THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Aug 26 2024

S.C. 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.

RETURN TO PETITION FOR REHEARING

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ARGUMENT

I. The Court correctly held that Michelin could not have relied on the Health Questionnaire because it was completed after Michelin hired Brailey and Dr. Tomarchio had cleared Brailey to work.

Michelin argues "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." To be clear, Michelin's argument concerns whether its hiring procedures comply with the ADA as a general proposition. As to Isaac Brailey's hiring, their argument fails since they relied on Dr. Tomarchio's physical examination rather than any health questionnaire.

Michelin characterizes the "stages considered in analyzing an employer's ability to make medical/disability-related inquiries and require medical examination [as] pre-offer, post-offer, and during employment." [Petition for Rehearing, page 2]. This requires clarification.

At the application (preemployment) stage, an employer "may [only] make preemployment inquires into the ability of an application to perform job-related functions." 42 U.S.C. § 12112 (d)(2). The employment application makes no such inquiries, so we need not consider the application stage.

The post-offer stage provides:

> A covered entity 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 . . .

42 U.S.C. § 12112 (d)(3)(emphasis added).

Michelin contends its hiring process follows the process permitted by the ADA. For the most part, Petitioner agrees. Brailey completed the health questionnaire and physical examination after

he was offered the job and before he commenced his employment duties. He was already hired, albeit conditionally upon the results of the examination. His successful completion of the physical examination meant his hiring was finalized. As Michelin's safety manager, Mark Gross, confirmed "if [Dr. Tomarchio] cleared him; [we] were good to go." [R.P. 778, lines 14-24; p. 776, lines 19-24]

If there is an ADA violation in Michelin's hiring practices, it was exposed under questioning from Michelin's attorney.[1] Gross was asked "And let's assume the information [about Brailey's physical condition] came back and said he can't do the PAP operator job, you all would have looked for a – other jobs potentially he could perform?" He responded: "Probably not." [R. P. 776, lines 11-24]. Conversely, in Fredrick, the employer's Human Resources Representative testified "if Fredrick had revealed her back problems, he would have checked to see if there was another open position in the plant she was capable of filling." Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct.App. 2009). See, also Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009)(". . . the employment application is important in the hiring *and* placement decisions. Clearly, the questionnaire portion of the application protects the employer and the employee. Had Brayboy given truthful information, WorkForce would have been able to give him suitable job assignments, which would not have included heavy lifting.")(*emphasis added);* Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) (employer's Human Resource Manager "testified that the fact that Claimant had prior physical ailments would not have barred her from working for [employer].

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[1]An employer may condition the job offer on the results of the medical examination. However, if an individual is not hired because a medical examination reveals the existence of a disability, the employer must be able to show that the reasons for exclusion are job related and necessary for conduct of its business. The employer also must be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Rather, [employer] would have attempted to find a job for Claimant that would not subject a pre-existing physical impairment to further deterioration."); Small v. Oneita Industries, 318 S.C. 553, 459 S.E.2d 553 (1995)("An agent of employer testified that knowledge of Small's prior injury would not have affected its decision to hire him, but would have affected its job placement of Small.").

Petitioner's quarrel with Michelin is not about whether its *general* hiring process violated the ADA, but with its heavy-handed use of that process as a shield – a *gotcha* – to *ex post facto* deny workers' compensation claims from unsuspecting employees who give pro forma answers to a confusing piece of new hire paperwork. As shown above, Michelin's approach to the ADA was limited to how far they could stretch it; not to find a way to accommodate people with disabilities in their workforce.

Michelin states the questionnaire "warned Claimant that any false, misleading, or incomplete information would make his subject to *disqualification from employment* or subject to dismissal at any time. [Petition for Rehearing, page 2]. Michelin contends 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 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; merely 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 any omission – even one as minor as a lumbar strain twenty years ago – will bar a workers' compensation claim a work injury. Workforce wanted its employees to make informed decisions *before* they got injured; Michelin wanted to trap its employees *after* they got injured.

