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Aug 05 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2022-001688

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

v.

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

PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240, SCACR, Petitioners Michelin North America, Inc. (US7), and Safety National Casualty Corp., hereby petition this Court for rehearing of its Opinion No. 28214 as it is grounded on a materially erroneous understanding of the facts of this case and the American with Disabilities Act (ADA). Although this Court limits rehearing to extraordinary cases, rehearing is warranted here in light of the material error of the facts and law, and to allow the Court to reconsider its decision considering the devastating impact the Opinion has on workers compensation litigation in South Carolina as well as potentially other jurisdictions across the United States.

- I. **The Court incorrectly concluded Michelin hired Claimant before Claimant made the misrepresentation which led the Court to then incorrectly hold the timing of the Questionnaire defeated the reliance prong of Cooper¹ and “because of the Americans with Disabilities Act (ADA), it was not possible in this case for Michelin” to satisfy Cooper.**

This Court incorrectly held “the sequence of events in this case made it impossible for Michelin to demonstrate that any misrepresentation was a ‘substantial factor’ in making the decision to hire” Claimant. The Court’s Opinion relies on an erroneous belief that because the medical questions were not on Michelin’s Employment Application and were asked after a conditional offer was made, Michelin could not have relied on the misrepresentation. This was legally and factually incorrect.

Pursuant to the ADA, there are three stages considered in analyzing an employer’s ability to make medical/disability-related inquiries and require medical examinations—pre-offer, post-offer, and during employment. 42 U.S.C. §12112. This Court appears to have incorrectly conflated the three stages in determining Michelin could not have relied on the medical questionnaire. Contrary to this Court’s Opinion, here, exactly as seen in cases like Fredrick v. Wellman, Inc., 385

¹ Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973).

S.C. 8, 13, 682 S.E.2d 516, 518 (Ct. App. 2009), “[d]uring the hiring process, [Michelin] gave [Claimant] a conditional offer of employment and then required [him] to complete a medical history form.” Like Fredrick, “[Michelin’s] reliance on the medical history form was undoubtedly a substantial factor in hiring [Claimant] for the specific position in which [he] was placed.” Id. at 21, 682 S.E.2d at 523.

Specifically, here, on February 27, 2017, Claimant completed Michelin’s Employment Application.² (R. 139-140). The Employment Application³ states under the heading “**PLEASE READ CAREFULLY**” that “Employment is subject to: . . . Passing a physical examination” The Application again notes that a physical exam is required for employment by Michelin and Claimant checked the box affirming that he was willing to submit to a physical exam.

On March 21, 2017, Claimant falsely completed and executed Michelin’s “*Confidential Health Questionnaire for Post-Offer Examination*” and underwent the contemporaneous physical examination. (R. 176, 774). On the form, Claimant denied any prior medical problems with or ever receiving any medical attention for any prior back injury, backache, or back pain. He also denied ever experiencing a medical problem that affected his ability to perform his work. The

² Claimant graduated from high school in 1984 and took college classes from 1984-1986. (R. 139-140). Although Claimant included on Michelin’s Employment Application prior jobs as far back as August 1986 when he stopped taking college classes, he glaringly omitted his job at Richtex in 1997 where he had a workers compensation claim to the same area of his back. (R. 139-140). Michelin’s Employment Application specifically states “I have read and certify that the information I have provided in this application is true and correct. I understand that I may be refused hire or, if hired, my employment will be subject to termination if I have made any omissions or misrepresentations in completing this application” directly above Claimant’s signature.

³ The Employment Application begins by explaining to the applicant that “**Michelin is an equal employment/affirmative action employer. If you need an accommodation for any part of the application/employment process because of a medical condition or disability, please call [phone number] or send an email to [email address] to let us know the nature of your request. Answers to the following questions should provide the Company with an accurate record of your personal history.**”

Questionnaire warned Claimant that any false, misleading, or incomplete information would make him subject to *disqualification from employment* or subject to dismissal at any time. Michelin's doctor relied on Claimant's responses on the Questionnaire to conduct the corresponding physical exam and evaluate whether Claimant could perform the heavy labor job duties. (R.775, 785-86).

