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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

WCC File No.: 0818219

South Carolina Court of Appeals Opinion No. 2013-UP-127
filed March 27, 2013

Joe A. Osmanski, Employee, ... Petitioner,

v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier .... Respondents.

**RESPONDENTS' RESUBMITTED RETURN
IN OPPOSITION TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 240(e), SCACR, Respondents Watkins & Shepard Trucking, Inc. and Zurich North American Insurance Company hereby oppose Petitioner Joe A. Osmanski's ("Petitioner") Petition for Writ of Certiorari ("Petition") for review of the Court of Appeals' Opinion No. 2013-UP-127, Filed on March 27, 2013 ("Opinion"). Petitioner presents no novel questions of law, there was no dissent in the decision of the Court of Appeals, the Court of Appeals' decision is not in conflict with any prior decisions of this Court, and Petitioner's claim does not present any federal or constitutional issues. Rule 242(b), SCACR. In fact, Petitioner does not mention the Court of Appeals or its Opinion at all, except to note that he sought

rehearing. Thus, Petitioner does not present any reasons or arguments that warrant this Court's review, and his request for the same should be denied.

STATEMENT OF THE CASE

Petitioner alleges he incurred a work-related injury on November 1, 2008, when a box containing a recliner fell, causing his left arm to be pulled straight down and thereby injuring it. (Appx. 226, line 14 – 227, line 15).

Petitioner testified that previously, in 1987, he had suffered a work-related accident when he fell 32 feet when the ladder he was on slid "out down the wall. I stayed on the ladder and my elbows hit first." Although he injured multiple body parts in the 1987 accident, his left arm was the most significantly injured. (Appx. 179, line 18 –. 180, line 10). As a result of the 1987 accident, Petitioner was treated by several physicians, including Dr. Larry Chidgey .at the University of Florida, who was his primary treating physician. (Appx. 260, line 1 – 261, line 21) (Appx. 203, lines 18-21) (Appx. 506-547). Petitioner underwent multiple surgeries, including a total left elbow replacement. (Appx. 180, lines 11-22) (Appx. 345, line 17 – 346, line 18).

Following his recovery from the above-referenced surgery, Petitioner was assigned an impairment rating of 14 percent for his left arm and 6 percent for his right shoulder for a combined rating of 20 percent. (Appx. 528). Petitioner was given permanent lifting restrictions of 10 to 15 pounds for the left arm, (Appx. 347, line 16 – 348, line 20) (Appx.349, line 2 – 351, line 6) (Appx. 352, line 24 – 353, line 23), which Petitioner admitted he was aware of. (Appx. 209, line 14 – 210, line 16). Petitioner was specifically and repeatedly warned by Dr. Chidgey that he was not to stress the left arm and should permanently restrict his activities. (Appx. 520, 526-528). After Petitioner's elbow surgery, Dr. Chidgey "again stressed the importance of limited use of [Petitioner's] left arm to increase the longevity of this prosthesis," that Petitioner

"will **always** have a 15 pound weight limit restriction for the left upper extremity," and Petitioner "should also avoid situations where he might fall or excessively stress his left arm. We stressed this multiple times today, and the **patient stated he understands**." (Appx. 526) (emphasis added). Dr. Chidgey testified both that the Petitioner's work restrictions were permanent unless things changed, and that there was no medical evidence to suggest that the Petitioner's condition had changed between March 2002 and the date of the Petitioner's alleged November 2008 work-related accident. (Appx. 353, lines 13-23). Petitioner received benefits for the 1987 injury, and ultimately settled his workers' compensation claim with his employer for approximately $86,000. (Appx. 264, lines 2-25).

