THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners R. Michael Campbell, II, Avery B. Wilkerson, Jr., and Aisha Taylor

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Appellate Case No.: 2015-002116

Danny B. Crane, ... Appellant,

v.

Raber's Discount Tire Rack, Employer, and
South Carolina Uninsured Employers Fund, Carrier, ... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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1. Danny Crane suffered compensable hearing loss with headaches and dizziness arising out of his work accident.

The Appellate Panel erred in finding Danny Crane's injuries had resolved or returned to baseline when the unrefuted medical evidence overwhelmingly confirms otherwise. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)("To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it."). As Respondents acknowledge, "[t]he Commission did in fact find that Petitioner [sic] suffered a hearing loss; however the Commission found that this hearing loss as temporary and not permanent." [Brief of Respondents, page 13]. Respondents' statement confirms that the true error of the Commission lies in disregarding the Pure Tone Audiograms and multiple opinions of the doctors proving Crane's permanent hearing loss.

A. The Commission improperly used an arbitrary credibility finding to disregard positive evidence of disability [in reply to Respondents' argument at pages 13-18].

Respondents devote the bulk of their brief to attacking Crane's credibility. This is understandable, as the Commission rejected *all* the medical evidence based on an inherently arbitrary and capricious credibility finding. This is the very essence of the "sit and squirm" jurisprudence long condemned by the Federal Courts.[1] Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984)("In 'sit and squirm' jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied.").

The playbook used by Respondents in this case is a simple one. The medical evidence is

[1]No South Carolina state court has addressed the issue.

overwhelmingly against them. The law is against them. The only way to get around that is an *ad hominem* attack against Crane, painting him as someone undeserving of sympathy and credence, let alone disability benefits. Once the well is poisoned, then the trier of fact simply combs the record for isolated nuggets to bolster this preordained conclusion.[2]

Respondents recite a litany of purported discrepancies within the testimony and medical records. The vast majority of these are random isolated instances where the Commission saw inconsistencies which simply do not exist. Respondents contend the instant case is akin to Fishburne v. Ati Systems Intern., 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009). A closer look at Fishburne demonstrates that, while the playbook is the same, the evidence is completely different.

In Fishburne, this Court affirmed the Commission's disability award, including affirming a finding that "she did not provide credible testimony at the hearing." Id. at 681 S.E.2d 602. Fishburne contended she was permanently and totally disabled. However, the Commission found she only sustained a 10% loss of use of her back.

In affirming the 10% loss of use under the substantial evidence standard of review, this Court focused on the wide range of medical evidence presented by both parties. Fishburne relied on an opinion by Dr. Tollison that she was permanently and totally disabled, along with a vocational opinion. While acknowledging the existence of Fishburne's evidence, the Court referenced multiple medical opinions that supported the Commission's 10% disability award. The Court noted:

- Dr. Thomas thought Fishburne could return to her previous work if she were off narcotics.
- Dr. Reid determined Fishburne could work at medium duty.
- An FCE determined Fishburne could perform medium work.
- "Fishburne underwent many tests and none revealed any serious problems."

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[2]Carl Sandburg expressed the concept in more colorful terms: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell." Carl Sandburg, The People, Yes (1936)

Fishburne stands for the well-established proposition that it is the role of the Commission to weigh conflicting evidence. The instant case differs in that *there is no conflicting evidence.*

Unlike the testing in Fishburne, three separate Pure Tone Audiograms consistently showed profound hearing loss in the right ear and severe hearing loss in the left. Speech discrimination testing was also consistent. [APA pages 22, 25, Supplemental APA].

And unlike Fishburne, the medical opinions are unanimous. The three doctors who evaluated Crane's deafness universally opined he had suffered substantial hearing loss as a result of his work accident. As to Crane's hearing "returning to baseline," Dr. Cassone confirmed the hearing loss and dizziness had persisted even six months after the accident – and his opinion was based on testing done months after the hearing. [Supplemental APA].

