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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.

REPLY IN SUPPORT OF PETITION FOR REHEARING

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ARGUMENT

The response does not dispute that Opinion No. 28214 is grounded on a materially erroneous understanding of the facts and law. The response effectively concedes this case warrants rehearing, albeit the response seeks a different conclusion. Even if this Court were to accept the response's position (which Petitioners oppose), rehearing and oral argument is necessary. To ensure the Court has the information it needs to make an informed decision on the pending Petition for Rehearing, Petitioners submits this brief reply.

I. This Court's factual and legal errors related to the reliance prong of Cooper and the ADA require reconsideration and reversal of its Opinion No. 28214.

Despite the response's arguments otherwise, the Petition for Rehearing does not simply concern whether Petitioners' procedures comply with the ADA. The Petition explains why this Court erred in finding Petitioners could not have relied on the misrepresentation because of the "sequence of events." The response's attempt to somehow suggest analysis under the ADA is in any way inconsistent with Petitioners' statement of the law is undermined by the plain language of the law cited in the Petition. (Pet. 2-6). Moreover, the response frankly does not respond to the Petition's central discussion of law which explains that despite this Court's Opinion in the instant case, the "sequence of events" allowed for Petitioners to rely on the misrepresentations in its decision to hire Respondent following the conditional offer. This Court's belief that Petitioners hired Respondent before the medical questions were asked and therefore Petitioners could not have relied on the misrepresentation, is incorrect on the law and on the facts. As a result, this Court should reconsider and reverse its Opinion No. 28214.

Rather than defend the Opinion's confusingly ambiguous discussion of the interplay between the ADA and the reliance prong of the fraud in the application doctrine, the response claims reliance was not met because Petitioners relied on the physical exam, and not on the

misrepresentations on the medical Questionnaire. The response wants to hang its hat on a theory that there could be no reliance because according to the response, Petitioners only relied on the physical exam and not the medical Questionnaire.[1] Yet, the response's reasoning is flawed and a distraction from the core issue. During the application process, Petitioners give the Questionnaire to each applicant contemporaneously with the physical exam. It is part and parcel with the exam. Indeed, the title of the Questionnaire is "Confidential Health Questionnaire ***for Post-Offer Examination***," which states in plain language the Questionnaire is part of the examination. The circumstances are akin to a person going to a doctor for an illness and completing the medical intake forms before meeting with the doctor. The forms question the person's medical history. The doctor then uses those intake forms to complete his evaluation of the person to determine any necessary follow up questions, further examination needed, diagnosis, and proper treatment. The doctor cannot give proper treatment or a proper evaluation if the person lies on the form (or during the exam). The same is true here—Petitioners and its doctor could not properly evaluate Respondent for placement into a heavy labor job because Respondent misrepresented his medical

[1] The response's unsubstantiated contention that because Petitioners did not depose Petitioners' doctor, "it must therefore be presumed that his testimony would not have been favorable to Michelin" is not supported by the record.

Furthermore, despite the response's insinuation of an ADA violation, the simple fact is there was no ADA violation in this case and as outlined in the Petition, Petitioners relied on the misrepresentations when hiring Respondent after the conditional offer. Petitioners were not required to place Respondent in a role in which he could not perform and assume the risk of him aggravating a pre-existing injury. See, e.g., Beasley v. United States Fid. & Guar. Co., 699 S.W.2d 143, 145 (Tenn. 1985) ("While an employer takes the employee as he finds him, an employer is not required to assume the risk of aggravating a pre-existing injury unless either some notice of the condition is given by the applicant to enable the employer to make an informed hiring decision, or the employer does not rely upon the employee's representations"); Colonial Care Nursing Home v. Norton, 566 So. 2d 44, 46 (Fla. Dist. Ct. App. 1990) (same).

history.[2] As in Fredrick, Petitioners relied on the misrepresentations when placing Respondent. (Pet. 4-6).

The fact that Respondent "passed" the exam does not suggest Petitioners did not rely on the misrepresentation. Simply put, Respondent "passed" the exam because he lied. As the record reflects, Petitioners or their doctors could not truly investigate his back because he did not report a prior problem that the doctor needed to investigate further during the physical exam. (R. 775-76). If they had known, they would have investigated the issue further before placing him in the PAP Operator position. In fact, Petitioners' Nurse testified that if an applicant like Respondent wanted a job bad enough, he could provide false information on the Questionnaire in order to pass the initial medical examination and get the job. (R. 754). And Respondent agreed he needed to tell the doctor about his medical history on the Questionnaire in order for the doctor to fully investigate. (R. 684-85). Respondent also agreed that it was possible to lie during an examination in order to get the job. (R. 685).

