michelin argues the Court of Appeals "ignored the fact that Brailey admitted he did not tell Dr. Boyd that the prior injury did not resolve or any evidence of the extent of the prior injury. . . . thus Dr. Boyd only had false information . . ." [Brief of Petitioners, page 18]. In reality, Brailey had no back problems whatsoever after the 1997 back strain (which Dr. Norris noted "has improved" by the second visit). [R. P. 159]. Brailey testified he had no back problems and sought no treatment for back pain between 1997 and 2017. [R. P. 257, 408-411]. There is no evidence of back pain in this twenty year period.

Brailey told Dr. Boyd he had a previous episode of back pain some 25 years ago. He also testified in his deposition about his previous back strain and workers' compensation claim with Richtex twenty years prior. Michelin knew about the prior back strain because Brailey told them. Michelin's attorney cross-examined Dr. Boyd at length about his opinions during which he reviewed the medical records from the weeks prior to the June 24, 2017 accident when Brailey reported 10/10 back pain from lifting at his new job. Dr. Boyd explained his reasoning and confirmed his opinion that Brailey had herniated the L4-L5 disc working at Michelin.

Michelin wants to argue that if only Dr. Boyd had known the "extent" of Brailey's 1997 injury, then surely he would have opined otherwise. Michelin had the opportunity to reopen Dr. Boyd's deposition. Yet, at the conclusion of the trial, Michelin withdrew its motion to depose or reconvene the deposition of Dr. Boyd. In so doing, Michelin waived any objection to the sufficiency

of Dr. Boyd's testimony. See Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011)(where a party rescheduled a doctor's deposition solely for its own tactical reasons, the Commission acted within its authority in refusing to leave record open for a reconvened deposition).

Lastly, Michelin doubles down on their Jones theory by concluding that "the evidence is not necessary for a finding that the Full Commission's decision is supported by substantial evidence."[12] [Petition, page 10]. No disrespect is intended towards Petitioners, but this statement is absurd on its face. Petitioners had the burden of proving the causal connection. One way to prove this would have been a showing that Brailey had a previous herniated disc at L4-L5, or showing ongoing treatment for back problems, or showing he had missed time from work at Westinghouse due to back problems. To suggest, as Michelin does, that "there is no evidence Brailey's injury did 'resolve'" ignores that Michelin bears the burden of proving their affirmative defense. Their argument that they need no evidence shows they have no evidence.

C. The instant case is distinguishable from *Brayboy v. Workforce.*

Respondents argue the facts in this case are similar to those in Brayboy v. Workforce, 383 S.C. 463, 681 S.E.2d 567 (2009). 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

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[12]Michelin seeks to mislead the Court stating "The medical records indicated Brailey was 'on disability" following his job at Westinghouse and before beginning employment with Michelin." [Brief of Petitioners, page 19]. Michelin seeks to draw the Court into speculating that this brief period of disability is somehow relevant to this case. Yet there is no connection. Brailey testified he had been on disability while "getting my blood pressure under control." [R.P.509].

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. Workers' compensation is not even mentioned; only the vague statement" "I understand and agree that any false or misleading, or incomplete information will make me subject to disqualification from employment or dismissal at any time. [R.P. 176]. Brailey and other similarly situated Michelin employees only learn that an y 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 got injured.

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 case law 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 without altering the at-will relationship, the employer must insert a conspicuous disclaimer into the policy. The South Carolina Supreme Court "has held that a disclaimer appearing in bold, capitalized letters, in a prominent position, is conspicuous."[13] Id. It cannot be gainsaid that Michelin's disclaimer fails this 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

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[13]The legislature codified this rule in 2004:

> It is the public policy of this State that a handbook, personnel manual, policy, 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).

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. [R.P. 172]. Unlike 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 by Michelin's doctor, his omission was immaterial.

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 for placement purposes they would have required it to be completed in full, instructed the employee to its purpose, and reviewed it with the employee. 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.[14]

Michelin wants to set this up as if Brailey had a major ongoing disability which he knew would disqualify him from the job and which he knew would result in injury; yet proceeded with the lie to set up a workers' compensation claim.[15] 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.[16]

Michelin concludes by stating: "As in Brayboy, Michelin presented credible evidence that it relied upon Brailey's false statement, and there was irrefutable evidence of a casual connection between the false information and *the current injury is 'primarily in the same area' as the prior back injury."* [Brief of Petitioners, page 22 (emphasis added)]. Michelin repeats this canard several times throughout its brief. Merely saying it over and over again does not change the fact that the 1997 injury was at L2-3; the 2017 injury is at L4-5. These are unquestionably *different* parts of the back.

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[14]The 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.

[15]Brailey'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].

[16]Our 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.").

As John Adams famously stated, "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770.

Brayboy is distinguishable from the instant case on all three of the Cooper elements. The Court should reject Petitioners' arguments and hold Michelin failed to prove its affirmative defense.

