

State of South Carolina
Workers' Compensation Commission

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: The Honorable Cynthia C. Dooley; The Honorable Melody James;
and The Honorable Aisha Taylor.

SCWCC File No.: 2104833

Qushon Inman,

Claimant,

v.

GE Healthcare, Inc.,

Employer,

and

Riverstone International Ins.,

Carrier,

Defendants.

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SC Court of Appeals

AFFIRMED

Hearing held in Richland County, South Carolina,
July 15, 2024

Per notice timely and properly served upon all Parties of Interest.

Appearances: Stephen J. Wukela, Esq., of Wukela Law Firm, appeared on
behalf of Claimant/1st Appellant.

Nicolas L. Haigler, Esq., of Robinson Gray Stepp & Laffitte,
LLC, appeared on behalf of Defendants/2nd Appellants.

Court Reporter: Amber Scarborough, 1230 Richland St, Columbia, SC 29201,
803-252-3445, contact@creelreporting.com.

Filed: September 19, 2024

I. STATEMENT OF THE CASE

Procedural History

On August 29, 2023, a hearing was set before a Single Commissioner to determine issues set forth on the parties' Forms 50 and 51. Qushon Inman (Claimant) asserted he sustained injuries on March 19, 2021, to his neck, thoracic spine, lumbar spine, arms and legs after jumping from the trailer of an 18-wheeler to the loading dock of GE Healthcare's (Employer's) facility. Claimant further asserted that he was not at maximum medical improvement (MMI) for his injuries. Claimant sought a medical evaluation and treatment for his injuries. Claimant also sought temporary total disability (TTD) benefits.

Employer and Riverstone International Ins. (Carrier) (hereinafter collectively known as "Defendants") denied Claimant's alleged injuries. Defendants sought a finding that Claimant did not sustain compensable injuries on March 19, 2021, and was therefore not entitled to benefits under the Act. Defendants further sought to assert the Fraud in the Application defense under *Cooper v. McDevitt & Street. Co.*, 196 S.E.2d 833 (1973).

Prior to the hearing, Defendants challenged the admission of the second deposition testimony of Dr. William Edwards by filing a Motion to Quash. On August 30, 2022, the Commission granted Defendants' Motion. The parties continued to dispute this issue until Claimant sought to submit a written statement by Dr. Edwards dated November 3, 2022, in lieu of taking a second deposition. Defendants objected to this submission as hearsay.

The Single Commissioner determined:

[D]efendants contend that the November 3, 2022, document is an inadmissible hearsay statement and filed in a Motion to exclude the statement as evidence at any future hearing. [D]efendants' Motion was denied by Commissioner Beck and Defendants were instructed to depose Dr. Edwards if they wished to cross examine him regarding the hearsay document. Defendants filed a Form 30 with the Commission to appeal Commissioner Beck's Order. The appeal was dismissed as interlocutory on July 20, 2023.

(Single Commissioner's Decision and Order filed on February 16, 2024; Finding of

Fact No. 19, p. 31.)

On April 20, 2023, Defendants deposed Dr. Edwards.

The hearing before the Single Commissioner proceeded as scheduled on the merits of Claimant's claim.

The Single Commissioner determined:

[C]laimant has failed to meet his burden of proof pursuant to § 42-1-160 and § 42-9-35 regarding the alleged injuries to his neck and low back with radicular leg symptoms based upon my review of the greater weight of the evidence and is, therefore, not entitled to any benefits under the Act.

(Single Commissioner's Decision and Order filed on February 16, 2024, p. 33.)

Full Commission Review

This matter is now before the South Carolina Workers' Compensation Commission's Appellate Panel pursuant to issues raised on appeal by the parties. Within the statutory period, Claimant and Defendants each filed a Form 30, Request for Commission Review. Accordingly, the parties presented for oral arguments before the Appellate Panel on July 15, 2024.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The [Single Commissioner] has carefully considered all the evidence presented by the parties in this claim, including the medical records and exhibits properly included by the parties through APA Submissions. From this evidence, **IT IS FOUND AS A FACT THAT:**

1. Claimant alleges injuries to his neck and lumbar spine affecting his legs due to radiculopathy by accident occurring on March 19, 2021, arising out of the course and scope of his employment when he jumped from an 18-wheeler to a loading dock. (See Statement of the Case).
2. Claimant worked at GE through a temp agency beginning in 2018. He was hired as an employee of GE effective January 11, 2021. As part of the onboarding process of Claimant's hiring with GE, Claimant was asked to complete a medical questionnaire in which he was asked about any past or current health issues including back problems. Claimant completed the form on December 24, 2020. In that form, Claimant denied any past or current back pain or trouble. Claimant's response in this document was relied upon by GE in determining Claimant's job placement and whether any accommodations should be made so that he could safely perform

his job duties as an employee of GE. Had Claimant indicated he had prior or current back issues, GE would have consulted a physician to determine whether Claimant was fit for duty in the job he had been hired to perform and whether he required any accommodations to perform that job safely. Claimant's failure to disclose his low back condition in the questionnaire created an increased likelihood that he would be injured on the job. (Prevatte Hearing Testimony; Claimant's Hearing Testimony; Def. Ex. C p. 1; Dr. Edwards 4/20/23, pp. 60-62).