Accordingly, this Court should grant the Petition for Rehearing. Petitioners relied on Respondent's misrepresentations and this Court's entire discussion of the ADA Opinion in No. 28214 creates an issue which had never before been raised to the Court. The entirety of the discussion of reliance and the ADA should be removed because it is unnecessary to rule on the issue, creates unnecessary confusion for the workers compensation bar, and is legally and factually incorrect.

[2] Petitioners had a similar process for when employees met with the doctor following a workers compensation claim. Respondent completed a "HealthWorks Post-Injury Questionnaire" on June 26, 2017, directly before meeting with Petitioners' doctor. (R. 80-81). He also misrepresented his back issues on that form. (R. 80-81).

II. This Court's Opinion is inconsistent with South Carolina law.

It is unnecessary to rehash here all the arguments outlined in the Petition related to Capers, Bartley v. Allendale Cty. Sch. Dist, and Section 42-1-160 of the South Carolina Code (Pet. 7-15) because the response's attempts to distinguish the legal propositions in those cases by quibbling with the facts are too attenuated to be persuasive. Furthermore, the response's reimagination of the facts to fit its narrative is simply an attempt to relitigate factual findings of the Commission and determine how much weight to give the evidence. The bottom line is this Court's Opinion No. 28214 significantly departs from statutory law and this Court's prior rulings. (Pet. 7-15).

As outlined in the Petition, the Court of Appeals first found the Commission's findings were insufficient to rule on Capers which would have required a remand, but the Court of Appeals reversed, and when the issue was brought to the Court's attention, instead of remanding, the Court of Appeals engaged in fact finding and weighed the evidence to determine that Capers was not applicable. By affirming with no analysis of the issue, this Court also engaged in fact finding. The response simply argues the fact finding and weighing of the evidence is permissible, which again, is in contradiction to South Carolina law. 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.

Furthermore, the burden was on Respondent to prove an injury by accident on June 24, 2017, pursuant to Section 42-1-160, and as outlined in the Petition (Pet. 11-15), he failed to meet that burden. The response again has revisionist history in its view of the facts. This Court, in determining how much weight to give Dr. Boyd's testimony, Respondent's testimony, or Respondent's prior employment is inconsistent with this Court's reminder to the bench, bar, and

Court of Appeals in Sharpe.[3] The response's attempt to distinguish these cases and allow this Court to engage in fact finding is without merit.[4]

III. The Court should grant oral argument.

The last section of the response is not a response at all. Instead, it ultimately cross-petitions asking the Court to grant rehearing and reverse Cooper altogether. Thus, this portion of the response does not respond to Petitioners petition, but effectively cross petitions for rehearing of the fraud in the application defense.

This Court should not overturn Cooper. For the reasons stated in the Petition, Cooper is still good law, and nothing changed in the ADA to warrant a reversal of Cooper. (Pet. 15-19). The ADA allows for various levels of questioning regarding a person's medical history at different stages of the employment process and nothing in the ADA permits fraud or intentionally

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[3] This legal proposition has a long-standing history in South Carolina. See, e.g., Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986) (holding the Full Commission is the ultimate fact finder and makes the final determination of witness credibility and the weight to be accorded evidence); Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969) (same); Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981) (holding it was not the task of the Court of Appeals to weigh the evidence as found by the Full Commission).

[4] Petitioners have cited numerous South Carolina cases to support of their positions but notes here that the arguments Petitioners raise throughout the Petition based upon the facts of this case are consistent with the majority of other jurisdictions. See, e.g., Sanchez v. Memorial Gen. Hosp., 110 N.M. 683, 798 P.2d 1069 (N.M. Ct. App. 1990) (affirming denial of workers compensation benefits based on misrepresentation of health condition on application despite the fact that nineteen years passed before a second injury to claimant's back); United States Fid. & Guar. Co. v. Edwards, 764 S.W.2d 533, 536 (Tenn. 1989) ("Common sense dictates that a prior injury of the nature suffered by defendant would create a predisposition to further injury considering the nature of the [heavy labor] work involved. Such a predisposition has been found to establish a causal connection."). "In many cases, the principal evidence of causation for a claimant's injury consists of the claimant's own testimony. Therefore, in large part, this case boils down to the question whether [Claimant]'s story was credible, which makes the Commission's credibility findings relevant." Johnson v. PAM Transp., Inc., 2017 Ark. App. 514, ¶ 10, 529 S.W.3d 678, 684 (Ark Ct. App. 2017) (finding claimant failed to prove an injury by accident, noting an employer could rely on claimant's misrepresentation in medical history on form for physical examination despite claimant passing the exam).

misrepresenting the person's medical history to secure a job.