Michelin states – without evidence – that "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."[2] [Petition for Rehearing, page 2]. The two employees

[2]Michelin cites to testimony from Mark Gross in support of this argument. However, Gross did not even know if the exam included an examination of the back, testifying "Personally,

(Brailey and Lemon) who had first hand knowledge of the post-employment physical exam both testified it was a thorough examination of the back, testing whether somebody can lift, bend, twist, stoop, squat and so forth. [R.P. 624, line 15-p, 626, line 1; p. 683, line 23-page 684, line 20]. Gross agreed with the description and conceded he could not dispute it. [R.P. 777, lines 20-24; page 778, lines 4-13].

The simple fact is Michelin relied on Dr. Tomarchio's physical examination; not the questionnaire.[3] [R.P. page 410, lines 14-24]. If Michelin had relied on the questionnaire, the application would not have explicitly required consent to submit to a physical examination. [R.P. 85]. This is reinforced by the fact that not only did Dr. Tomarchio clear Brailey, but two other doctors (Drs. Marom and Donato) cleared him for full duty work *even after* he began his employment duties despite "likely strained muscles due to heavier work load at new job." [R.P. 61-69].

There are two key differences between the instant case and the cases cited by Michelin. The first is that Brailey was cleared to work as a PAP operator after a thorough physical examination by Michelin's doctor. Conversely, in Brayboy, Jones, Small and Fredrick the employees never underwent physical exams. Those employers relied solely on health questions on the applications.

Secondly, Brailey's alleged misrepresentation was neither wilful nor material. Brailey had a single episode of back strain twenty years before he applied to Michelin. As the Court of Appeals

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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 13-17]. Michelin's attorney later asked, "And your doctors, do they also rely upon the questionnaires and the answers so that they can do the thorough investigation?" This drew an objection. Michelin's attorney then withdrew the question. [R.P. 418-lines 6-17].

[3]Michelin did not depose Dr. Tomarchio or call him as a witness. It must therefore be presumed that his testimony would not have been favorable to Michelin.

stated "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 North America, Inc., 438 S.C. 77, 88, 882 S.E.2d 172, 178 (Ct. App. 2022). Conversely, the employees in the cases cited by Michelin all had much more serious preexisting physical ailments – conditions which a reasonable person could believe would prevent them from being hired had they told the truth.[4] And which a doctor likely would have identified on a physical examination.

The Court made no misapprehensions of fact nor errors of law. Michelin had made the decision to hire Brailey when it required him to fill out his new hire paperwork – including the questionnaire. His employment was confirmed when he passed Dr. Tomarchio's physical examination. As Michelin's safety manager, Mark Gross, confirmed "if [Dr. Tomarchio] cleared him; [we] were good to go." [R.P. 778, lines 14-24; p. 776, lines 19-24].

Therefore, the Court should deny the Petition for Rehearing. Should the Court address the reliance prong of the Cooper test, it should review the issue de novo and find that Michelin failed to meet its burden of proof as Michelin's doctor had cleared Brailey for the position.

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[4]See Brayboy (previous lumbar surgery resulting in 40% disability rating); Jones at 418, 586 S.E.2d 413 ("She testified that she was afraid that she would not get the job if she responded truthfully on the forms [about 'her history of back and leg problems'].."); Small at 554, 459 S.E.2d at 307 ("[T]wenty-five percent disability rating due to back injuries suffered in prior employment."); Fredrick , 682 S.E.2d at 522 ("the record as a whole supports the Appellate Panel's finding that Fredrick knew she was concealing the truth [about her 'preexisting disc herniation'] from Wellman when she completed the medical history form."). See, also Cooper v. McDevitt & Street, 260 S.C. 463, 196 S.E.2d 833 (1973)(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" due to previous "serious injury to his back, a ruptured disc" resulting in "a fourteen per cent disability to the lumbar spine."

II. The Court of Appeals did not engage in impermissible fact finding when it correctly held *Capers v. Flautt* is inapplicable to this case as a matter of law.

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. Despite the dearth of *any factual findings* to support this legal conclusion, Michelin argues that this Court must remand because "[t]he Commission's determination of whether whatever happened on June 24, 2017, was unlooked for or unexpected is an issue of fact." [Petition for Rehearing, page 7].

Michelin contends the Court's opinion conflicts with Bartley v. Allendale Cty. Sch. Dist., 392 S.C. 300, 709 S.E.2d 619 (2011). Michelin argues the "Court of Appeals engaged in fact finding to determine that Capers was not applicable," thus repeating the error it made in Bartley.