3. Defendants assert the employer/employee relationship is brought into question by Claimant's false representations as to his physical condition in inducing his employment such that the question of whether the facts support a defense under *Cooper v. McDevitt & St. Co.* is jurisdictional. However, the Supreme Court in *Cooper* held "The fact that the appellant knowingly and willfully made a false representation as to his physical condition thereby inducing his employment, did not make the contract for his services void, but voidable; and the employer, having been deceived, could terminate the contract whenever it discovered the deception." *Cooper v. McDevitt & St. Co.* 260 S.C. 463, 469, 196 S.E.2d 833, 836 (1973). The contract for employment is rendered voidable, and not void ab initio. The employer/employee relationship must first exist before a fraud in the application of employment defense can be pled. Therefore, I do not find that a question of fraud in the application for employment is jurisdictional. As such, I find Defendants failed to plead it as an affirmative defense on at least two Form 51s and therefore the defense is waived.
4. I further decline to consider the affirmative defense pursuant to 42-1-705(B) as I find that decision within my discretion.
5. Even were I to consider the defense, Defendants fails to satisfy the second prong of *Cooper v. McDevitt & St. Co.* in that the employer clearly did not rely upon the misrepresentation in the "HIRING" process.
6. The affirmative defense having been waived and not considered by the [Single Commissioner] pursuant to S.C. Code Ann. § 42-1-705(B), I am left with determining whether Claimant suffered compensable injuries to his neck and back affecting both legs by why of radiculopathy pursuant to S.C. Code Ann. § 42-1-160 or § 42-9-35.
7. I find Claimant properly pled a S.C. Code Ann. § 42-9-35 claim by checking the "Injury" box on the Form 50.
8. On December 26, 2020, Claimant sought medical evaluation and treatment at MRMC for ten out of ten stabbing lower back pain with radicular pain and numbness in his left leg beginning one and a half months prior to the hospital visit. These symptoms had been progressively worsening. Claimant underwent a CT scan of his lumbar spine which showed degenerative changes at the L5-S1. Claimant was taken out of work for a period of time as the result of this emergency room visit. (Claimant's Hearing Testimony; Claimant's APA 1).
9. Claimant presented to Kelley Prevatte on March 22, 2021. He reported that he injured his back "some months ago" but was unable to identify the cause of his initial back pain at this meeting with Prevatte. He reported having been to the hospital on December 26, 2020, for his lower back

pain. He felt it was related to work because his body was not used to the job he was performing at that time. Claimant told Prevatte that he did not report this back pain to his supervisor in December 2020. He told Prevatte that the back pain from December had improved until the Friday before this March meeting when he was jumping on and off trucks. (Def. Ex. C).

10. Claimant presented to MUSC on March 23, 2021. He reported gradual onset of lower back pain shooting down both legs and up his back. Claimant thought he may have jumped off of a truck wrong. This same pain initially started in December 2020 and had been on and off since that time. Claimant returned to MUSC on March 24, 2021, and complained of low back pain radiating to his left leg. Claimant returned to MUSC on March 29, 2021, at which time he reported low back pain with radiation to his left leg for "several months." On April 1, 2021, Claimant reported to P.A. Huiet a history of back spasms beginning December 23, 2020, and fully resolving after a few days. (Claimant's Hearing Testimony; Claimant's APA 2).
11. Claimant did not report neck pain to MUSC on March 23, 24, or 29, 2021, nor did he report neck pain to P.A. Huiet on April 1, 2021. (Claimant's APAs 2 and 3)
12. Claimant presented to Dr. Willie Edwards of McLeod Spine Center on June 22, 2021. Based upon his consultation with Claimant and review of Claimant's prior thoracic and lumbar MRIs of April 16, 2021, and cervical MRI of May 4, 2021, Dr. Edwards opined: "Patient has perplexing symptoms that seem out of proportion to MRI findings." (Claimant's APA 4).
13. As it relates to compensability, the decision turns on three documents:
 - a. The 9-23-21 deposition of Dr. Edwards,
 - b. The 11-3-22 written statement of Dr. Edwards; and
 - c. The 4-20-23 deposition of Dr. Edwards.
14. As it relates to the September 23, 2021, deposition set by Claimant, Dr. Edwards initially establishes compensability of both Claimant's neck and back and then on cross examination by Defendants, Dr. Edwards recanted.
15. Dr. Edwards did not have the opportunity to review Claimant's complete, relevant medical records prior to making his initial assertion that Claimant sustained compensable injuries to his neck and lower back during the alleged work accident, despite his opinion that, specifically, the December 26, 2020, medical record is an important document in determining causation of Claimant's alleged injuries. (Dr. Edwards 9/23/2021, pp. 5-6, 29, 31, 33, and 40).
16. Upon review of Claimant's medical records from MUSC on March 23, 24, and 29, 2021, as well as P.A. Huiet's report from April 1, 2021, Dr. Edwards determined that based upon the lack of complaints of neck pain in these records combined with Claimant's description of the alleged work accident and lack of objective findings to support a neck injury in the May 4, 2021, cervical MRI, Claimant's alleged neck injury is not causally related to the alleged accident. (Dr. Edwards 9/23/2021, pp. 27-28 and 32-33).
17. Upon review of Claimant's medical record dated December 26, 2020, and Claimant's June 15, 2021, deposition testimony, Dr. Edwards confirmed that the extent claimant's low back and radicular left leg pain and complaints in December 2020 were not consistent with his deposition