Thereafter, on April 17, 2017, Michelin hired Claimant in reliance upon Claimant's misrepresentation as to his medical history.⁴ See R. 141 Michelin's First Report of Injury providing April 17, 2017, as the "date hired"; R. 240-41 Claimant's deposition testimony stating he was hired on April 17, 2017; R. 333 Claimant's hearing testimony agreeing that he was hired on April 17, 2017; R. 52 Claimant's Attachment to his Pre-Hearing Brief stating he "was hired on April 17, 2017"; R.775, 785-86 Michelin's Safety Manager's testimony stating Michelin relied on the Questionnaire, Michelin's doctor relied on the Questionnaire to conduct the physical exam, and had Claimant truthfully completed the Questionnaire, Michelin would have investigated the prior issue to determine whether Bailey could safely perform the PAP Operator job and if Michelin discovered Claimant could not perform the heavy labor PAP Operator position, it would not have hired him.

Accordingly, Michelin made the medical inquiries on the Questionnaire and relied upon Claimant's responses after a conditional job offer but *before* Michelin hired Claimant and he began working in the position. Michelin's offer of employment was conditioned on its reliance on the information. Michelin's actions were in compliance with the ADA. 42 U.S.C. §12112(d)(3); 29 C.F.R. §1630.14(b) (permitting employers to make medical inquiries and require a medical examination after an offer of employment has been made to a job applicant and prior to

⁴ Under Smalls v. Oneita Industries, 318 S.C. 553, 459 S.E.2d 306 (1995), Michelin was not required to terminate Claimant upon learning of Claimant's misrepresentation of his physical condition to raise the fraud in the application defense.

commencement of employment duties of such applicant, and allowing the employer to condition an offer of employment on the results of such information).⁵

The “sequence of events” in fact demonstrate Michelin relied upon the misrepresentation for hiring and placement decisions as seen in this Court’s opinions in Small and Brayboy, and the South Carolina Court of Appeals’ opinion in Fredrick. See Small v. Oneita Industries, 318 S.C. 553, 554 n.1, 459 S.E.2d 306, 306 n.1 (1995) (affirming conclusion that reliance prong under Cooper met where employer testified knowledge of claimant's prior injury would have affected its job placement of claimant); Brayboy v. WorkForce, 383 S.C. 463, 467, 681 S.E.2d 567, 569 (2009) (elucidating that reliance “is twofold” and medical information relied upon is important “in the hiring and placement decisions”).

The reliance here is identical to Fredrick, 385 S.C. at 13, 682 S.E.2d at 518. The claimant in Fredrick argued unsuccessfully the very same view this Court’s Opinion in the instant case erroneously suggests to future claimants—that because the claimant completed her medical history form after she had been hired, the company could not have relied on the form in hiring her and that, therefore, there could be no fraud as a matter of law. In Fredrick, the Court correctly determined that like the instant case, the employer intended to condition the offer of employment for a position on the results of a medical history inquiry and in hiring the applicant following the conditional offer, the employer relied to its detriment on the applicant’s false statements.

Here, Michelin’s Employment Application, the Confidential Health Questionnaire for Post-Offer Examination, and Michelin employees’ testimony evidence Michelin’s intent to condition

⁵ As discussed more fully below, the ADA has not been amended since 2008 and amendments in 2008 did not change the fact that the ADA permits employers to make medical inquiries and require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant. 42 U.S.C. §12112(d)(3); 29 C.F.R. §1630.14(b).

Claimant's hiring and placement as a PAP Operator on his responses related to his medical history. Mark Gross, Michelin's Safety Manager, explained Michelin relied on the Questionnaire because it was critical for Michelin to know and understand the physical condition of the prospective employees. (R. 793). He explained he would have been concerned about safety if he had known of Claimant's prior issues. (R. 775-76). Had Michelin been aware of the issues, Michelin would have investigated the extent of Claimant's issues to determine whether Claimant could be placed in the PAP Operator position, but Claimant did not give it the opportunity. (R.775, 785-86). Importantly, had Claimant been truthful in his responses, and Michelin discovered he could not perform the PAP Operator position, Michelin would not have hired him. (R.775, 785-86, 793). Similarly, Jermaine Lemon, Claimant's trainer, confirmed Michelin relied on the Questionnaire to prevent injuries when placing workers in specific positions. (R. 665-69). Lemon explained that an individual such as Claimant, who was instructed by a doctor that he could not perform heavy lifting, could not perform the PAP Operator position at Michelin. (R. 667). Troy Lowman, Claimant's Training Manager, explained a person's physical ability to do a job where he was placed was important because of the impact it had on the safety of Michelin, that person's co-workers, and other members of that person's team. (R. 706). Lowman explained that Claimant could not perform the PAP Operator position safely. (R. 697-98).