Bartley was a school teacher. She injured her neck in September 2002 when a student accidentally knocked her down resulting in a cervical fusion. The next year, she returned to work with a different school district. In October 2003, a student picked up a desk and threatened to throw it at her. She was not physically harmed, but developed post-traumatic stress disorder. She was put on a medical leave of absence.

Bartley filed a Form 50 requesting a hearing. She alleged she was disabled by a combination of the neck injury and subsequent psychological injury. The Commission held she failed to prove "that she suffered an injury to any body part other than her neck or that her psychological condition has worsened as a result of this injury." She was awarded 30% permanent loss of use of her back.

Bartley appealed. In the interim, this Court decided Ellison v. Frigidaire Home Products, 371

S.C. 159, 638 S.E.2d 664 (2006)(adopting the *combined effects doctrine* and holding "Ellison's workplace injury, combined with his pre-existing physical conditions . . . rendered him physically unable to return to work and left him permanently and totally disabled.").

The Court of Appeals affirmed the award of 30% to the back. The court also went on to hold Ellison II was not applicable. This Court stated "In Bartley it appears the Court of Appeals focused on whether Bartley's 2002 accident *caused* her other medical conditions or whether it *aggravated* her pre-existing conditions. However, in Ellison II this court held that aggravation was not a requirement but an alternative analysis . . ." Id.

This Court reversed and remanded. The Court reasoned both the Single Commissioner and the Appellate Panel made an error of law. The error arose when the "commissioner stated that he ' d[id] not doubt that the Claimant's future prospects of employment will be limited,' but that he 'is not allowed to stack her personal ailments with her work related injury to make a finding of disability,' citing Ellison I." Id. The Court added that when the Court of Appeals affirmed:

> it arguable made findings of fact . . . that were not made by the Commission and *ti also did not properly apply the legal standard* in Ellison II because it focused on an aggravation analysis instead of a combined effects analysis, although it recited the language in Ellison II that indicated aggravation was not required.

Id. (emphasis added).

The Court further explained: "The Commission, had it considered the application of law in Ellison II, would have made additional findings of fact pertinent to this analysis that are missing from the record. Thus a remand to to the Commission to allow it to make the necessary factual findings and legal conclusions to resolve Bartley's claims." Id.

Bartley required a remand because the law had changed. The Commission did not make findings of fact pertinent to the combined effects doctrine because the doctrine did not exist when

the case was tried. As Bartley was still on appeal when Ellison II was published, a remand was necessary for the Commission to make new findings of fact and conclusions of law under the combined effects doctrine. The Court of Appeals was not reversed merely because it "arguably made findings of fact," but because it made an error of law in "not properly apply[ing] the legal standard in Ellison II." [Id.].

These concerns are not implicated here. The Capers defense has been around for over thirty years. It has not changed, the Commission was well aware of it, yet made no findings of fact at all. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)("[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."). As the Commission merely made a legal conclusion, it is well within the authority of the appellate courts to reverse. 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.").

A remand is not necessary because *Capers* is inapplicable to the facts of this case.[5] 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 developed contact dermatitis and filed a second workers' compensation claim.

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[5]A remand would also frustrate the purpose of the Act to ensure swift and sure justice. As Michelin points out, "the instant case involves a claim from 2017 and this opinion was rendered almost a decade later in 2024." [Petition for Rehearing, page 19].

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 develop 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 2017, 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 argued: "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." See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(a conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages.").

Michelin also argues:

> Moreover and most 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 is believed, then certainly it is to be expected that he would injure his back eventually if he continued to do the same job.

[Petition for Rehearing, pages 9-10].

It is true that Brailey developed soreness in his back that he characterized as 8/10 and 10/10 to Dr. Marom and Dr. Donato. However, Brailey also told Dr. Izard after the accident that his pain was "a 20." [R.P. 80]. Brailey may have a low threshold for pain and be somewhat histrionic in describing it. Nevertheless, the record is clear that his pain level was much worse after the accident. Moreover, it is also an established fact that – unlike Capers – Drs. Marom and Donato cleared him

to work even though he was reporting high levels of pain.

Braiely knew he would develop back pain from his new job because fellow Michelin workers told him to expect it. Brailey started working for Michelin on April 17, 2017. The work was strenuous and, as expected, caused body aches – eventually including back pain. He 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].