testimony regarding those symptoms. Moreover, Claimant's December 26, 2020, complaints are identical to the complaints Claimant presented with to Dr. Edwards on June 22, 2021, such that an MRI of the lumbar spine in December 2020 would have likely been identical to the lumbar MRI performed in May 2021. Edwards confirmed that Claimant's reports as reflected in the December 26, 2020, and March 29, 2021, are inconsistent with the alleged March 19, 2021, date of injury. Further, the March 23, 2021, medical report wherein Claimant reported low back pain on and off since December 2020, is inconsistent with Claimant's reports to P.A. Huiet and his deposition testimony that his December 2020 back problems completely resolved shortly thereafter. Based upon the records from December 26, 2020, March 23, 2021, March 24, 2021, and March 29, 2021, as well as Claimant's deposition testimony, it is impossible for Dr. Edwards to link causation of Claimant's alleged back and radicular leg problems to an incident on March 19, 2021. (Dr. Edwards 9/23/2021, pp. 35-41 and 44).

18. Defendants filed a Form 19 with the commission on October 5, 2021. Claimant's counsel subsequently attempted to re-depose Dr. Edwards almost one year later on August 25, 2022, to address the same issues on which he had previously deposed Dr. Edwards in September 2021. Defendants filed a Motion to Quash the second deposition of Dr. Edwards. The Motion was granted by Commissioner Dooley by Order dated August 30, 2022. Claimant's counsel subsequently notified defense counsel that he intended to move forward with the deposition anyway. Defendants filed a Motion for Rule to Show Cause to enforce the terms of Commissioner Dooley's Order. This Motion was granted by Commissioner McCaskill by Order dated October 27, 2022. Defendants later learned that in October 2022, Claimant's counsel privately met with Dr. Edwards to the exclusion of defense counsel. (See Procedural History). This meeting resulted in a November 3, 2022, statement that was the subject of much controversy (and resulting in orders from 2 Commissioners), wherein Dr. Edwards changes his mind again and finds both the back and the neck compensable.
19. Defendants contend that the November 3, 2022, document is an inadmissible hearsay statement and filed a Motion to Exclude the statement as evidence at any future hearing. Defendants' Motion was denied by Commissioner Beck and Defendants were instructed to depose Dr. Edwards if they wished to cross examine him regarding the hearsay document. Defendants filed a Form 30 with the commission to appeal Commissioner Beck's Order. The appeal was dismissed as interlocutory on July 20, 2023.
20. And finally, Dr. Edwards is deposed on April 20, 2023, by Defendants. In that deposition, he reneged his opinion on the neck finding it not compensable. However, as it relates to the back, he found the back compensable via an unsolicited opinion that it was an aggravation of Claimant's preexisting condition (an issue of great discussion on both depositions).
21. Dr. Edwards did not review his September 23, 2021, deposition testimony prior to the execution of the November 3, 2022, causation statement. Claimant's counsel did not review this prior testimony with Dr. Edwards at their October 2022 meeting, nor did Claimant's counsel provide Dr. Edwards with any additional medical records other than Dr. Edwards' own records during said meeting. Dr. Edwards reiterated the importance particularly of the December 26, 2020, medical report in determining causation of Claimant's alleged injuries. (Dr. Edwards 4/20/23, pp. 4-10, 22-23 and 45-46).
22. When Dr. Edwards met with Claimant's counsel in October 2022, he was not advised that the

South Carolina Workers' Compensation Commission had ordered Claimant's counsel not to re-depose Dr. Edwards. (Dr. Edwards 4/20/23, p. 17).