In short, this Court's Opinion is based upon a determination this Court made that is legally and factually not correct. Accordingly, this Court should reconsider and reverse its Opinion No. 28214.

II. This Court engaged in impermissible fact finding to overturn the Commission’s finding of fact that any injury on June 24, 2017, was not an unlooked or unexpected event pursuant to Capers⁶ and by affirming the Court of Appeals, this Court’s Opinion is inconsistent with Bartley v. Allendale Cty. Sch. Dist.⁷

The Court ignored the fact that the Court of Appeals, and this Court as well by not addressing the Court of Appeals’ handling of the Capers issue, has made findings of fact which is in contradiction to the Workers Compensation Act and Administrative Procedures Act. See, e.g., S.C. Code Ann. § 1-23-610 (Supp. 2020) (providing that review “must be confined to the record” and a reviewing Court shall not substitute its judgment for that of the agency “as to the weight of evidence on questions of fact”). The Commission’s determination of whether whatever happened on June 24, 2017, was unlooked for or expected is an issue of fact; and the Commission's determination of that issue is conclusive when it is supported by substantial evidence. 67 S.C. Code Ann. Regs. 215; Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986) (providing although evidence presented below was contradictory, the Commission's findings were supported by substantial evidence; “[t]herefore, analogous to a jury's findings of fact on disputed issues, the Commission's conclusions must be affirmed”). And, as this Court is aware, in making this determination, the Commission has discretion to weigh and consider all the evidence, including both lay and expert testimony. See Provins v. Spirit Constr. Servs., 433 S.C. 17, 27, 855 S.E.2d 318, 323 (Ct. App. 2021) (“[T]he Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established.” (quotation marks and citation omitted)).

This Court’s Opinion in the instant case conflicts with Bartley v. Allendale Cty. Sch. Dist., 392 S.C. 300, 310, 709 S.E.2d 619, 624 (2011). In Bartley, the Court of Appeals did not remand

⁶ Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991).

⁷ Bartley v. Allendale Cty. Sch. Dist., 392 S.C. 300, 709 S.E.2d 619 (2011).

the case to the Commission and instead concluded on its own that a specific workers compensation case was not applicable. Id. This Court held the Court of Appeals improperly made findings of fact when instead it should have remanded the issue to the Commission to allow the Commission to make the necessary factual findings and legal conclusions to resolve the workers compensation claim. Id. In Bartley, this Court held that in holding a specific workers' compensation case was not applicable to the facts of the claimant's case, the Court of Appeals improperly made findings of fact that were not made by the Commission. Id.

In the instant case, the Court of Appeals first held the Commission's Order did not contain sufficient findings of fact and conclusions of law relating to Capers and reversed. In its second opinion, like in Bartley, the Court of Appeals engaged in fact finding to determine that Capers was not applicable. Specifically, in concluding that Capers was not applicable, the Court of Appeals found as fact that: Claimant could not have expected to have similar back problems at Michelin; the fact that Claimant worked at Westinghouse was significant; the Richtex injury was to a different area of Claimant's back; and Dr. Boyd's testimony and opinion do not support the theory that Claimant's 2017 injury was non-accidental and could not have been expected.