The mere existence of back pain is not a compensable injury. To suggest, as Michelin does, that "strained muscles due to heavier work load at new job" will inexorably and inevitably lead to an actual back injury is pure speculation. Capers requires much more.

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. This Court affirmed. The Petition for Rehearing should be denied.

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.

Michelin raises the new argument that the Court of Appeals failed to follow Sharpe v. Case Produce., Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). Under Michelin's theory, it is legal error for an appellate court to overrule the Commission's findings based on an uncontroverted medical opinion. Michelin's argument fatally misunderstands the holding in Sharpe.

Sharpe dealt with a purely factual dispute over whether the employee was injured in an unwitnessed accident or had been injured in an altercation with his girlfriend the previous Saturday. Sharpe worked for a produce company. He claimed that he picked up two 25-pound boxes of tomatoes to load into his car for a small delivery. As he did so, he felt a sensation of electricity through his body. He testified "I couldn't move. I couldn't feel my legs." Id. He was hospitalized for 10 days and had back surgery. He filed a workers' compensation claim for his alleged work-

related injury.

The employer denied the claim. Sharpe admitted to an altercation with his girlfriend over the previous weekend, although denied any injuries. The employer, Doc Case, testified that Sharpe came in that Monday "complaining he'd been in a fight and could hardly stand up because his back hurt so bad." Id. From Monday through Wednesday, Sharpe was "too broke up and hurt to day anything." Case testified he heard Sharpe yell for help Thursday morning while most of the other employees were on their morning break. Sharpe was lying on the ground stating he couldn't move his legs and asked for an ambulance. Case "testified it did not look like the tomatoes had been dropped, as generally if the cases were dropped, the lids would pop." Id. Sharpe's girlfriend testified, confirming the altercation and that he told her a couple of days later that "he was still real sore and his back had been bothering him."

The Single Commissioner "specifically noted that he did not find Sharpe's testimomy credible, but did find Case and [the girlfriend] regarding their testimomny that Sharpe injured his back during the confrontation on Saturday, July 16th." The Commissioner also discounted a medical report from Sharpe's neurosurgeon, Dr. Samuels, which stated the injury and surgery wer the result of a work-related accident.

The Court of Appeals reversed because there was "no evidence the injury, as Sharpe relaet[d], did not happen." The court also held the Commission had ignored the medical evidence from Dr. Samuels.

This Court reversed, holding:

> there is ample evidence in the record from which reasonable minds could infer that Sharpe was actually injured on July 16th, that no accident occurred on July 21st, and that, in fact, Sharpe "stage" the July 21st acciddent. Accordingly, the Court of

Appeals erred in finding the aggravation of a pre-existing injry where there is substantial evidence supporting the Commission's holdinig that Sharpe did not suffer an injury by accident on July 21st.

Michelin hopes to use Sharpe to convince this Court to disregard Dr. Boyd's testimony. This should be rejected. The reason the Court of Appeals erred in relying on Dr. Samuels's opinion is because its underlying predicate – that there had been no altercation and there had been a work accident – was rejected by the Commission. The Commission found there had been no work accident at all – that Sharpe was injured in the altercation and "staged" the lifting event to make up a false workers' compensation claim.

Michelin twists the evidence to make these two vastly disparate cases appear to be the same. Brailey was working in a plant surrounded by other people. He immediately reported the issue to Jermaine who told him "yeah, I know that hurt you." [R.P. 439, line 3-p. 440, line 5]. And while there is evidence of back pain in the weeks prior to the accident, the two doctors who examined him considered it merely "strained muscles due to heavier work load at new job." [R.P. 65].

The most important distinguishing factor is the fact that Dr. Boyd testified about his opinions and the foundation for them. Conversely, in Sharpe, as there is no actual testimony from Dr. Samuels in the record, it is impossible to determine whether her opiinion is based strictly upon medical symptoms reported to her by Sharpe, or on some other factors." Sharpe at note 2.

Dr. Boyd's medical opinions have been dissected at length in the briefs and at oral argument. 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. Brailey informed Dr. Boyd about the previous episode of back pain some 25 [sic] years earlier. Dr. Boyd was cross-examined on the records from Dr. Maron and Donato.