23. Dr. Edwards confirmed that the mechanism of injury as described by Claimant and Claimant's counsel was unlikely to cause an injury to Claimant's cervical spine. Upon review of the MUSC records dated March 23, 2021, and March 29, 2021, as well as his prior testimony regarding these reports, Dr. Edwards reiterated his opinion that Claimant did not sustain an injury to his neck as the result of the alleged March 19, 2021, accident. He retracted his opinion noted in the November 3, 2021, letter regarding causation of any alleged neck injury and the need for any medical treatment to the neck arising out of the alleged accident. (Dr. Edwards 4/20/22, pp. 24-32).
24. Dr. Edwards confirmed that Claimant's report to him of minor back issues prior to the alleged work accident is inconsistent with Claimant's complaints as reflected in the March 29, 2021, MUSC record. Claimant's complaints in the March 29, 2021, MUSC record are also inconsistent with Claimant's symptoms arising out of the alleged March 19, 2021, accident. (Dr. Edwards 4/20/23, pp. 32-33 and 35-36).
25. Dr. Edwards reiterated that Claimant's reports of prior lower back muscle spasms to P.A. Huiet on April 1, 2021, and during his June 15, 2021, deposition are inconsistent with medical records from December 26, 2020, and March 23, 2021. Dr. Edwards confirmed that a muscle spasm and severe low back pain with radicular symptoms are two different conditions. Further, he confirmed that Claimant's report on March 23, 2021, that the low back pain and radicular symptoms had occurred on and off since December 2020 is inconsistent with his report to P.A. Huiet that his low back pain from December 2020 had completely resolved prior to March 19, 2021. (Dr. Edwards 4/20/23, pp. 37-42). Moreover, Claimant's low back and radicular leg symptoms as noted in the December 26, 2020, medical report are identical to his complaints to Dr. Edwards in June of 2021. Further, given the level of symptomatic complaints made by Claimant in December 2020, it is unlikely that his symptoms had completely resolved prior to the alleged date of accident. Pathology in Claimant's lumbar spine that was causing his symptoms in December 2020, is likely the exact same pathology he reported to Dr. Edwards in June 2021 such that, had an MRI been performed in December 2020 it would have been identical to the lumbar MRI of April 16, 2021. (Dr. Edwards 4/20/23, pp. 42-47 and 74-75).
26. As it relates to the aggravation theory, Dr. Edwards relied upon Claimant's statements to him. However, on examination by Defendant, admitted that Claimant's statements to him had been "inconsistent." (Dr. Edwards 4/20/23, p. 74).
27. Dr. Edwards was never asked either via deposition in September 2021 or during his meeting with Claimant's counsel in October 2022, to render an opinion regarding the possible aggravation of a preexisting condition. He did not opine in the November 3, 2021, letter that Claimant's alleged injuries resulted from an aggravation of a preexisting condition. The only way Dr. Edwards could know whether Claimant's alleged injuries resulted from a continuation versus aggravation of a preexisting condition would be through Claimant's subjective reporting. Claimant's reports regarding timing and symptomology of his low back condition varies between the GE medical questionnaire and what he told Dr. Edwards, the emergency room, and P.A. Huiet such that Claimant is not a reliable source for that information. Further, Dr. Edwards testified there is no

evidence to support the aggravation of a preexisting condition. (Dr. Edwards 4/20/23, pp. 52-54 and 57-58).

28. Claimant's counsel then addressed the issue of objective evidence by comparing a CT prior to the date of injury and two MRIs taken after. However, defense counsel examined Dr. Edwards and he subsequently testified the CT was not the appropriate test for determining whether Claimants' condition on the MRI pre-dated the injury. (Dr. Edwards 4/20/23, pp. 71-72)
29. A CT scan does not provide as much information as an MRI, including disc herniations. Thus, the lumbar disc herniation that appeared on Claimant's lumbar MRIs is from 2021 and 2022 could have been present at the time of Claimant's December 26, 2020, CT scan given the severity of Claimant's complaints at that time. (Dr. Edwards 4/20/23, pp. 70-72).
30. Claimants neck condition is not compensable. This Finding is based on the greater weight of the evidence outlined above. (See FOF 10, 15 and 22).
31. Because Claimant's statements to Dr Edwards are not reliable, they cannot be relied upon for establishing compensability for an aggravation claim. This Finding is based on the greater weight of the evidence outlined above. (See FOF 7-9, 11, 16, 23, and 26).
32. Likewise, because of the lack of an "apples to apples" objective testing, I cannot rely on the objective test to make a finding of compensability for an aggravation claim. (See FOF 28).
33. Claimants request for benefits is denied as I find he has not satisfied his burden of proof for neither the neck or back under both a 42-1-160 and 42-9-35 standard. (See FOF 15, 16, 22, and 25-26).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of [the Single] Commissioner that:

1. Pursuant to S.C. Code Ann. § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant-Employer was a covered employer.
2. Pursuant to S.C. Code Ann. § 42-1-160 Claimant did not sustain a compensable injury to his neck or low back causing radicular symptoms in his legs on March 19, 2021, as he has failed to meet his burden of proof regarding same and is therefore not entitled to any benefits under the Act.
3. Pursuant to S.C. Code Ann. § 42-9-35 Claimant did not sustain an aggravation of a preexisting condition to his neck or low back causing radicular symptoms in his legs on March 19, 2021, as he has failed to meet his burden of proof regarding same and is therefore not entitled

to any benefits under the Act.

4. Pursuant to S.C. Code Ann. § 42-15-60, Claimant is not entitled to medical treatment.
5. Pursuant to S.C. Code Ann. § 42-9-10 and § 42-9-260, Claimant is not entitled to temporary total disability benefits.

III. ISSUES ON APPEAL

Claimant/1st Appellant

1. Did the Single Commissioner err in failing to find, as a matter of fact and conclusion of law, that Claimant sustained compensable injury, by accident, to his back, which aggravated the preexisting condition of his back?
2. Did the Single Commissioner err in failing to find, as a matter of fact and conclusion of law, that as result of Claimant's compensable injury, he is entitled to temporary total disability benefits and medical treatment?