All of these factual findings and the weight to be afforded the testimony of the witnesses is left exclusively to the province of the Commission and this Court's affirmance of the Court of Appeals on this issue was erroneous. See S.C. Code Ann. § 1-23-610 (Supp. 2020) (providing that reviewing Court shall not substitute its judgment for that of the agency "as to the weight of evidence on questions of fact"); Bartley v. Allendale Cty. Sch. Dist., 392 S.C. at 310, 709 S.E.2d at 624. It was left to the Commission to determine for example, whether Claimant could have expected to have similar back problems at Michelin.⁸ Likewise, it was left to the Commission to

⁸ Putting aside the fraud in the application defense, as discussed below, there is ample evidence in

consider the heavy-duty work at Richtex and the heavy-duty work at Michelin to determine whether Claimant could have expected similar problems when considered in the context of Claimant's light duty work at Westinghouse. The Commission—not this Court or the Court of Appeals—determines the weight to be afforded to Claimant's work at Westinghouse in light of Claimant's position at Westinghouse as contrasted to his positions at Richtex and Michelin.⁹

Further, although Claimant testified the Richtex injury was to a different area of his back, it was left to the Commission to determine the weight of that testimony and whether it was believable in light of the medical records from Richtex and Michelin both noting issues at L-5 and noting that in both instances Claimant claimed pain in the lower left and middle of back that hurts when he bends.

Moreover, and perhaps more importantly, the Commission properly narrowed the issue to whether Claimant could have expected to have suffered back problems on *June 24, 2017*, at Michelin. This Court completely ignored the fact that Claimant went to doctors complaining of 8/10 and 10/10 back problems on June 11, 2017, and June 13, 2017. If Claimant's testimony that the back pain on June 11th and June 13th was caused by his work at Michelin is believed, then certainly it is to be expected that he would injure his back eventually if he continued to do the same job. In other words, it is not possible or plausible to accept as true that Claimant hurt his back on June 11th and June 13th from doing the PAP Operator job and also conclude that Claimant injuring

the record that Claimant understood that doing heavy labor, and particularly the PAP Operator position at Michelin, could injure his back.

⁹ At his deposition, Claimant testified the Westinghouse job was "light." He worked in quality control. Not surprisingly, at the hearing, Claimant changed his tune and suggested that the Westinghouse job was more heavy duty. It was within the province of the Commission to determine which testimony was true. *See, e.g., Brayboy v. WorkForce*, 383 S.C. 463, 465, 681 S.E.2d 567, 568 (2009) ("Brayboy testified in deposition that his current back pain was 'primarily in the same area' as the cave-in injury; however, at the hearing, he disputed the similarity of the injuries.").

his back by doing the same job on June 24th is unexpected.¹⁰ See Capers v. Flautt, 305 S.C. 254, 255, 407 S.E.2d 660, 661 (Ct. App. 1991) (“The word ‘accident’ has been applied by our courts in the workers’ compensation context to mean an ‘unlooked for or untoward event that the injured person did not expect, design or intentionally cause.’”). Finally, the Commission—again, not this Court or the Court of Appeals—determines the weight of Dr. Boyd’s testimony. Dr. Boyd’s testimony was not necessary to prove whether Claimant’s incident on June 24, 2017, was accidental. The medical evidence in the record demonstrates Claimant was informed and knew that continuing to do the PAP Operator position would injure his back.

If the Court of Appeals and this Court by affirming the Court of Appeals did not believe the Commission’s Order made sufficient findings of fact to support its conclusion that Capers barred Claimant’s claims, the proper remedy is to remand to the Commission for a factual determination as to whether Claimant’s alleged injury on June 24, 2017, was unlooked for or unexpected. This issue involves the basic question of liability for compensation. In that circumstance, a remand is necessary. This Court cannot imply a finding of fact as to the basic issues of liability for compensation to support an award of benefits where, to do so, would impose upon this Court the function of determining such facts from conflicting evidence.¹¹

Accordingly, this Court should reverse its erroneous factual findings and remand for the Commission to make the proper findings of fact as to whether the incident on June 24, 2017, was unlooked for or unexpected under Capers.

¹⁰ In fact, Claimant reported he was in less pain on June 24, 2017, than he had been on June 13, 2017.

¹¹ Fox v. Newberry Cty. Mem’l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995).

III. Substantial Evidence supports finding Claimant did not sustain an injury by accident on June 24, 2017, pursuant to Section 42-1-160 and by ruling otherwise, this Court's Opinion misapprehends the Workers' Compensation Act and is inconsistent with Sharpe v. Case Produce, 336 S.C. 154, 519 S.E.2d 102 (1999).