In 2006, Petitioner applied for work with Respondent Watkins & Shepard Trucking, Inc. ("Employer") as a truck driver and furniture deliveryman. (Appx. 184, lines 10-19). Petitioner completed multiple forms during his application process where he denied having any prior injuries or impairment. (Appx. 407, 447, 549). Petitioner admitted at the hearing that, prior to accepting employment, he knew the job required him to lift 100-150 pounds, which was outside of the permanent lifting restrictions Dr. Chidgey had placed on him. (Appx. 218, lines 3-16). Petitioner admitted that his job required him to use both arms. (Appx. 281, lines 5-8). Petitioner testified that he knew he was subject to the lifting restrictions imposed by Dr. Chidgey when he applied for work with Employer, and that the restrictions had not been lifted by a medical provider. (Appx 210, lines 5-25) (Appx. 211, lines 7-17). Petitioner confirmed that, although he was aware of these restrictions, (Appx. 211, lines 1-17), he knew Employer was not. (Appx. 219, lines 4-20). Although Petitioner agreed that, "it would have been a good idea" to have told Employer about his prior injury to his left arm and lifting restrictions, (Appx. 214, line 22 – 215, line 2), he openly admitted that he did not "bother telling them" because he did not think it was

specifically asked of him and because he thought he could perform the job. (Appx. 214, line 12 – 215, line 4) (Appx. 211, line 13 – 213, line 17). Although he marked "no" on forms provided to Employer that asked whether he had any impairment, (Appx. 407, 447, 549), he admitted at the hearing that his left arm was, in fact, impaired. (Appx. 216, lines 1-11). Although Petitioner testified that he could not recall giving the phone interview that was the source of the Post Job Offer Questionnaire, (Appx. 447), he never denied that the interview took place. He simply could not recall. (Appx. 194, line 25 – 195, line 1) (Appx. 214, lines 7-15). With respect to the portion of the Department of Transportation ("D.O.T.") physical form that he filled out in October 2006, Petitioner explained that he checked "no" to the question asking whether he had any impairment because he said he understood the form to be asking only for the prior five years. (Appx. 216, line 12 – 217, line 20). However, Petitioner admitted he had seen Dr. Chidgey for his left arm within the five years prior to filling out the D.O.T. form. (Appx. 210, lines 5-16) (Appx, 528). With respect to an affirmative action form, which asked if he had an impairment or a record of any impairment, Petitioner marked "No." (Appx. 549). Petitioner testified that he "answered no that I'm not disabled. That's what I answered to," despite the fact that he acknowledged he had an impairment. (Appx 232, line 4 – 233, line 23).

As part of the hiring process, Dr. Albert James Osbahr saw Petitioner for a D.O.T. exam on October 30, 2006. (Appx. 379, Osbahr Dep. p. 6, lines 6-8). Although Dr. Osbahr noticed some impairment to Petitioner's left arm, (Appx. 379-380, Osbahr Dep. p. 9, lines 23 – p. 10, line 1), he had no information regarding Petitioner's previous accident and surgery to his left elbow, and did not know that Petitioner had been assigned an impairment rating or any lifting restrictions. (Appx. 379, Osbahr Dep. p. 7, line 15 – p. 8, line 24; *see also* Appx. 380, Osbahr Dep. p. 11, lines 20-25). Petitioner admitted that he did not inform Dr. Osbahr that he had been

placed under lifting restrictions. (Appx. 202, lines 22-24) (*see also* Appx. 380, Osbahr Dep. p. 10, lines 11-17). Specifically, Dr. Osbahr concluded after examining Petitioner that, "even though he had the impairment, it appeared he could use his arm for the purposes of driving a truck." (Appx. 382, Osbahr Dep. p. 21, lines 7-8). Dr. Osbahr was not provided with Petitioner's job description and was only examining him "overall for truck driving." (Appx. 380, Osbahr Dep. p.11, lines 13-16). Dr. Osbahr had no connection to and was not provided any information regarding the requirements of Petitioner's job, but only certified that Petitioner was able to perform the duties of a commercial motor vehicle driver. (Appx. 382-383, Osbahr Dep. p. 21, line 17 – p. 22, line 13). Dr. Osbahr was unaware of and did not evaluate Petitioner for any pushing, pulling or lifting requirements of his job. (Appx. 385-386, Osbahr Dep. p. 25, line 23 – p. 26, line 12). Dr. Osbahr testified that he was not certain whether he sent the "long" form, which would have had the notation regarding Petitioner's arm impairment, or the "short" form to Employer. (Appx. 382, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (Appx. 385-386, Osbahr Dep. p. 25, line 6 – p. 26, line 3 (Dr. Osbahr testifying that he cannot confirm whether Employer received the long or the short form)).