Defendants/2nd Appellants

1. Did the Single Commissioner err in Finding of Fact No. 7 that Claimant properly pled a claim under S.C. Code Ann. § 42-15-35 of the South Carolina Workers' Compensation Act?
2. Did the Single Commissioner err in Finding of Fact Nos. 3 and 6 and Conclusion of Law No. 1 Defendants of Fraud in the Application of Employment pursuant to *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973) was waived by Defendants when it was not included in Defendants' Form 51? The error being that Fraud in the Application of Employment is a jurisdictional issue which cannot be waived rather than an affirmative defense governed by S.C. Code Regs. § 67-603?
3. Did the Single Commissioner err in Finding of Fact Nos. 4 and 6 and Conclusion of Law No. 1 to exercise his discretion as afforded to him by S.C. Code Ann. § 42-1-705(B) to consider the defense of Fraud in the Application of Employment pursuant to *Cooper v. McDevitt & Street Co.*, S.C. 463, 196 S.E.2d 833 (1973)?
4. Did the Single Commissioner err in Finding of Fact No. 5 and Conclusion of Law No. 1 that, should he consider Fraud in the Application of Employment as a defense, that Defendants failed to satisfy the second prong of *Cooper v. McDevitt & Street Co.*, S.C. 463, 196 S.E.2d 833 (1973) in that Defendants did not prove that Claimant's misrepresentation was relied upon in the hiring process?

5. Did the Single Commissioner err in Finding of Fact No. 13 and in denying Defendants' Motion to Exclude the November 3, 2022, hearsay statement of Dr. Edwards by admitting the hearsay statement as evidence, said error being:
 - a. The document dated November 3, 2022, is not an expert report as contemplated by S.C. Code Regs. § 67-612;
 - b. The document dated November 3, 2022, violates the previous Orders of Commissioners Dooley and McCaskill precluding further causation evidence from Dr. Edwards;
 - c. Consideration of the hearsay statement dated November 3, 2022, violates Defendants' constitutional right of due process; and/or
 - d. The document dated November 3, 2022, was not corroborated by other evidence as is required by our Supreme Court in *Hamilton v. Bob Bennett Ford*, 528 S.E.2d 667, 339 S.C. 68 (2000)?

6. As the result of the Single Commissioner's error in admitting the hearsay statement of Dr. Edwards, did the Single Commissioner also err in Finding of Fact No. 20 by admitting Dr. Edwards' April 20, 2023, deposition testimony as evidence of the hearing, said error being that this second deposition of Dr. Edwards' was necessitated only by the admission of the improper November 3, 2022, hearsay statement as evidence for the hearing?

IV. DECISION OF THE APPELLATE PANEL

Pursuant to S.C. Code Ann. §42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the initial hearing. We have also considered all issues raised in the respective Appellant and Respondent briefs of the parties, as well as those issues raised at the Full Commission Review Hearing.

After careful review, the Appellate Panel of the South Carolina Workers' Compensation Commission, by unanimous vote, does hereby fully **AFFIRM** the Decision and Order of the Single Commissioner filed on February 16, 2024.

Below are set out the Findings of Fact and Conclusions of Law of the Appellate Panel as to this claim.

FINDINGS OF FACT

1. Claimant alleges injuries to his neck and lumbar spine affecting his legs due to radiculopathy by

accident occurring on March 19, 2021, arising out of the course and scope of his employment when he jumped from an 18-wheeler to a loading dock. (See Statement of the Case).

2. Claimant worked at GE through a temp agency beginning in 2018. He was hired as an employee of GE effective January 11, 2021. As part of the onboarding process of Claimant's hiring with GE, Claimant was asked to complete a medical questionnaire in which he was asked about any past or current health issues including back problems. Claimant completed the form on December 24, 2020. In that form, Claimant denied any past or current back pain or trouble. Claimant's response in this document was relied upon by GE in determining Claimant's job placement and whether any accommodations should be made so that he could safely perform his job duties as an employee of GE. Had Claimant indicated he had prior or current back issues, GE would have consulted a physician to determine whether Claimant was fit for duty in the job he had been hired to perform and whether he required any accommodations to perform that job safely. Claimant's failure to disclose his low back condition in the questionnaire created an increased likelihood that he would be injured on the job. (Prevatte Hearing Testimony; Claimant's Hearing Testimony; Def. Ex. C p. 1; Dr. Edwards 4/20/23, pp. 60-62).
3. Defendants assert the employer/employee relationship is brought into question by Claimant's false representations as to his physical condition in inducing his employment such that the question of whether the facts support a defense under *Cooper v. McDevitt & St. Co.* is jurisdictional. However, the Supreme Court in *Cooper* held "The fact that the appellant knowingly and willfully made a false representation as to his physical condition thereby inducing his employment, did not make the contract for his services void, but voidable; and the employer, having been deceived, could terminate the contract whenever it discovered the deception." *Cooper v. McDevitt & St. Co.* 260 S.C. 463, 469, 196 S.E.2d 833, 836 (1973). The contract for employment is rendered voidable, and not void ab initio. The employer/employee relationship must first exist before a fraud in the application of employment defense can be pled. Therefore, we do not find that a question of fraud in the application for employment is jurisdictional. As such, we find Defendants failed to plead it as an affirmative defense on at least two Form 51s and therefore the defense is waived.
4. We further decline to consider the affirmative defense pursuant to 42-1-705(B) as we find that decision within our discretion.
5. Even were we to consider the defense, Defendants fails to satisfy the second prong of *Cooper v. McDevitt & St. Co.* in that the employer clearly did not rely upon the misrepresentation in the "HIRING" process.
6. The affirmative defense having been waived and not considered by the Single Commissioner pursuant to S.C. Code Ann. § 42-1-705(B), we are left with determining whether Claimant suffered compensable injuries to his neck and back affecting both legs by why of radiculopathy pursuant to S.C. Code Ann. § 42-1-160 or § 42-9-35.
7. We find Claimant properly pled a S.C. Code Ann. § 42-9-35 claim by checking the "Injury" box on the Form 50.