Michelin was unsuccessful in impeaching Dr. Boyd or changing his opinion on cross-examination. Michelin presented no evidence to the contrary. As the Court may recall from oral argument, Michelin's counsel was unable to identify anything in the record to refute Dr. Boyd's testimony on causation, stating unpersuasively that causation is a question for the Commission regardless of the medical evidence.

In a bid to analogize to Sharpe Michelin speculates that the Commission could have found other causes for Brailey's herniated disc. They list "a lot of coughing and hacking and all kinds of crazy stuff."[6] They say Brailey was on disability prior to working at Michelin.[7] They note Brailey worked for his cousin's company doing yardwork after Westinghouse and before Michelin."[8] Michelin had a full opportunity to explore its alternative facts with Dr. Boyd. They did not change his opinion. The Court should summarily reject these red herrings.

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

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[6]This colorful wording came in an offhand remark from the Single Commissioner during an extended colloquy with the attorneys. [R.p. 751-752].

[7]Brailey testified he had briefly been on disability while "getting my blood pressure under control." [R.P.509].

[8]The fact Brailey was doing commercial landscaping without difficulty would seem to imply that his back was absolutely fine.

medical evidence.[9] 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).

Therefore, the Court should deny the Petition for Rehearing. The Court properly affirmed the Court of Appeals.

IV. The Court should either eliminate *Cooper* altogether as inconsistent with the text and purpose of the Act, or modify *Cooper* to create a fairer more open system consistent with the ADA.

The Court's Opinion, while not as "devastating" as Michelin claims, is nonetheless a significant one. The Court held the Cooper defense is essentially unworkable in light of the Americans with Disabilities Act (ADA) along with exposing employers to liability in tort.

The Court expressed several areas of concern regarding the "continued validity of Cooper," to wit: (1) conflicts with the Americans with Disabilities Act; (2) the Workers' Compensation Act does not address fraud in the application; and (3) "by committing fraud in an employment application the employee would regain the right to sue in tort." Brailey v. Michelin North America, Inc, Op. No.

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[9]The Court may note that the Commission accepted every defense raised by Michelin, even including the § 42-9-60 (intent to harm oneself) defense – a defense so specious that even Michelin abandoned it on appeal to this Court. The Commission appears to have blinded itself to the evidence, apparently due to the Single Commissioner's dislike of Brailey as a party and witness. 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).

28214 (S.C. Sup. Ct. filed July 10, 2024) (Howard Adv. Sh. No. 26 at 10). In light of Michelin's Petition for rehearing, these policy considerations warrant further discussion.

South Carolina was an early adopter of the so-called fraud in the application defense when Cooper was published in 1973. The decision was not without controversy, as Justice Bussey penned a detailed and thoughtful dissent. Justice Bussey observed that the rule "seems to be emerging" rather than the "general rule" as characterized by the majority. Although many more jurisdictions have since adopted the rule in the ensuing half-century, Justice Bussey's concerns are in no way diminished. Indeed, today's Court echoes them.

Justice Bussey's primary concern was that "Nowhere in the Act, however is there any provision which attempts to limit or bar compensation benefits by reason of misrepresentation on the part of the employee with respect to prior injury or physical disability other than occupational disease." Cooper at 473, 196 S.E.2d at 838. He was correct. Cooper stands alone as the sole common law defense in our workers' compensation law.

Justice Bussey explained his reasoning:

> It is elementary that our Act has to be liberally construed in favor of employees and to the end of including employees within coverage rather than excluding them. Contrary to this elementary principle, were we to adopt the rule enunciated in the majority opinion, formulated by other courts upon statutory provisions not present in our statute, we would, in effect, write into our Workmen's Compensation Act a provision which would deny an employee benefits under certain circumstances when the legislature has not seen fit do so.

Cooper at 474, 196 S.E.2d at 838.

The Act contains a number of statutory affirmative defenses.[10] Among these is an explicit prohibition on making a wilful and false representation about a pre-existing occupational disease.

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[10]See, § 42-9-50 (intoxication or wilful intention to harm oneself or another); § 42-15-20(lack of notice); § 42-15-40(statute of limitations).