Matthew Grandy, the Director of Driver Recruiting and Training, testified that all hiring for Employer is conducted from corporate headquarters in Missoula, Montana. Mr. Grandy testified that, once an application has been received and evaluated, a conditional job offer is extended, after which the company engages in a post job offer evaluation in order to identify an individual's ability to perform the job. (Appx. 333-334, Grandy Dep. p. 9, line 5 – p. 10, line 24). Mr. Grandy testified that a conditional offer of employment is contingent upon completion of a drug test, a lift test, a D.O.T. physical, as well as the post-job offer questionnaire administered by the safety department. (Appx. 334, Grandy Dep. p. 10, lines 2-15) (Appx. 336,

Grandy Dep. p. 18, line 14 – p. 19, line 1). Mr. Grandy further testified that, had Petitioner provided Employer with accurate information regarding the permanent work restrictions that were placed upon Petitioner by Dr. Chidgey, Petitioner would not have been subjected to a lift test. (Appx. 337, Grandy Dep. p. 25, lines 16-22). Instead, Employer would have conducted further research, including obtaining a copy of Petitioner's work release from Dr. Chidgey. (Appx. 337, Grandy Dep. p. 25, line 22 – p. 26, line 7). Mr. Grandy confirmed that Employer would want any medical records documenting Petitioner's restrictions in order to conduct a thorough investigation to determine if he was physically capable of performing the job. (Appx. 337-338, Grandy Dep. p. 25, line 16 – p. 27, line 4).

At the hearing, Petitioner denied that his left arm and elbow had been bothering him since the 2002 total elbow replacement. (Appx. 206, lines 15-19). However, just days prior to his alleged November 1, 2008 accident, Petitioner told his family doctor that he still had range of motion problems. Petitioner later admitted that he had been experiencing limited range of motion and occasional numbness. (Appx. 225, line 17 – 226, line 13). In November 2008, Petitioner told Dr. McIntosh "it has always been painful, but this is a little more." (Appx. 504-505).

Petitioner alleges that, on November 1, 2008, a box containing a recliner weighing 100-150 pounds shifted when he tried to move it. The box came down and straightened his left arm out, injuring it. Petitioner acknowledged that the box did not strike his arm, but only straightened it out. (Appx. 196, line 20 – 198, line 2) (Appx. 226, line 14 – 227, line 15).

In July 2009, Petitioner filed a Form 50 seeking medical treatment and workers' compensation benefits from Respondents. (Appx. 111). Respondents filed a Form 51 denying that Petitioner suffered a work-related accidental injury as defined by the South Carolina

Workers' Compensation Act ("Act") and that his claim was barred because Petitioner had engaged in fraud in the application. (Appx. 113).

A Hearing took place on April 29, 2010 before the Single Commissioner Susan S. Barden. Commissioner Barden determined Petitioner did not satisfy his burden of proving a compensable injury to the left upper extremity. (Decision and Order of Single Commissioner Barden, November 10, 2010, Appx. p. 42). Commissioner Barden further found that Petitioner failed to prove that he had sustained an accidental injury pursuant to Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), and that Petitioner had engaged in fraud in the application which barred his claim under Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973). (Appx. pp. 46-47). Commissioner Barden also expressed doubts about Petitioner's credibility. (Appx. pp. 43-44, 46-48).

Within the proscribed time period, Petitioner sought Full Commission Review. The Full Commission heard oral argument on April 18, 2011 and adopted the findings of fact of the Single Commissioner in their entirety, (Decision and Order of the Full Commission, July 26, 2011, Appx. p. 15) ("Commission Decision"), including that Petitioner failed to prove he suffered a work-related injury, that Petitioner's alleged injury was not accidental pursuant to Capers, and that Petitioner's claim was barred by Cooper v. McDevitt. (Appx. pp. 16-17, 20-24). The Commission also found Petitioner's hearing testimony to not be credible. (Appx. pp. 16-18, 19-22).