The Court overlooked law placing the burden on Claimant to prove his injury arose out of his employment.¹² Whether there is any causal connection between employment and an injury is a question of fact for the Commission (Sharpe v. Case Produce, 336 S.C. 154, 519 S.E.2d 102 (1999) (citing Rhodes v. Guignard Brick Works, 245 S.C. 304, 140 S.E.2d 487 (1965)) and the Commission's decision must be affirmed if the factual findings are supported by substantial evidence in the record. Id. Here, the Commission's decision is supported by substantial evidence because the record as a whole shows Claimant failed to meet his burden of proving he sustained an injury by accident arising out of and in the course his employment with Michelin on June 24, 2017. This Court's decision otherwise misapprehends the Workers Compensation Act and conflicts with Sharpe, 336 S.C. 154, at 519 S.E.2d at 104.

In Sharpe v. Case Produce, Inc., the claimant claimed he injured his back picking up a box while working. 336 S.C. 154, 158, 519 S.E.2d 102, 104 (1999). He denied problems from fighting with his girlfriend the week before. Id. The Commission found the claimant lacked credibility. Id. at 159, 519 S.E.2d at 105. The only medical records to support the claimant's claim that his injury was causally connected to his employment was a note from his doctor stating his injury resulted from a work accident, and the history contained in the hospital discharge summary stating his issue "occurred when the patient was lifting at work." Id. The Commission and the Circuit Court discounted the medical report from the claimant's doctor and found the claimant did not prove he sustained an injury arising out of and in the course of his employment. Id. The Court of

¹²Turner v. SAIIA Constr., 419 S.C. 98, 104, 796 S.E.2d 150, 154 (Ct. App. 2016).

Appeals reversed, holding there was no evidence the injury as the claimant reported did not happen, and the Commission ignored the medical evidence. The Court of Appeals further held that even if the claimant was injured in an altercation outside of work, he was nonetheless entitled to compensation due to the aggravation of his pre-existing condition. *Id.*

This Court reversed the Court of Appeals in *Sharpe*, finding that contrary to the Court of Appeals' opinion, there was evidence to support the Commission's decision that the accident did not happen as the claimant reported. Importantly, this Court further held that the Court of Appeals erred in holding the Commission ignored medical evidence. This Court emphasized to the Court of Appeals, bench, and bar that the Commission determines the weight to give the expert opinions. *Id.* (“[T]herefore, **the Commission determines the weight and credit to be given to the expert testimony.** Once admitted, expert testimony is to be considered just like any other testimony.” (citation and quotation marks omitted)).¹³

Here, considering Claimant's credibility along with the medical records presented, the Commission correctly determined Claimant simply did not put forth sufficient evidence to meet his burden to prove an injury by accident on June 24, 2017. There is substantial evidence to support the Commission's decision. As an initial matter, like *Sharpe*, the records demonstrate other causes for Claimant's back issues, including medical records showing Claimant: complained to doctors of coughing issues as early as January 2017 before he began working for Michelin in April 2017 and later admitted he was coughing hard enough to herniate a disk; was on disability when he started at Michelin; and worked for this cousin's company doing yard work after Westinghouse

¹³ In *Sharpe*, this Court noted that there was no actual testimony from the doctor to determine whether her opinion was based strictly upon medical symptoms reported to her by the claimant. Here, however, Dr. Boyd testified his opinion that the Claimant injured his back at work was based on the information Claimant reported to him.

and before Michelin. (R. 56, 63, 81, 87, 530-532, 752). And, importantly, Dr. Boyd stated he could not opine how long the herniated disc had been present. Dr. Boyd testified that his opinion that an accident at Michelin caused the injury was based on what Claimant told him. As aptly noted by the Commission, Claimant “had a lot of coughing and hacking and all kind of crazy things” going on around the time that he claimed an injury by accident. (R. 751-52). The Commission was well within its discretion to disregard Dr. Boyd’s note stating the injury was caused by the employment and put more weight on the lay witnesses it found credible.