Alternatively, if the Court has concerns with Cooper, then Petitioners agree with the response that instead of casually mentioning that this Court is unsure whether it still works, the Court should address it head on now and not wait for "the General Assembly to take up this issue and resolve it legislatively." This Court set the standard in Cooper and has considered the defense in many cases since that time. If the Court believes the doctrine needs to be re-worked, then this Court should clarify the rule. Waiting on the legislators is unnecessary. See, e.g., Ex parte S. Energy Homes, Inc., 603 So. 2d 1036, 1039 (Ala. 1992) ("It is not a usurpation of the legislative function for this Court to conclude that misrepresentation on an employment application as to prior physical injuries is a bar to recovery of worker's compensation benefits.").

If the Court is going to rework Cooper, it should only reaffirm the validity and clarify the elements. First, as discussed, the rationale and underpinnings of Cooper are still valid and nothing about the ADA changed the foundation underlying the fraud in the application defense. The Court can reaffirm the elements of Cooper while also acknowledging the ADA. Many states Supreme Courts, including some sister states, have created the same defense (with the same or similar elements) when its state's code was silent, found the defense does not violate the ADA, and concluded such judicial action was not contrary to legislative intent. See, e.g., Johnson v. PAM Transp., Inc., 2017 Ark. App. 514, ¶ 4 n.4, 529 S.W.3d 678, 681 n.4 (Ct. App. 2017) (reconfirming that Arkansas' Supreme Court, like South Carolina, created a fraud in the application defense where its statutes were silent on the issue (citing Shippers Transport of Georgia v. Stepp,265 Ark. 365, 369, 578 S.W.2d 232, 234 (1979))); Caldwell v. Aarlin/Holcombe Armature Co., 267 Ga. 613, 613, 481 S.E.2d 196, 196-97 (1997) (reaffirming false representation defense created by Georgia's Supreme Court with exact same elements as South Carolina's defense in Cooper and

concluding the defense is not inconsistent with the ADA); Ex parte S. Energy Homes, Inc., 603 So. 2d 1036, 1039 (Ala. 1992) (creating fraud in the application defense for workers compensation and concluding "[s]uch a judicial holding is not contrary to legislative intent"); Jewison v. Frerichs Constr., 434 N.W.2d 259, 260 (Minn. 1989) (adopting false representation defense in workers compensation and providing that "We are not aided by any explicit provision of the Workers' Compensation Act. By implication, however, there is statutory evidence of a public policy regarding an employee's obligation of truthful pre-employment health disclosure to a prospective employer"); Allred v. Berkline, LLC, No. M2009-01236-WC-R3-WC, 2010 Tenn. LEXIS 626, at *14 (2010) (reaffirming that "[i]n a long line of cases, [the Tennessee Supreme] Court has set forth the requirements for an employee's misrepresentation to constitute a bar to recovery of benefits" in a false representation doctrine the Court created); Falls Church Constr. Co. v. Laidler, 254 Va. 474, 477-78, 493 S.E.2d 521, 523 (1997) (adopting of fraud in the application defense by Virginia Supreme Court).

Further, many of the state Supreme Court decisions creating the fraud defense, including Cooper itself, rely on Larson's Workers' Compensation Law. The most recent iteration of Larson's Workers' Compensation Law provides that the fraud defense is still viable even in light of the ADA. *See* 5 Larson's Workers' Compensation Law § 66.04 (2024) ("Note that with the passage of the Americans With Disabilities Act, employers may no longer inquire into an individual's medical history or require a physical examination until after an offer of employment has been made. This does not change the analysis here regarding false statements other than to note that such questions cannot be asked before the conditional hiring of the individual.").

Accordingly, if the Court believes "it has become necessary to rework the Cooper analysis to address the timing issues arising out of the ADA," then it should rework it now. If the Court is

not going to "rework the Cooper analysis" then as previously discussed, the Court should remove from the Opinion the entirety of the discussion of the ADA and any references to its concerns "with the continued validity of Cooper."

CONCLUSION

The response effectively concedes the Opinion creates confusion for the workers compensation bar. For all the reasons stated herein and in Petitioners' Petition for Rehearing, Petitioners request that this Court allow oral argument and grant their Petition for Rehearing of the issues presented in Opinion No. 28214.

Respectfully submitted,

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