See, S.C. Code Ann. § 42-11-80 (2023). This section was enacted in 1949 and has never been amended or expanded beyond occupational diseases. The language largely mirrors the Cooper test.[11] It is instructive that the Legislature has not codified the Cooper defense. This silence can fairly be taken as a statement of public policy, although Respondent acknowledges the Legislature is presumed to be aware of this Court's decisions.

Nonetheless, public policy has evolved since 1973, particularly as to people with disabilities. The most significant change in public policy was the adoption of the Americans with Disabilities Act in 1990. Since then we have seen amazing changes in the lives of disabled people from the simple presence of wheelchair ramps and handicapped parking spaces to more dramatic endorsements of acceptance of their worth and abilities such as the Paralympics.

The ADA shares an ethos with the Workers' Compensation Act. Both were forms of social legislation enacted for the benefit, protection and welfare of disabled and injured people.[12] "South

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[11]SECTION 42-11-80. Wilful misrepresentation by employee as to absence of disease; waivers.

If an employee, at the time of his employment, wilfully and falsely represents in writing that he has not previously suffered from the disease which is the cause of disability or death, no compensation shall be payable. If an employee who has previously suffered from an occupational disease desires to continue in an employment to which such a disease is a hazard, he may waive his right to receive further benefits for disablement or disability from such disease by written agreement approved by the commission in accordance with such rules as it may promulgate."

[12]"Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results." Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

Carolina's public policy [favors] coverage for injuries suffered at work . . ." Bentley v. Spartanburg Cnty., 398 S.C. 418, 730 S.E.2d 296 (2012). It is contrary to the purpose of the Act for the courts to add common law barriers to compensation which were not enacted by the Legislature. See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)("Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed.")

In the instant case, the Court stated "Our preferred course of action, however, would be for the General Assembly to take us this issue and resolve it legislatively." There is no certainty the Legislature will act. In Bentley, the Court saw a grave injustice in the denial of compensation to a deputy sheriff who developed a disabling mental-mental injury after he shot and killed a suspect in the line of duty. The Court called on the Legislature to amend the statute in light of modern knowledge about mental health, observing "[W]e are interpreters not legislators and are bound by the language of section 42–1–160 as written. Bentley v. Spartanburg Cnty., 398 S.C. 418, 730 S.E.2d 296 (2012). Despite the compelling facts involving Deputy Bentley, the General Assembly has failed to act in the succeeding twelve years.

This puts the Court on the horns of a dilemma of its own making. It can deny rehearing, await legislative action and "address the problems with Cooper" in future cases. Or the Court can be proactive either eliminating Cooper altogether or modifying Cooper to create a balanced approach favoring honest and disclosure on both sides.

There is precedence in our workers' compensation jurisprudence for th Court to reconsider its own decisions. In Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009), the Court changed the four-factor common law test for determination of employment status. In

James v. Anne's Inc., 701 S.E.2d 730, 390 S.C. 188 (2010), the Court wholly reversed its initial decision on rehearing to hold that the Commission has authority to allocate a disability award for social security disability purposes. And a mere two years ago, the Court redefined statutory employment to conform with public policy. Keene v. CNA Holdings, LLC, 436 S.C. 1, 870 S.E.2d 156 (2021)("The original purposes of the statutory employee doctrine are not served by making CNA Holdings an additional provider of workers' compensation benefits, because Daniel provided those benefits. The original purposes are certainly not served by granting CNA Holdings immunity for its wrongful conduct. It is not the role of courts to second-guess a legitimate business decision whose effect—far from the improper purposes the statutory employee doctrine was designed to prevent—was actually to guarantee that the workers affected by the decision would be insured against work-related injuries").

The general concerns over fraud were expressed in Brailey, "To be clear, this Court does not in any way condone such fraud. But we believe the consequences of the fraud should be a legislative determination, not a judicial one." Brailey.

The General Assembly shares this view and has spoken to the issue of fraud in workers' compensation. And has done so long since Cooper was decided. In 1994, the Act was amended to provide "The commission shall report all cases of suspected false statement or misrepresentation, as defined in Section 38-55-530(D), to the Insurance Fraud Division of the Office of the Attorney General for investigation and prosecution, if warranted, pursuant to the Omnibus Insurance Fraud and Reporting Immunity Act." S.C. § 42-9-440 (1994). The insurance fraud statute applies to any insurance transaction including workers' compensation. It also applies to *all* parties involved in any

such transaction instead of discriminating against only those seeking benefits.[13] The fact the General Assembly enacted a comprehensive anti-fraud statute providing for immunity, reporting, punishment and restitution renders the "fraud in the application" defense superfluous. This Court should take this opportunity to eliminate it as unworkable and obsolete.