Furthermore, by affirming the Court of Appeals, this Court’s Opinion finds that because Claimant stated he hurt his back at Michelin in appointments in the weeks prior to June 24, that supports an injury by accident at Michelin. But that finding and reasoning overlooks or misapprehends the law. Under the Workers Compensation Act, the word “accident” “must *not* be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time.” S.C. Code Ann. § 42-1-160(F) (2015) (emphasis added).¹⁴ Under the Workers Compensation Act, in order for the prior appointments to support an injury by accident on June 24, 2017, Claimant would have to have proven a repetitive trauma or an aggravation of pre-existing conditions which have their own requirements under the code. *Id.*; S.C. Code Ann. § 42-1-172

¹⁴S.C. Code Ann. § 42-1-160(F) (2015) (“The word ‘accident’ as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. *Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 or an occupational disease pursuant to the provisions of Chapter 11 of this title.*” (emphasis added)).

(2015)¹⁵; S.C. Code Ann. § 42-9-35 (2015)¹⁶. That is not what Claimant claimed. He claimed an injury on June 24, 2017, only.

Like Sharpe, the opinion from Dr. Boyd was not sufficient for Claimant to meet his burden of proving an injury by accident that arose out of and in the course of his employment at Michelin on June 24, 2017. Dr. Boyd was under the impression that Claimant “had an injury on June 24th [2017] and no problems before then.” (R. 54). Once provided with the June 11 and June 13, 2017, records, Dr. Boyd reiterated several times that he could not “be certain” as to whether Claimant’s lower back problem was caused by an accident on June 24, 2017. (R. 328-339). Contrary to Claimant’s arguments, Dr. Boyd’s testimony that he “believe[d], based on his 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” does not prove an injury by accident on June 24, 2017. See Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) (finding doctor’s testimony that “I feel that the straw that broke the camel’s back was when she lifted those heavy pieces of cardboard when she was on the job in September of 1997 as she describes. I think indeed she may have had some aches and pains in her back before but that indeed it was the last straw that broke the camel’s back that caused her to have this aggravation of her problems” was not sufficient to prove an injury by accident).

Consequently, this Court’s Opinion is based upon a misapprehension of the law and is inconsistent with legal precedent. Accordingly, this Court should reconsider and reverse its

¹⁵ S.C. Code Ann. § 42-1-172 (2015) (defining repetitive trauma injury and stating “An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury”).

¹⁶ S.C. Code Ann. § 42-9-35 (2015) (outlining specific requirements for a claimant to prove aggravation of a pre-existing condition).

Opinion No. 28214.

IV. The Opinion creates an issue for the workers compensation bar because it effectively renders Cooper nugatory, the practical effect of the Opinion creates confusion in the legal community, and the Court's vague and superficial statutory interpretation of the ADA is flawed and must be reversed.

The vast impact of this Court's Opinion cannot be emphasized enough. Although this Court does not reverse Cooper or any of its progeny, Cooper seemingly no longer has any force or effect after this Opinion, and even if it did, this Opinion muddles how an employer could ever possibly prove the elements of Cooper. Under this Court's analysis, it appears there will never be a case where an employer could raise the fraud in the application defense. Even if the employer did raise the defense, the Workers' Compensation Commissioners have no authority to find a claimant committed fraud in the application. Likewise, a claimant has no indication of what actions could potentially hinder his/her availability to receive workers compensation.

One of the many problems with the Opinion is it creates confusion by outlining several reasons why the Court believes Cooper "simply does not work well anymore" but the Opinion does not address how the reasoning outlined in Jones discussing the interplay between the ADA is no longer sound nor does it analyze any changes to the ADA that would invalidate Cooper.¹⁷ This Court's vague proclamation of an interpretation of the ADA and the interplay between the fraud in the application defense and the ADA is both legally and logically flawed, and must be reconsidered.

The Cooper defense does not allow discrimination based upon a person's medical history in contravention of the ADA. Instead, the purpose of the defense is to curtail fraud by denying benefits to an individual who fraudulently and intentionally misrepresented his medical history

¹⁷ And, as previously stated, the Opinion conflates the different stages of the employment process and the medical inquiries that can be made at each stage under the ADA.

and put everyone's safety at risk because he is placed into a position that he cannot perform after the employer relies on his misrepresentation. In fact, taking things a step further, this Opinion encourages every employee to be untruthful in answering medical history forms such as these, as there would be no recourse or defense for an employer if an employee sustains an injury on the job after he knowingly provided false information on the form. The only winner in such a situation is the bad actor employee even where the employer has done everything it could possibly do to elicit information with which to determine whether that employee can physically or mentally perform a certain job. That simply is not justice, and presumably why this Court created the public policy defense of fraud in the application years ago.