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

Michelin argues "[t]he Court of Appeals also improperly weighed the evidence by placing great weight on the fact that Brailey worked at Westinghouse in the time between his employment with Richtex and Michelin." [Brief of Petitioners, page 19]. As noted, to be faithful to the preponderance of evidence standard of review, the court is *supposed* to weigh the evidence. That being said, the court did no such thing – as there is no conflicting medical evidence to weigh.

In the Opinion, the Court states: "The record contains no medical evidence that Brailey's 1997 back injury somehow contributed to the June 24 injury or that he was predisposed to back injury. Indeed, Brailey worked at Westinghouse for sixteen years without a back injury." Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022). This is hardly giving undue weight to Brailey's uneventful tenure at Westinghouse. It is a simple fact that he worked there for sixteen years without back problems or a back injury. This was proper evidence for the court to consider as it applied the facts to Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993)("There is no evidence Vines' previous injury contributed to the occurrence of the accident.").

Petitioners venture into speculation as they argue "[m]ore importantly, there is no credible evidence for the [Court of Appeals] to conclude Brailey never complained to Westinghouse about

back issues or that Westinghouse never sent [Brailey] for any medical treatment inhouse or elsewhere, resolving the matter internally."[17] The reason no evidence supports Michelin's argument is because Michelin – operating under the mistaken belief it did not need evidence to support its allegations – did "not include testimony from any Westinghouse representative . . ." [Brief of Petitioners, page 20]. Michelin's argument is "rank speculation without any evidentiary support [and is] manifestly without merit." Youmans v. Dept. of Transp., 670 S.E.2d 1, 380 S.C. 263 (Ct.App. 2008).

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

II. The Court of Appeals correctly held *Capers v. Flautt* is inapplicable to this case.

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

A. *Capers* is inapplicable to the facts of this case.

Robert Capers was a dishwasher with a known allergy to dishwashing liquid which caused contact dermatitis. After claiming permanent and total disability in a previous workers' compensation case, he returned to work as a dishwasher with a different employer. He again

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

developed contact dermatitis and filed a second workers' compensation claim.

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

To say that Brailey knew with substantial certainty that he would herniate a disc in his back from working at Michelin is neither reasonable nor plausible. 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 uneventful years working at Westinghouse. Furthermore, unlike Capers, Brailey had been cleared to work without restriction by multiple doctors even after he became sore from working at Michelin.

While Brailey did suffer back pain (without radiculopathy) after working at Michelin for about 6 weeks, he reasonably believed 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.

Michelin argues: "And at Richtex, the medical records succinctly state that the doctor told Brailey that if he performed a laborious job that he is incapable of performing, he can injure his back." [Brief of Petitioners, page 23]. Michelin again overstates – or misstates – the evidence. Dr. Norris wrote: ". . . 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 his very first day." It's fair to say Dr. Norris stated Brailey was unable to perform the job and "it might be in his and Richtex's best interest for him to find new employment." [R.P. 158-159]. Dr. Norris seemed to be more focused on liability from a "very hostile encounter" with a patient he thought "may very well be in a litigation thought mode." It is rank speculation to presume Dr. Norris told Brailey "he can injure his back." There is no evidence he told Brailey any such thing.

As the Court of Appeals explicated:

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

Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022).

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

The Court should also note that Brailey suffered a distinct new injury on June 24, 2017 when

he herniated the disc at L4/5 requiring back surgery. This is vastly different from the episodic back pain he experienced twenty years earlier. For that matter, it is vastly different than the soreness he experienced working his new job at Michelin. Conversely, Capers had a recurrence of the exact same contact dermatitis he previously experienced from washing dishes.

The Court of Appeals correctly reversed the Commission on the Capers issue.

B. As there are no facts supporting a *Capers* defense, a remand is unwarranted.

Perhaps recognizing the paucity of evidence supporting a Capers defense, Petitioners ask this Court for a second bite of the apple. While it is undeniable that the Appellate Panel's order is legally insufficient for appellate review, this is more a function of the lack of support for a Capers defense than inability to write a sufficiently detailed order. Michelin's counsel is an exceptionally able workers' compensation defense lawyer with extensive appellate experience. If a Capers defense was viable, counsel would surely have written a detailed order for the Single Commissioner's signature.

Given the record in this case, a remand would serve no purpose. There are no facts in this case supporting a Capers defense.

III. The Court of Appeals correctly held there was no substantial evidence to support the Commission's finding that Brailey failed to prove he sustained an injury by accident on June 24, 2017 [In Response to Petitioners' argument at pages 26-35].

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

The Commission held "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." [R.P. 45, Finding of Fact 10] These findings are not supported by substantial evidence.

The vague and general credibility finding will be addressed in the next section. This section will address the medical evidence.

Dr. Boyd's medical opinions have been dissected at length earlier in this brief. Suffice it to say, Dr. Boyd offered an uncontradicted opinion to a reasonable degree of medical certainty that Brailey "injured his lumbar spine at his employment, on June 24, 2017." [R.P. 71]. Dr. Boyd reviewed every medical record in the case (except the 1997 records Michelin elected not to cross-examine him with); read the MRI scan; and met with and examined Brailey. Michelin was unsuccessful in impeaching Dr. Boyd or changing his opinion on cross-examination. Michelin presented no evidence to the contrary.