8. On December 26, 2020, Claimant sought medical evaluation and treatment at MRMIC for ten out of ten stabbing lower back pain with radicular pain and numbness in his left leg beginning one and a half months prior to the hospital visit. These symptoms had been progressively worsening. Claimant underwent a CT scan of his lumbar spine which showed degenerative changes at the L5-S1. Claimant was taken out of work for a period of time as the result of this emergency room visit. (Claimant's Hearing Testimony; Claimant's APA 1).
9. Claimant presented to Kelley Prevatte on March 22, 2021. He reported that he injured his back "some months ago" but was unable to identify the cause of his initial back pain at this meeting with Prevatte. He reported having been to the hospital on December 26, 2020, for his lower back pain. He felt it was related to work because his body was not used to the job he was performing at that time. Claimant told Prevatte that he did not report this back pain to his supervisor in December 2020. He told Prevatte that the back pain from December had improved until the Friday before this March meeting when he was jumping on and off trucks. (Def. Ex. C).
10. Claimant presented to MUSC on March 23, 2021. He reported gradual onset of lower back pain shooting down both legs and up his back. Claimant thought he may have jumped off of a truck wrong. This same pain initially started in December 2020 and had been on and off since that time. Claimant returned to MUSC on March 24, 2021, and complained of low back pain radiating to his left leg. Claimant returned to MUSC on March 29, 2021, at which time he reported low back pain with radiation to his left leg for "several months." On April 1, 2021, Claimant reported to P.A. Huiet a history of back spasms beginning December 23, 2020, and fully resolving after a few days. (Claimant's Hearing Testimony; Claimant's APA 2).
11. Claimant did not report neck pain to MUSC on March 23, 24, or 29, 2021, nor did he report neck pain to P.A. Huiet on April 1, 2021. (Claimant's APAs 2 and 3)
12. Claimant presented to Dr. Willie Edwards of McLeod Spine Center on June 22, 2021. Based upon his consultation with Claimant and review of Claimant's prior thoracic and lumbar MRIs of April 16, 2021, and cervical MRI of May 4, 2021, Dr. Edwards opined: "Patient has perplexing symptoms that seem out of proportion to MRI findings." (Claimant's APA 4).
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 - a. The 9-23-21 deposition of Dr. Edwards,
 - b. The 11-3-22 written statement of Dr. Edwards; and
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14. As it relates to the September 23, 2021, deposition set by Claimant, Dr. Edwards initially establishes compensability of both Claimant's neck and back and then on cross examination by Defendants, Dr. Edwards recanted.
15. Dr. Edwards did not have the opportunity to review Claimant's complete, relevant medical records prior to making his initial assertion that Claimant sustained compensable injuries to his neck and lower back during the alleged work accident, despite his opinion that, specifically, the December 26, 2020, medical record is an important document in determining causation of Claimant's alleged injuries. (Dr. Edwards 9/23/2021, pp. 5-6, 29, 31, 33, and 40).