A. The Opinion of this Court misapplies the ADA and overlooks the confusion that results because cases since Cooper applying the Cooper defense are still valid under the ADA.

Despite this Court's offhand proclamations questioning Cooper's veracity, the analysis in Jones regarding the ADA is still valid. This Court in Jones in 2003, grappled with the pre-job offer stage of the employment process. In that case, the employment application itself asked the applicant: "Do you have any physical or mental disability which would interfere with or impair your ability to perform the job(s) for which you have applied?" This Court concluded that pursuant to 42 U.S.C. §12112(d)(2)(B) which states an employer "may make preemployment inquiries into the ability of an applicant to perform job-related functions," the employer did not violate the ADA in making the pre-employment inquiry and the Cooper test did not violate the ADA because the ADA specifically allows the inquiry. Similarly, in 2009, in Brayboy, this Court analyzed the Cooper factors where the employment application itself included medical questions. Brayboy does not mention the ADA; however, its analysis and the analysis of other similar cases involving erroneously answered employment applications track the reasoning in Jones.

Furthermore, the Court’s Opinion misapprehends that the instant case and other cases like Fredrick deal with the post-offer stage—i.e., once an applicant receives a conditional job offer but has not begun to work. As previously stated, pursuant to the ADA, after an applicant is given a conditional job offer, but before he starts work, an employer may make disability-related medical inquiries and conduct medical examinations and condition the offer of employment on the results of the medical inquiries, regardless of whether the inquiries are related to the job, as long as the employer does so for all entering employees in the same job category. 442 U.S.C. § 12112(d)¹⁸; 29 C.F.R. §1630.14(b); King v. Smithfield Food, Civil Action No. 2:08cv487, 2009 U.S. Dist. LEXIS 145215, at *17 (E.D. Va. Sep. 23, 2009).

Our sister state of Georgia has addressed this issue head on and determined the identical defense created by its state Supreme Court¹⁹ does not conflict with the ADA and can be read to be in harmony with the ADA. Shepherd Ctr. v. Williams, 251 Ga. App. 560, 563-64, 553 S.E.2d 872, 875 (2001) (citing Caldwell v. Aarlin/Holcombe Armature Co., 267 Ga. 613, 614, 481 S.E.2d 196, 197 (1997)). Again, the ADA Amendments Act was enacted in 2008 and became effective on January 1, 2009. The Act has not changed since January 2009 and importantly, the amendments

¹⁸ 442 U.S.C. § 12112(d) (providing that an employer “may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination” so long as “all entering employees are subjected to such an examination regardless of disability” and “information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record”).

¹⁹ In Georgia, “a false statement in an employment application will bar the employee's recovery of workers' compensation benefits in those situations where (1) the employee knowingly and wilfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury.” Caldwell v. Aarlin/Holcombe Armature Co., 267 Ga. 613, 613, 481 S.E.2d 196, 197 (1997) (quoting Ga. Elec. Co. v. Rycroft, 259 Ga. 155, 155, 378 S.E.2d 111, 112 (1989)).

in the Amendment Act did not change any provisions related to an employer’s ability to make disability-related inquiries after an applicant is given a conditional job offer. As cited by the Fourth Circuit as recently as June 2024, those provisions of the ADA have not changed. See, e.g., Schaeffer v. Mayor of Balt., Civil Action No. CCB-22-1539, 2024 U.S. Dist. LEXIS 112980, at *15-16 (D. Md. June 26, 2024) (citing 42 U.S.C. §12112(d)(3) and finding employer did not violate ADA in conditioning offer of employment on the results of medical inquiries); Sigley v. ND Paper, LLC, No. 1:22-CV-52, 2023 U.S. Dist. LEXIS 173226, at *10 (N.D.W. Va. Sep. 27, 2023) (same).