Petitioner timely appealed to the Court of Appeals, which heard oral argument on February 6, 2013, and issued its Opinion on March 27, 2013, affirming the Commission. (Appx. 3-6).

ARGUMENTS

I. The Commission applied the correct legal standard for fraud in the application.

Petitioner argues that the Commission erred by applying the wrong legal standard to this case, and then urges this Court to supplant the test for fraud in the application as set forth in Cooper v. McDevitt with the general common law test for fraud. However, none of the common law fraud cases cited by Petitioner – Outlaw v. Calhoun Life Ins. Co., 236 S.C. 272, 113 S.E.2d 817 (1960) (alleging fraudulent inducement to execute a final release and discharge on a life insurance policy); Hansen v. DHL Laboratories, 316 S.C. 505; 450 S.E.2d 624 (Ct. App. 1994) (alleging fraudulent inducement to sign promissory notes); and Byars v. Cherokee County, 237 S.C. 548; 118 S.E.2d 324 (1961) (alleging fraudulent sale and reconveyance of property) – involved a workers' compensation claim. Fraud in the application is a defense peculiar to workers' compensation and is distinct from claims or defenses alleging common law fraud. The test for fraud in the application is set forth clearly in Cooper v. McDevitt and requires that an employer prove the following: "(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the inquiry." 260 S.C. at 468, 196 S.E.2d at 835. This rule has been applied consistently in workers' compensation claims in South Carolina. *See, e.g.*, Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009) (finding the claimant's arguments that he was entitled to make material misrepresentations on his employment application "because he believed he was fit for construction work . . . a specious position"); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) (finding claimant lied on an application form where she failed to disclose

prior back and leg problems, that her employer regularly relied on the information supplied by applicants in making its hiring decisions, and that there was a causal connection between her failure to disclose her back problems and her alleged back injury); Frederick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009) (claim for back injury denied because claimant falsely indicated on her job application that she had had no prior back injuries).

As this Court pointed out in Brayboy, once an employer establishes the three prongs set forth in Cooper v. McDevitt, the "employment relationship may be vitiated." Brayboy, 383 S.C. at 467, 681 S.E.2d at 569. In other words, once an employer has proven fraud in the application, the employer/employee relationship is deemed to not have existed for workers' compensation purposes. Id.; *see also* Frederick, 385 S.C. at 16, 682 S.E.2d at 519-20. If there is no employer-employee relationship at the time of the accident, the Act does not apply and the inquiry is complete. Brayboy, 383 S.C. at 466-67, 681 S.E.2d at 568-69.

Petitioner asserts that the burden of proof in this case should be clear and convincing evidence.[1] However, South Carolina courts have never applied a "clear and convincing" standard of evidence to fraud in the application cases. *See* Brayboy, 383 S.C. at 568, 681 S.E.2d at 466 (stating that the "existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard"); Jones, 355 S.C. 413, 586 S.E.2d (applying the substantial evidence standard to the factual determination that employer met the three-prong test set forth in Cooper v. McDevitt);

[1] Petitioner argues that the standard of proof for fraud in the application should be higher than preponderance due to the harsh result of a finding of fraud in the application. (Pet. p. 7). Respondents note that the result in this case is no different from the result obtained where an employee is denied benefits because he is a gratuitous employee, such as in Shuler v. Tri-County Elec. Co-op, Inc., 385 S.C. 470, 684 S.E.2d 765 (2009) (decided under a preponderance of the evidence standard), or an independent contractor, such as in, Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009) (denying benefits under a preponderance of the evidence standard).

see also Cooper v. McDevitt 260 S.C. at 469, 196 S.E.2d at 835 (finding "ample evidence" supported the finding below that false statements in an employment application barred benefits).