The Court should also note that none of the employees in the reported cases wo actually misrepresented their physical conditions did so for the purpose of setting up a future worker's compensation claim. They were simply trying to work. They were primarily blue-collar workers with disabilities (as defined by the ADA) with real fear that no employer would hire them. The practical reality is that many employers are either not subject to the ADA (because they have less than 15 employees) or do not make reasonable accommodations (like Michelin).

The "fraud" alleged here is entirely different than the fraud in Sharpe, where the employee staged a fake accident to claim workers' compensation benefits for an injury sustained in an altercation with his girlfriend. Sharpe v. Case Produce,, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). Sharpe was rightly denied benefits.

It can be presumed that the vast majority of workers who do not disclose their preexisting

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[13]SECTION 38-55-530.

(C) "Person" means any natural person, company, corporation, unincorporated association, partnership, professional corporation, or other legal entity and includes any applicant, policyholder, claimant, medical providers, vocational rehabilitation provider, attorney, agent, insurer, fund, or advisory organization.

(D) "False statement or misrepresentation" means a statement or representation made by a person that is false, material, made with the person's knowledge of the falsity of the statement and made with the intent of obtaining or causing another to obtain or attempting to obtain or causing another to obtain an undeserved economic advantage or benefit or made with the intent to deny or cause another to deny any benefit or payment in connection with an insurance transaction, and such shall constitute fraud.

conditions never suffer disabling injuries. For those that do, it seems counterproductive for them to be denied workers' compensation benefits because they were never employees when the employer has enjoyed the benefits of their labor. And while sometimes the period of labor is short, there are others where the period of employment covers several years.[14]

It is axiomatic that a preexisting condition will not bar a claim for workers' compensation. "A condition is compensable unless it is due solely to the natural progression of a pre-existing condition. It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

This rule should apply to all claimants. The harm caused by denying claims based on Cooper simply shifts "the burden of injured employees and their dependents [to] becoming charges on society." Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). Employers can protect themselves by improving their screening and placement processes concordant with the ADA, although at the end of the day they should be responsible for work-related injuries that happen on their watch.

An employer can protect itself by a more transparent process than that followed by Michelin. Rather than burying an ambiguous health questionnaire in a stack of new hire paperwork, the health questionnaire should contain bold-faced disclaimers and explanations that put a potential employee on notice of the employer's requirements (as in Brayboy). The employee should be given an opportunity to sit one-on-one with a company representative who will explain the form and answer

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[14]Sandra Jones was employed for six years before her work accident. Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003)

any questions. As in Brailey's case, an employer can further protect itself by requiring a post-hiring physical exam. While an employee may still suffer an injury, these procedures – if properly used for placement under the ADA – would have the affect of lessening the likelihood of an injury to the benefit of all parties. And if there truly is actionable fraud as in Sharpe, an employer has the remedy of section 42-9-440.

In the event the Court elects to retain the core of Cooper, the Court should address its inherent problems. Cooper began as a means to protect employers from liability for injuries resulting from employees who concealed preexisting injuries or conditions and were placed in jobs that put them at risk of near-certain injury. Since then it has morphed into a weapon for employers to defeat otherwise meritorious workers' compensation claims. The Court can limit this abuse and create a fairer system by requiring employers to end the subterfuge and be open and honest with their new employees about the health questionnaires and physical exams. By requiring the employers to use the process for placement purposes and to make reasonable accommodations, the Court can encourage employment, limit the dishonesty on both sides, limit the rate of injuries, and ensure that when injuries do occur compensation is more likely to be legitimately paid.

Therefore, the Court should declare that Cooper is overruled as unworkable and inconsistent with the text and purpose of the Workers' Compensation Act. Alternatively, the Court should modify Cooper as set forth above.

CONCLUSION

For the foregoing reasons, the Petiton for Rehearing should be denied. The case should be remanded to the Commission with instructions to award medical treatment and compensation to Isaac Brailey.

Respectfully Submitted,

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Columbia, South Carolina
August 26, 2024