Indeed, an eerily similar (and entirely speculative) finding of a work injury "returning to baseline" is exactly what this court faced in Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). In Burnette, the Court wrote "We find no evidence that challenges the conclusions of Burnette's doctors . . . As a result, the record provides little or no support of the findings of the Commission . . . " Id. Regarding one specific finding by the Commission, the Court made the stunning observation that: "Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, *we are forced to conclude it is the medical opinion of the single commissioner*, adopted by the Commission." Id.

In this case, there is simply no evidence to weigh. It is absurd for the Commission to hone in on a medical report by a doctor who was treating Crane for a broken rib – not hearing loss and dizziness. An isolated medical report written by a doctor treating an unrelated medical condition who gives no opinion (nor was cross-examined) on the material facts is probative of nothing. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App.2011)(permitting the

Commission to disregard medical evidence only when other competent evidence exists in the record).

The employee in Burnette also challenged the Commission's findings on her credibility as "neither material nor supported by substantial evidence." Burnette. The Court sidestepped the issue, noting other issues were dispositive of the appeal. A similar result should follow in this case. As in Burnette, the Commission "bullet-proofed" its decision with gratuitous credibility findings that ostensibly would withstand appellate review. The credibility findings must be disregarded as the underlying factual finding that Crane's hearing loss had returned to baseline is speculation and conjecture unsupported by substantial evidence.

To the extent that the credibility findings are relevant, one can return to Fishburne for an example of credibility findings with a basis in the record. Fishburne used a cane no doctor prescribed, wiped away non-existent tears, and sniffled from a nose that never ran. These displays are overtly calculated to appear more disabled and more emotionally distraught than was actually the case.

Here, we have the opposite. Crane wore a hearing aid so he could function more – so that he could participate in the hearing. He never made himself appear more disabled than he was – in fact, he repeatedly testified that he wanted and needed to work because he had a wife and six children to support.

Unlike in Fishburne, the single commissioner could not point to any overt objective sign of exaggeration (a nonprescribed cane, nonexistent tears and sniffles). Her observations are simply that sometimes Crane could understand the questions he was asked and sometimes he couldn't. This is not demonstrable evidence of subterfuge; it is simply evidence that the witness is hard of hearing. It is not entirely clear what the single commissioner expected would happen – it is certainly what she

was told to expect at the beginning of the hearing.

This is the concern. We all accept the general proposition that a credibility finding is difficult to reverse on appeal because the trier of fact is in the best position to observe the demeanor of the witness. However, what happens when the trier of fact makes a fundamentally arbitrary ruling, yet couches it as a credibility finding? Must the court abandon its duty and accede to a rule of untouchability when faced with blatant caprice and hypocrisy?

Whether the Court decides this case on the Commission's substitution of concrete evidence with speculation or addresses the credibility findings head on, the decision below cannot stand. The finding that Crane's hearing loss had returned to its pre-injury baseline – and the resulting denial of medical treatment and compensation – is not supported by substantial evidence. The decision below should be reversed because it is based on pure speculation wherein the hearing commissioner "arbitrarily substitute[d] h[er] own hunch or intuition for the diagnoses of a medical professional." Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). Cf., Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

B. The Appellate Panel's finding that Crane's hearing had returned by baseline by March 31, 2014 is contrary to the evidence [in reply to Respondents' argument at pages 18-20].

Respondents argue that the Commission correctly found Crane's hearing loss had resolved by March 31, 2104, because "the only clinical impression listed in [Cranes's] Emergency Room records from that night [and the follow-up with Dr. Ky] is the right rib condition." [Brief of Respondents at page 19]. Respondents ask this Court to accept the premise that a treatment record for an unrelated broken rib is substantial evidence proving that hearing loss had spontaneously resolved – even though the records in question make no such statement. This is exactly the kind of

speculation that commanded reversal in Burnette. Id. The Appellate Panel cannot simply make things up; their decisions *must* be based on concrete evidence in the record. See Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.")