16. Upon review of Claimant's medical records from MUSC on March 23, 24, and 29, 2021, as well as P.A. Huiet's report from April 1, 2021, Dr. Edwards determined that based upon the lack of complaints of neck pain in these records combined with Claimant's description of the alleged work accident and lack of objective findings to support a neck injury in the May 4, 2021, cervical MRI, Claimant's alleged neck injury is not causally related to the alleged accident. (Dr. Edwards 9/23/2021, pp. 27-28 and 32-33).
17. Upon review of Claimant's medical record dated December 26, 2020, and Claimant's June 15, 2021, deposition testimony, Dr. Edwards confirmed that the extent claimant's low back and radicular left leg pain and complaints in December 2020 were not consistent with his deposition testimony regarding those symptoms. Moreover, Claimant's December 26, 2020, complaints are identical to the complaints Claimant presented with to Dr. Edwards on June 22, 2021, such that an MRI of the lumbar spine in December 2020 would have likely been identical to the lumbar MRI performed in May 2021. Edwards confirmed that Claimant's reports as reflected in the December 26, 2020, and March 29, 2021, are inconsistent with the alleged March 19, 2021, date of injury. Further, the March 23, 2021, medical report wherein Claimant reported low back pain on and off since December 2020, is inconsistent with Claimant's reports to P.A. Huiet and his deposition testimony that his December 2020 back problems completely resolved shortly thereafter. Based upon the records from December 26, 2020, March 23, 2021, March 24, 2021, and March 29, 2021, as well as Claimant's deposition testimony, it is impossible for Dr. Edwards to link causation of Claimant's alleged back and radicular leg problems to an incident on March 19, 2021. (Dr. Edwards 9/23/2021, pp. 35-41 and 44).
18. Defendants filed a Form 19 with the commission on October 5, 2021. Claimant's counsel subsequently attempted to re-depose Dr. Edwards almost one year later on August 25, 2022, to address the same issues on which he had previously deposed Dr. Edwards in September 2021. Defendants filed a Motion to Quash the second deposition of Dr. Edwards. The Motion was granted by Commissioner Dooley by Order dated August 30, 2022. Claimant's counsel subsequently notified defense counsel that he intended to move forward with the deposition anyway. Defendants filed a Motion for Rule to Show Cause to enforce the terms of Commissioner Dooley's Order. This Motion was granted by Commissioner McCaskill by Order dated October 27, 2022. Defendants later learned that in October 2022, Claimant's counsel privately met with Dr. Edwards to the exclusion of defense counsel. (See Procedural History). This meeting resulted in a November 3, 2022, statement that was the subject of much controversy (and resulting in orders from 2 Commissioners), wherein Dr. Edwards changes his mind again and finds both the back and the neck compensable.
19. Defendants contend that the November 3, 2022, document is an inadmissible hearsay statement and filed a Motion to Exclude the statement as evidence at any future hearing. Defendants' Motion was denied by Commissioner Beck and Defendants were instructed to depose Dr. Edwards if they wished to cross examine him regarding the hearsay document. Defendants filed a Form 30 with the commission to appeal Commissioner Beck's Order. The appeal was dismissed as interlocutory on July 20, 2023.
20. And finally, Dr. Edwards is deposed on April 20, 2023, by Defendants. In that deposition, he reneged his opinion on the neck finding it not compensable. However, as it relates to the back, he found the back compensable via an unsolicited opinion that it was an aggravation of Claimant's preexisting condition (an issue of great discussion on both depositions).

21. Dr. Edwards did not review his September 23, 2021, deposition testimony prior to the execution of the November 3, 2022, causation statement. Claimant's counsel did not review this prior testimony with Dr. Edwards at their October 2022 meeting, nor did claimant's counsel provide Dr. Edwards with any additional medical records other than Dr. Edwards' own records during said meeting. Dr. Edwards reiterated the importance particularly of the December 26, 2020, medical report in determining causation of Claimant's alleged injuries. (Dr. Edwards 4/20/23, pp. 4-10, 22-23 and 45-46).
22. When Dr. Edwards met with Claimant's counsel in October 2022, he was not advised that the South Carolina Workers' Compensation Commission had ordered Claimant's counsel not to re-depose Dr. Edwards. (Dr. Edwards 4/20/23, p. 17).
23. Dr. Edwards confirmed that the mechanism of injury as described by Claimant and Claimant's counsel was unlikely to cause an injury to Claimant's cervical spine. Upon review of the MUSC records dated March 23, 2021, and March 29, 2021, as well as his prior testimony regarding these reports, Dr. Edwards reiterated his opinion that Claimant did not sustain an injury to his neck as the result of the alleged March 19, 2021, accident. He retracted his opinion noted in the November 3, 2021, letter regarding causation of any alleged neck injury and the need for any medical treatment to the neck arising out of the alleged accident. (Dr. Edwards 4/20/22, pp. 24-32).
24. Dr. Edwards confirmed that Claimant's report to him of minor back issues prior to the alleged work accident is inconsistent with Claimant's complaints as reflected in the March 29, 2021, MUSC record. Claimant's complaints in the March 29, 2021, MUSC record are also inconsistent with Claimant's symptoms arising out of the alleged March 19, 2021, accident. (Dr. Edwards 4/20/23, pp. 32-33 and 35-36).
25. Dr. Edwards reiterated that Claimant's reports of prior lower back muscle spasms to P.A. Huiet on April 1, 2021, and during his June 15, 2021, deposition are inconsistent with medical records from December 26, 2020, and March 23, 2021. Dr. Edwards confirmed that a muscle spasm and severe low back pain with radicular symptoms are two different conditions. Further, he confirmed that Claimant's report on March 23, 2021, that the low back pain and radicular symptoms had occurred on and off since December 2020 is inconsistent with his report to P.A. Huiet that his low back pain from December 2020 had completely resolved prior to March 19, 2021. (Dr. Edwards 4/20/23, pp. 37-42). Moreover, Claimant's low back and radicular leg symptoms as noted in the December 26, 2020, medical report are identical to his complaints to Dr. Edwards in June of 2021. Further, given the level of symptomatic complaints made by Claimant in December 2020, it is unlikely that his symptoms had completely resolved prior to the alleged date of accident. pathology in Claimant's lumbar spine that was causing his symptoms in December 2020, is likely the exact same pathology he reported to Dr. Edwards in June 2021 such that, had an MRI been performed in December 2020 it would have been identical to the lumbar MRI of April 16, 2021. (Dr. Edwards 4/20/23, pp. 42-47 and 74-75).
26. As it relates to the aggravation theory, Dr. Edwards relied upon Claimant's statements to him. However, on examination by Defendant, admitted that Claimant's statements to him had been "inconsistent." (Dr. Edwards 4/20/23, p. 74).