Petitioner argues that Brayboy is not persuasive or controlling because no party raised the standard of proof issue and this Court merely was "copying and pasting the general idea that the standard of proof in a Workers' Compensation case is the preponderance of the evidence." (Pet. p. 7). However, there is no evidence that this Court "copied and pasted" the standard of review in Brayboy, but quite the opposite. In Brayboy, the hearing commissioner awarded benefits, rejecting the employer's defense of fraud in the application. Brayboy v. WorkForce, 2004 SC Wrk. Comp. LEXIS 1116 (Nov. 29, 2004). The Full Commission affirmed, Brayboy v. WorkForce, 2005 SC Wrk. Comp. LEXIS430 (July 29, 2005), and the "circuit court upheld the award on the basis of the substantial evidence standard of review." Brayboy, 383 S.C. at 464, 681 S.E.2d at 567. On further review, this Court purposefully and specifically held that, "[b]ecause the issue of Brayboy's employment status is jurisdictional, the Court makes findings based on its view of the preponderance of the evidence." Id. Later cases have recognized this as the appropriate standard. *See* Rabon v . Arrow Exterminating, Inc., 393 S.C. 510, 514, 713 S.E.2d 347, 350 (Ct. App. 2011) (noting that, "[r]ecently, in *Brayboy v. WorkForce, 383 S.C. 463, 464, 681 S.E.2d 567, 567 (2009)*, our supreme court determined that when reviewing a case where the employer asserts the employee's concealment of prior injuries vitiated the employment relationship, this court reviews the Appellate Panel's findings on the relationships existence according to our own view of the preponderance of the evidence"). Thus, Petitioner's assertion that the standard of review in this case should be clear and convincing is entirely without support.

Petitioner's first argument presents no argument or controversy that warrants this Court's review and his Petition should be denied.

II. The Commission correctly determined that Petitioner's claim is barred due to fraud in the application.

Despite Petitioner's arguments to the contrary, the Commission correctly and properly determined that his workers' compensation claim is barred under Cooper v. McDevitt. As noted above, the Cooper v. McDevitt defense requires proof that Petitioner knowingly and willfully made a false representation as to his physical condition, that Employer relied on the false representation and such reliance was a substantial factor in the hiring, and that a causal connection exists between the false representation and the injury. By not appealing the first and third prong of the Cooper v. McDevitt test, Petitioner tacitly admits that: 1) he made a knowingly false misrepresentation on his job application,[2] and 2) that there was a causal connection between Petitioner's misrepresentation and the subsequent injury. He has thus conceded these issues. All that Petitioner challenges is the Commission's finding that Employer relied on his material representations, arguing that Employer knew Petitioner's statements to be false. The Commission's finding on this issue is supported by a preponderance of the evidence. (Appx. 16-24 (detailed findings of fact regarding Employer's reliance on Petitioner's false statements during the job application process)). In contrast, Petitioner's argument is built on misconstructions and misrepresentations of fact that are not supported by the record and, therefore, ultimately fails.

First, Petitioner claims that Dr. Osbahr, "reported to [Employer] that the Petitioner had both impairment and a loss of function in his left arm." (Pet. p. 8). There is no evidence in the record to support this assertion. Instead, Dr. Osbahr testified that he was not certain whether he

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[2] Petitioner's statement agreeing with "the logic" in Respondents' position regarding the false representations he made in response to Employer's questions, (Pet. p. 8), is a further concession of this point.

sent the "long" form, which had the information regarding Petitioner's arm impairment, or the "short" form to Employer. (Appx. 382, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (Appx. 383, Osbahr Dep. p. 24, lines 6-12) (Dr. Osbahr testifying that he could not confirm whether Employer received the long or the short form).

Next, Petitioner suggests that Respondents' own witness, presumably Mr. Grandy, "admitted that upon reading Dr. Osbahr's findings, they should have followed up with either Dr. Osbahr or the Petitioner." (Pet. p. 8). Mr. Grandy admitted no such thing. First, the D.O.T. physical form filled out by Dr. Osbahr does not state what normal supination for an elbow is, (Appx. 406-408), and Mr. Grandy testified that he did not know what normal supination for an arm was. (Appx. 339, Grandy Dep. p. 31, lines 9-23) (Appx. 339, Grandy Dep. p. 32, lines 11-17). The particular testimony cited by Petitioner, (Appx. 340, Grandy Dep. p. 35, lines 8-13), only states that nothing ***prevented*** Employer from following up with Dr. Osbahr. Counsel for Petitioner then asked Mr. Grandy to ***assume*** that normal supination was 180 degrees and then, ***if*** he was made aware of that fact, and was told that an applicant only had half that supination "is that something you would want to follow upon," to which Mr. Grandy replied yes. (Appx. 340, Grandy Dep. p. 35, lines 14-23). Thus, the statement Petitioner relies on requires both Mr. Grandy and this Court to assume facts that Employer was not aware of and/or that are not in evidence.