Respondents also contend the Commission was justified in rejecting both Crane's testimony and Dr. Rogers' report as not credible. This brings us back around to the question of what can the appellate courts do when faced with arbitrary and capricious credibility findings used as a proxy for rejecting positive evidence. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.").

Neither Dr. Rogers's report nor Crane's testimony were refuted or contradicted by other evidence in the record. The report and testimony are consistent with the reports from Drs. Kassahun, Koukos, Ansley and Cassone; and with the Pure Tone Audiogram testing. There may have been minor differences in the details, but all the medical evidence consistently shows significant hearing loss since the work accident. There is no legal justification for outright rejecting evidence.

Furthermore, even if the Commission could give no weight to Dr. Rogers' report or Crane's testimony, it cannot ignore (or outright misinterpret) the third Pure Tone Audiogram and Dr. Cassone's report. These were done after March 31, 2014 and after the hearing. A report confirming hearing loss and disability absolutely outweighs a medical record for an unrelated rib injury *as a matter of law*. Indeed, this is not a question of weighing conflicting medical evidence. It is a

question of the existence of evidence. There is no evidence showing Crane's hearing had returned to normal on March 31, 2014 or any other date.

As there is no substantial evidence supporting the Commission's finding that Crane's hearing had returned to baseline on March 31, 2014, the decision below should be reversed.

2. Danny Crane proved he is entitled to temporary total disability compensation as his injury prevented him from working in his normal employment and his employer made no offer of employment suitable to his capacity [in reply to Respondents' argument at pages 21-22].

Respondents seek to bar Crane from receiving temporary total disability compensation for his injury. Respondents contend Crane "did not submit any evidence that his incapacity for work is total and that light-duty was unavailable with Raber's tire." [Brief of Respondents, page 21].

As a general proposition, when the injured worker is unable to perform his regular duties, the employer must either offer suitable employment within the injured worker's capacity or pay either temporary total disability compensation or wages in lieu of compensation. See S.C. Code Ann. § 42-9-190 (2005); S.C. Code Ann. § 42-9-200 (2007)("if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of disability"); S.C. Code Ann. § 42-9-260(A) (Supp. 2006); 25A S.C Code Ann. Reg. 67-502 (2007)(defining "disability", "return to work without restriction", and "temporary partial incapacity").

Crane did submit evidence of his disability. Crane testified when he went back to work:

> With the amplifier they put in, with the noises from like the brake lays [sic], that electric motor running and the loud squeals that you can amplify off of that axle cutting of brake lays [sic], the electric motors of the lifts coming up and down, they would give me a headache and I couldn't – I mean severely. [Tr. Page 34, lines 15-23].

He added he attempted to work the next day and anther day but was unable to complete the entire shift. [Tr. Page 35, lines 2-6; page 56, lines 7-10]. He explained it was too loud to work with the

amplifier and impossible to work without out. [Tr. Page 56, line 18-page 58, line 19]. Crane was the only witness – the employer did not testify to dispute Crane's explanation for his inability to continue working at Raber Tire.

Respondents do not contend that proof of disability requires expert medical testimony. They question the sufficiency of Crane's testimony, but do not contest the fact that his testimony taken at face value supports his claim for temporary total disability compensation. Nonetheless, it should be noted that Dr. Ansley wrote Crane out of work on March 6, 2014. The work slip expired on April 1, 2014 – presuming that Crane would return to the doctor for further evaluation following the ABR test. [APA pages 24, 57]. The ABR test did not happen because Raber had no workers' compensation insurance to provide treatment and Crane's health insurance did not cover treatment at MUSC. [Tr page 45, lines 1-11]. Most importantly, Dr. Cassone wrote: "He has had balance problems ever since and has significant difficulty being able to work because of both the hearing loss and the dizziness. . . . **He should be considered disabled because of this.**" [Supplemental APA (emphasis added)]. See Johnson v. Rent–A–Center, Inc., 398 S.C. 595, 730 S.E.2d 857 (2012) (employee entitled to temporary total disability benefits where employee had not returned to work after being put under medical restrictions).