27. Dr Edwards was never asked either via deposition in September 2021 or during his meeting with Claimant's counsel in October 2022, to render an opinion regarding the possible aggravation of a preexisting condition. He did not opine in the November 3, 2021, letter that Claimant's alleged injuries resulted from an aggravation of a preexisting condition. The only way Dr. Edwards could know whether Claimant's alleged injuries resulted from a continuation versus aggravation of a preexisting condition would be through Claimant's subjective reporting. Claimant's reports regarding timing and symptomology of his low back condition varies between the GE medical questionnaire and what he told Dr. Edwards, the emergency room, and P.A. Huiet such that Claimant is not a reliable source for that information. Further, Dr. Edwards testified there is no evidence to support the aggravation of a preexisting condition. (Dr. Edwards 4/20/23, pp. 52-54 and 57-58).
28. Claimant's counsel then addressed the issue of objective evidence by comparing a CT prior to the date of injury and two MRIs taken after. However, defense counsel examined Dr. Edwards and he subsequently testified the CT was not the appropriate test for determining whether Claimants' condition on the MRI pre-dated the injury. (Dr. Edwards 4/20/23, pp. 71-72)
29. A CT scan does not provide as much information as an MRI, including disc herniations. Thus, the lumbar disc herniation that appeared on Claimant's lumbar MRIs is from 2021 and 2022 could have been present at the time of Claimant's December 26, 2020, CT scan given the severity of Claimant's complaints at that time. (Dr. Edwards 4/20/23, pp. 70-72).
30. Claimants neck condition is not compensable. This Finding is based on the greater weight of the evidence outlined above. (See FOF 10, 15 and 22).
31. Because Claimant's statements to Dr Edwards are not reliable, they cannot be relied upon for establishing compensability for an aggravation claim. This Finding is based on the greater weight of the evidence outlined above. (See FOF 7-9, 11, 16, 23, and 26).
32. Likewise, because of the lack of an "apples to apples" objective testing, we cannot rely on the objective test to make a finding of compensability for an aggravation claim. (See FOF 28).
33. Claimants request for benefits is denied as we find he has not satisfied his burden of proof for neither the neck or back under both a 42-1-160 and 42-9-35 standard. (See FOF 15, 16, 22, and 25-26).

CONCLUSIONS OF LAW

1. Pursuant to S.C. Code Ann. § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant-Employer was a covered employer.
2. Pursuant to S.C. Code Ann. § 42-1-160 Claimant did not sustain a compensable injury to his neck or low back causing radicular symptoms in his legs on March 19, 2021, as he has failed to meet his burden of proof regarding same and is therefore not entitled to any benefits under the Act.
3. Pursuant to S.C. Code Ann. § 42-9-35 Claimant did not sustain an aggravation of a preexisting

condition to his neck or low back causing radicular symptoms in his legs on March 19, 2021, as he has failed to meet his burden of proof regarding same and is therefore not entitled to any benefits under the Act.

4. Pursuant to S.C. Code Ann. § 42-15-60, Claimant is not entitled to medical treatment.
5. Pursuant to S.C. Code Ann. § 42-9-10 and § 42-9-260, Claimant is not entitled to temporary total disability benefits.

ORDER


THEREFORE IT IS HEREBY ORDERED that the Decision of the Single Commissioner filed in the above-captioned matter on February 16, 2024, is hereby fully **AFFIRMED**.

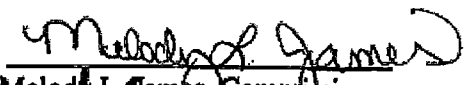
ACCORDINGLY:

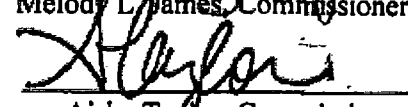
IT IS FURTHER ORDERED that Claimant has failed to meet his burden of proof pursuant to S.C. Code Ann. § 42-1-160 and § 42-9-35 regarding alleged injuries to his neck and low back with radicular leg symptoms based upon my review of the greater weight of the evidence and is, therefore, not entitled to any benefits under the Act.

AND SO IT IS ORDERED.

_____ (date)
Columbia, SC


Cynthia C. Dooley, Commissioner


Melody L. James, Commissioner


Aisha Taylor, Commissioner

Order Served via email:

<p>Nicolas L. Haigler Robinson Gray Stepp & Laffitte, LLC nhaigler@robinsongray.com</p>	<p>Steve Wukela, Jr. Stephen J. Wukela Wukela Law Firm steve@wukelalaw.com stephen@wukelalaw.com</p>
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on September 19, 2024