Petitioner now asserts that Mr. Grandy should have performed a Google search or called Dr. Osbahr to determine what normal supination is, in order to reveal the level of Claimant's impairment. (Pet. pp. 9-10). Petitioner's approach would impose on employers the duty to research the medical terminology and norms behind every physician's report they receive in order to determine the health status of potential employees. This is not and should not be the

rule, particularly where, as is the case here, the employee is making affirmative statements that he is not impaired and has no restriction that would limit his performance of his job.

In any event, courts have found reasonable reliance in common law fraud actions even where information was publicly available to the plaintiff. *See, e.g.*, Moseley v. All Things Possible, Inc., 395 S.C. 492, 719 S.E.2d 656 (2011) (affirming fraud judgment in favor of plaintiffs despite the fact that an easement was discoverable in public records); South v. Sherwood Chev., Inc., 277 S.C. 372, 287 S.E.2d 490 (1982) (finding plaintiff reasonably relied on representation that truck was a 1979 model even though the contract and an owner's manual in the glove box specified it was a 1978 model). By way of contrast, and in contrast to the instant case, the plaintiffs in the case relied on by Petitioner, O'Shields v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d 50 (1974), examined their mobile home upon delivery, specifically noted the deficiencies that were readily apparent, but accepted the home anyway. 262 S.C. at 282, 204 S.E.2d at 52. The deficiencies in O'Shields consisted of: 1) ceilings that were seven feet instead of eight feet; 2) no exposed beams in the living room; 3) no "swag lights"; and 4) the hall was not carpeted. 262 S.C. at 280, 204 S.E.2d at 51. Such deficiencies would be readily apparent upon a visual inspection. Petitioner's impairment here was not readily apparent or obvious to either Dr. Osbahr or Employer.

Mr. Grandy did not testify that Employer was aware of Petitioner's impairment – and Respondents certainly did not admit "they knew the Petitioners' [sic] responses were incorrect." (Pet. pp. 8-9). Instead, Mr. Grandy confirmed that Employer relied on the forms Petitioner filled out as well as the post-acceptance interview in order to determine whether he was capable of performing all the functions of his job. (Appx. 333, Grandy Dep. p. 9, line 2 – p. 11, line 12) (Appx. 272, Grandy Dep. p. 18, line 14 – p. 19, line 1). Furthermore, as Mr. Grandy stated, the

Employer would not have proceeded with the lift test had it known Petitioner was under restrictions from his doctor. (Appx. 337-338, Grandy Dep. p. 25, line 16 – p. 26, line 7).

Finally, Mr. Grandy testified that, "[a]s far as the hiring process, the DOT physical is basically almost a pass/fail thing." (Appx. 339, Grandy Dep. p. 30, lines 8-9). Because Dr. Osbahr was only evaluating Petitioner for his ability to drive a truck, and not for the other requirements of his job, and because Petitioner himself marked on the D.O.T. form that he did not have any impairments, (Appx. 407), as well as the facts that Petitioner denied having any impairment on Employer's Post Job Offer Questionnaire and on an Affirmative Action Program Information form, (Appx. 447) (Appx. 549), the Commission was correct in concluding that Employer relied on Petitioner's false representations and that Employer's reliance was a substantial factor in the hiring.

The Commission properly concluded that Petitioner's claim is barred because of fraud in the application and the Court of Appeals appropriately upheld the Commission's finding on this point. Simply because Petitioner disagrees with the finding that his claim is barred because of fraud in the application does not justify this Court's review and his Petition should be denied.