There is simply no basis on which the Commission could validly conclude there was a "lack of sufficient medical evidence to support his allegations." [R.P. 45, Finding of Fact 10]. The Commission's credibility finding led it to unreasonably and irrationally disregard uncontradicted medical evidence. By the same token, the Commission never identified "the medical evidence to the contrary." There is no such evidence to the contrary. The finding is pure speculation with no basis in the record. 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).

Michelin argues the "Court of Appeals ignored the fact that Brailey only claimed an injury by accident on June 24, 2017. He did not claim a repetitive trauma injury or an injury occurring on June 11, 2017 or June 13, 2017." [Brief of Petitioners, page 28]. Michelin wants to argue that, because Brailey went to the doctor before his accident for a sore back due to a new and physically

demanding job, he really has a repetitive trauma claim that would be compensable if only he had pled such a claim. This argument has no merit because Brailey proved he suffered a compensable injury by accident arising out of and in the course of his employment on June 24, 2017 – as pled on the Form 50.

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

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

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

problems with his back." On follow-up questions, he reiterated "I *can't be certain about the date*. . . . I think I would say *uncertain about the date*." [R. P. 328, line 7-page 329, line 4 (emphasis added)]. This testimony completely confirms the correctness of the Court's opinion where it states: "Dr. Boyd's deposition testimony shows that although he wavered on a specific date of injury he opined that Brailey's back problems were related solely to his work at Michelin, and the injury was aggravated on June 24." Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022).

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

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

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

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

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

Michelin argues "like in *Rummage*, credibility was a substantial issue that was 'reasonably and meaningfully' related to whether Brailey actually suffered an injury at work on June 24, 2017, alleged or as to the causation of his alleged injuries." [Brief of Petitioners, page 33]. Conversely, the Court of Appeals held "Brailey's credibility as to his prior workers' compensation claim and prior back injury in 1997 is not a reasonable and meaningful basis for the Commission's determination that he did not suffer an accidental injury arising out of his employment at Michelin in 2017." Brailey v. Michelin N. Am., Inc., 438 S.C. 77, 882 S.E.2d 172 (Ct.App. 2022).

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

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

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

> credibility was a substantial issue because the deterioration in Claimant's psychological condition was not objectively measurable like the employee's hearing loss in Crane. Therefore, the Appellate Panel could have properly given less weight to Claimant's doctor's opinions if it believed Claimant was untruthful in her self-reporting of symptoms or her presentation.

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

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

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

Id.

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

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

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

In the case *sub judice*, the Court of Appeals reversed the Commission's findings because Brailey proved his case with medical evidence. Dr. Boyd's medical opinion is not merely unrefuted; it is based on a solid foundation with an objective physical examination and MRI, along with a detailed review of other medical records under cross-examination by Michelin's attorney. Michelin contends "a crucial component of Dr. Boyd's opinion was his ability to trust the history Brailey provided to him . . ." [Brief of Petitioners, page 34]. However, as the court noted in Clark, doctors are trained to detect self-serving and unreliable reports from patients. Had Dr. Boyd been "duped into [his] opinions" he undoubtedly would have said so in his deposition.

The Court of Appeals recognized where the proof lies. It rejected the Commission's use of an arbitrary credibility finding "to disregard not just a party's testimony but their entire array of proof." Id. Michelin "could have offered contrary evidence; without any, the Panel had no basis to discount the objective medical evidence, and *Crane* tells us a vague nod to credibility cannot close the gap." Id. Michelin goes on at length to list various instances where, it says, "[Brailey]'s testimony was completely unreliable and lacked any credibility whatsoever . . ." [Brief of Petitioners, pages 34-35]. Notwithstanding Michelin's histrionic and misleading characterization

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

Michelin is asking this Court to repeat the same error the Commission committed in Clark. Michelin's argument is a thinly veiled reprise of the "false in one, false in all" maxim employed by the Commission in Crane, Clark and the instant case. The Court should reject this argument. As there was no misapprehension by the Court of Appeals, the holding that Brailey proved he suffered a compensable work-related injury as a matter of law should be affirmed.

CONCLUSION

For the foregoing reasons, the Opinion of the Court of Appeals should be affirmed as to the holdings that (1) Michelin failed to prove the causal connection element of the Cooper defense; (2) Brailey proved with medical evidence that he suffered a compensable injury by accident arising out of and in the course of his employment; and (3) that there is no evidence to support a Capers defense. The Court should hold (1) the standard of review for jurisidictional facts arising under Cooper is the preponderance of the evidence standard; and (2) that Michelin failed to prove the wilful and material misrepresentation prong and the reliance prong under Cooper. The case should be remanded to the Commission with instructions to award medical treatment and compensation to Isaac Brailey.

Respectfully Submitted,

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

Attorney for Respondent

Columbia, South Carolina
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