B. The Opinion overlooks the confusion that will inure because of the untenable framework for the reliance prong endorsed in the Opinion.

As discussed above, the Opinion rests on a legally incorrect proposition that “because of the American with Disabilities Act (ADA), it was not possible in this case for Michelin to satisfy the second element of the Cooper test.” The Opinion states an employer is not permitted to ask an employee whether he/she had any medical impairments until after the employer made the decision to hire her/him but goes on to hold the reliance factor was not met in this case because the employer had allegedly made the decision to hire Claimant before Claimant made the alleged misrepresentation as to medical impairment when asked. As already explained, this is not correct under the ADA because employers are permitted to make conditional offers of employment and thereafter require applicants to answer medical inquiries, which was the case here.

As the Opinion is currently written, in order for an employer to prove reliance, the claimant would always have to testify that the claimant lied because he was afraid he would not get the job, which is not going to happen²⁰ because it is clearly indicated in Jones and because it was reiterated in this Court’s instant Opinion. Furthermore, the Opinion suggests that if the Commission finds

²⁰ And has likely not happened since Jones.

that an employer met the elements of Cooper, then it means the claimant is not bound by the exclusivity of the Workers Compensation Act because cases like Brayboy hold the question is jurisdictional. However, surely this Court would not allow an employee to be barred from workers' compensation benefits due to having committed fraud in the application, and then reward that same employee by allowing him to then sue his employer in tort. There must be consequences to a claimant who commits fraud during his hiring process and that should include both being barred from receiving workers compensation benefits and also being barred from civil courts due to the exclusive remedy provisions of workers compensation.

As a matter of judicial economy, this Court should grant rehearing to clear the confusion it created. The issues that warranted certiorari in this case are unlikely to reach this Court again in the near future without costly and lengthy litigation and disputes at the Commission and Court of Appeals over the validity of Cooper in light of this Court's Opinion in this case. For example, the instant case involves a claim from 2017 and this Opinion was rendered almost a decade later in 2024.

V. Oral Argument is Warranted.

Petitioners request oral argument considering the grave importance and wide-ranging consequences of this Court's Opinion. The proper application of Cooper, Jones, Brayboy, Fredrick, and any other case affirming the Cooper elements is of critical importance to both claimants and employers. The long-standing fraud in the application defense outlined in Cooper and re-affirmed in numerous cases has been called into question without providing any answers to the bench and bar. C.f., Gordon v. Lancaster, 425 S.C. 386, 391, 823 S.E.2d 173, 175 (2018) (overruling by this Court of this Court's prior "decision [that] has created confusion in what was heretofore a well-settled area of the law"). Additionally, the Court's erroneous analysis of the ADA will have wide-reaching and detrimental consequences for the entire workers compensation bar.

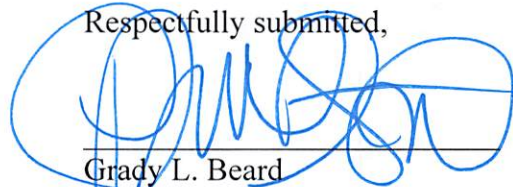
As written, the Court’s Opinion encourages fraud and encourages claimants to incorrectly turn to Circuit Court if a Workers Compensation Commissioner concludes the claimant committed fraud. A claimant has no incentive to ever provide truthful answers to medical inquiries at any stage of the employment process. And what about employers who are not “covered” employers under the ADA but still fall subject to workers compensation liability in South Carolina?²¹ Does Cooper only apply to those employers?

Given the substantial questions about the parameters of Cooper review in the context of the ADA which has not been amended since this Court’s Opinion in Brayboy, and the far-reaching implications of the Court’s Opinion, the Court should grant rehearing so that it may have the benefit of full argument on the issues.

CONCLUSION

For all the reasons stated herein, Petitioners request that this Court grant their petition for rehearing of the issues presented in the instant appeal.

Respectfully submitted,



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August 5, 2024

²¹ Under the ADA, “[t]he term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day” 42 U.S.C.S. § 12111. In South Carolina, the workers compensation act applies to businesses that regularly employ four or more employees. S.C. Code Ann. § 42-1-150 (2015).