The evidence confirms that Crane should be on a running award of temporary total disability compensation. The Appellate Panel's denial of temporary compensation rests on the erroneous finding that Crane's work injury had returned to baseline. Once that finding is reversed, the way is clear for him to receive temporary compensation.

3. The Commission erred in relying on electronic medical records [in reply to Respondents' argument at pages 22-23].

Respondents contend the issue about reliance on electronic medical records is not preserved and should be deemed abandoned. Appellant did not argue the reliance on EMR as a separate

ground. The issue is fully discussed in pages 16-17 of Appellant's brief. It does not appear as a separate argument. Rather it is part and parcel of the overall argument that the Appellate Panel relied on speculation in giving any weight to boilerplate medical records where the physician in question was treating an unrelated medical condition (broken rib). The error was relying on a medical record which contained no opinion by the doctor stating Crane's hearing loss had spontaneously resolved.. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of a commissioner is not evidence); Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing commission's factual finding because "rank speculation" is not substantial evidence).

4. The Commission erred in denying Crane's future claim for a permanent disability award [in reply to Respondents' argument at pages 24].

Respondents contend Appellant failed to preserve the issue of a permanent disability award for hearing loss. Respondents misapprehend the procedural posture of this case.

Appellant is not asking for a permanent disability award at this time. He is not at MMI and needs additional treatment before his disability can be determined. The essence of the issue is that the Commission found as a fact that Crane had reached MMI on March 14, 2014 with no permanent impairment. That finding effectively forecloses any future disability award.

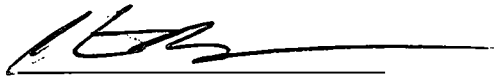
While a disability award could theoretically issue based on Dr. Rogers' opinion that the hearing loss is permanent and could not be improved by natural means, Crane asked the Commission to defer that finding until he completes a full course of treatment aimed at restoring some level of hearing and alleviating his dizziness. See McMahan v. S.C. Dept. of Education-Transportation, Op. No. 5415 (S.C.Ct.App. filed June 15, 2106)(Shearouse Adv.Sh. No. 24 at 56)(permanent disability award can be made based on existing evidence even if employee has not reached MMI).

In short, the issue is not ripe. MMI and permanent disability need to be determined by the Commission on remand. The decision below must be reversed and remanded with instructions to provide medical treatment, temporary compensation and, upon a determination of MMI, permanent disability compensation.

CONCLUSION

For the foregoing reasons, the Court should affirm in part and reverse in part. The Court should affirm the findings that Crane was an employee who suffered a work-related injury. The Court should reverse the denial of medical treatment after March 31, 2014 and the denial of compensation. Crane should be provided medical testing and treatment, along with temporary total disability compensation on a running award.

Respectfully Submitted,



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August 10, 2016
Columbia, South Carolina

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South Carolina Uninsured Employers Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Katherine R. Carter, am a paralegal to Stephen B. Samuels and I have served the **Appellant's Initial Reply Brief** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

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The Honorable Jenny Abbott Kitchings
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RE: Danny B. Crane v. Raber's Discount Tire Rack, *et. al.*
Appellate Care No. 2015-002116

Dear Ms. Kitchings:

Please find enclosed the original and one copy of **Initial Reply Brief of Appellant** for filing in the above-referenced matter. Please file the original and return the clocked copy in our enclosed self-addressed stamped envelope.

By copy of this letter and enclosure to Matthew Story, Lisa Glover and O. Edworth Liipfert, III, we are serving opposing counsel with a copy of our **Initial Reply Brief of Appellant** as indicated by the attached Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Respectfully,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

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