III. The Commission correctly determined that Petitioner's claim was barred because it was not unexpected from Petitioner's point of view.

As an alternative and independent reason for denying this claim, the Commission correctly held that the Capers defense barred the claim because Petitioner's injury was not unexpected from his point of view. Although Petitioner correctly cites general case law regarding the definition of an accident for workers' compensation purposes, he entirely fails to address the principle set out in Capers and properly relied on by the Commission. In Capers, the Petitioner had been treated for contact dermatitis while working for a prior employer, but did not reveal his condition on his application with Holiday Inn. While working for Holiday Inn as a

dishwasher, he began suffering from contact dermatitis and sought workers' compensation benefits. The Court denied the claim because "the outbreak of dermatitis was not an unlooked for event which Capers did not expect," but instead was "an event which Capers could anticipate given his past experience." 305 S.C. at 256, 407 S.E.2d at 661-62. Similarly, in Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992), the Court determined that the injury to claimant's vascular system was not an injury by accident as defined by our workers' compensation statute because the injury was not unexpected. Instead, the claimant knew standing would worsen his condition but continued to work in a job that required prolonged standing. 308 S.C. at 399-400, 418 S.E.2d at 330-31.

Pee v. AVM, Inc., relied on by Petitioner, instructs that the focus should be, "on the unexpected nature of the **injury** rather than requiring that the **event** causing the injury be unexpected," and that "an injury is unexpected, bringing it within the category of accident, if the worker did not intend it or **expect it would result from what he was doing**." 352 S.C. 167, 171, 573 S.E.2d 785, 787 (2002) (emphasis added). Substantial evidence supports the Commission's factual and legal conclusions that Petitioner: 1) knew he was under permanent lifting restrictions; 2) had been warned by Dr. Chidgey his treating physician "that he should avoid situations where he might fall or excessively stress his left arm;" 3) knew he was impaired and had settled his prior workers' compensation claim for approximately $68,000; and 4) knew prior to accepting the job with Employer that the requirements of his job exceeded his lifting restrictions, all of which support the conclusion that Petitioner should have expected just such an injury to his elbow. (Commission Decision, Appx. pp. 16-20) (Appx. 209, line 14 – 211, line17) (Appx. 218, line 3 – 219, line 20) (Appx. 526-528) (Appx. 347, line 16 – 353, line 23) (Appx. 362, line 19 – 363, line 2) (Appx. 264, lines 2-25) (Appx. 552-560).

There can be no legitimate question that Petitioner's job involved heavy lifting and required both arms. (Appx. 281, lines 5-8) (Appx. 552-560). Although Petitioner's counsel attempted to elicit testimony from Mr. Grandy that, "**most** of the physical requirements of [Petitioner's] job is the ability to push and pull," Mr. Grandy explicitly did not agree. (Appx. 340, Grandy Dep. p. 36, lines 16-20) (emphasis added). Although Mr. Grandy did agree that Petitioner would have done "more" pushing and pulling than lifting, (Appx. 340, Grandy Dep. p. 36, line 24 – p. 37, line 8), "more" can mean anything slightly over 50 percent and Mr. Grandy was clear that he did not mean "most." The stated requirements of Petitioner's job flatly contradict any suggestion that his job did not involve heavy lifting. (Appx. 552-560). Petitioner acknowledged that his job required him to use both arms. (Appx. 281, lines 5-8).

Petitioner was ***not*** certified by Employer's doctor "as able to perform the job." (Pet. p. 11). Dr. Osbahr only certified that Petitioner had passed his D.O.T. physical and could drive a truck. (Appx. 382, Osbahr Dep. p. 21, lines 7-8). Dr. Osbahr was not provided with Petitioner's job description, any information regarding the lift test, and did not evaluate him for any pushing, pulling or lifting requirements of his job. (Appx. 380, Osbahr Dep. p.11, lines 13-16) (Appx. 382-383, Osbahr Dep. p. 21, line 17 – p. 22, line 13) (Appx. 383-384, Osbahr Dep. p. 25, line 23 – p. 26, line 12). Although Dr. Osbahr noticed an impairment to Petitioner's left arm, (Appx. 379-380, Osbahr Dep. p. 9, lines 23 – p. 10, line 1), Petitioner did not reveal to him that he had suffered a previous accident, that he had undergone surgery on his left elbow, or that he had been assigned an impairment rating or was under any lifting restrictions. (Appx. 379, Osbahr Dep. p. 7, line 15 – p. 8, line 24) (Appx. 380, Osbahr Dep. p. 10, lines 11-17) (Appx. 380, Osbahr Dep. p. 11, lines 20-25) (Appx. 202, lines 22-24).

In addition, Dr. Chidgey, Petitioner's treating physician, did not state that Petitioner would not have been violating his restrictions by using his right arm for most of the lifting and his left arm as a guide, as Petitioner suggests. (Pet. p. 11). Instead, when pressed for just this precise answer, Dr. Chidgey only testified that he recommends to persons with an artificial elbow joint "that they try and do as much shifting of weight over to the opposite side," and that he had patients with "no left arm who lift 50 pounds so they are doing it not with the left arm at all," and finally stated only that, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (Appx. 367, line 25 – 369, line 21).

Petitioner's assertion that his treating physician opined that "but for" the accident that occurred on November 1, 2008, Petitioner would have been able to continue to perform his job indefinitely, (Pet. p. 13), is nothing more than pure speculation. It is axiomatic that workers' compensation awards may not be based on surmise, conjecture or speculation. Tiller v. National Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Dr. Chidgey specifically noted that he and Petitioner had discussed that, "if you want to try and gain life out of the arthroplasty, you keep your weight to a lower level. If you increase that, you may get away with it." (Appx. p. 300, lines 8-18). Implicit in this statement is the recognition that you may *not* "get away with it" also. The fact is that Petitioner took a calculated risk, got away with it for two years, but ultimately experienced precisely the type of injury his treating physician specifically warned him about. As the Commission observed, "it would be patently unfair to require [Respondents] to bear the burden for a risk that the Petitioner knowingly and willfully chose to take . . ." (Commission Decision, Appx. pp. 14-15).

Although Petitioner argues there was no testimony or evidence that Petitioner expected a box to fall on his arm, it is not the precise manner in which an accident occurs that controls the

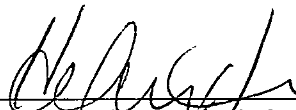
analysis. Pee, 352 S.C. at 171, 573 S.E.2d at 787. Rather, the key determination in this case is that Petitioner, examining the facts from his point of view, should have expected precisely the type of injury he incurred and his claim, therefore, is barred. Neither the Commission nor the Court of Appeals committed any error in determining that Petitioner did not prove his injuries were unexpected and this Court should deny Petitioner's request for review of this issue.

CONCLUSION

For the reasons set forth herein, this Court should deny Petitioner's Petition.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



August 1, 2013

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

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WCC File No.: 0818219

South Carolina Court of Appeals Opinion No. 2013-UP-127
filed March 27, 2013

Joe A. Osmanski, Employee, ... Petitioner,

v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier .... Respondents.

PROOF OF SERVICE

I certify that on the 1st day of August 2013, I served the **Respondents' Resubmitted Return in Opposition to Petitioner's Petition for Writ of Certiorari** on Joe A. Osmanski by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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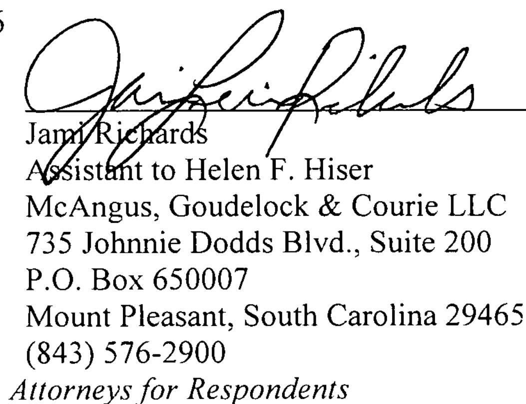

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