THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2015-002116

Danny B. Crane, ... Appellant,

v.

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

PETITION FOR REHEARING

Appellant, by and through his undersigned attorneys, hereby files this Petition for Rehearing. On February 14, 2018, this Court issued an opinion affirming in part, reversing in part, and remanding the Decision and Order of the South Carolina Workers' Compensation Commission. Crane v. Raber's Discount Tire Rack, Op. No. 2018-UP-085 (S.C.Ct.App. filed February 14, 2018).

As grounds for granting his Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence, law and arguments raised on the issues of (1) whether Appellant reached maximum medical improvement (MMI) on March 31, 2014; (2) whether Appellant is entitled to future medical care; (3) whether Appellant was a credible witness; (4) whether Appellant suffered no permanency from the injury; and (5) whether Appellant was entitled to an award of total temporary disability benefits (TTD) after March 31, 2014.

ARGUMENT

1. Danny Crane did not reach Maximum Medical Improvement for his hearing loss on March 31, 2014.

The Court affirmed the Appellate Panel's finding that Crane had reached maximum medical improvement (MMI) on March 31, 2014, holding this finding was supported by substantial evidence in the record. Appellant respectfully argues that the Court may have overlooked or misapprehended the evidence in the record – which does not support the Appellate Panel's MMI finding.

The Appellate Panel found "Claimant reached maximum medical improvement on March 31, 2014." [R.p. 16, Finding of Fact 39]. The date corresponds with the evaluation for a rib injury by Dr. Mol Ky. [R.p. 95-99]. The Appellate Panel seems to have concluded – despite a complete lack of supporting evidence in the record itself[1] – that this visit was also for hearing loss, as they ordered "Claimant is entitled to receive reimbursement for the medical treatment he received through (and including) the March 31, 2014 visit, with the exception of the March 26, 2014 Emergency Room visit for the unrelated rib injury." Surely if the emergency room visit is unrelated, then so necessarily must the follow up visit for "RIGHT RIB PAIN." [R.p. 95 (all capital letters in original)]. A medical evaluation for an unrelated condition cannot be substantial evidence supporting a finding that the employee reached MMI with no impairment for a compensable injury.

The flaw in the Appellate Panel's reasoning arises from the Commission's failure to separate genuine medical treatment notes from boilerplate default notations inherent in electronic medical

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[1]Further confirmation that Dr. Ky's evaluation was limited to addressing rib pain is found in the Commission's remarkable statement that "Strikingly absent are any references to hearing loss (Claimant's tympanic membranes are 'clear and mobile'), memory loss, headaches, dizziness, bleeding, or psychological difficulty." [R. P. 48, Finding of Fact 10(b)]. Illogically, the Commission places great reliance on a medical record wholly unrelated to the compensable hearing loss.

records. It is obvious the March 26th emergency room visit and the March 31st visit with Dr. Ky had nothing to do with hearing loss. Crane specifically went to those providers solely for rib pain from a fall in the bathroom. It is not possible to discern why the single commissioner developed such a negative impression of Crane, but the choice of March 31st as an MMI date seems chosen to punish him for bringing a claim the single commissioner felt was "questionable."

There is one easy way to determine what is boiler plate and what is new. Consider Dr. Koukos's report from February 25, 2014. Under History of Present Illness, the report states: "The patient is a 37 year old male who presents with hearing loss. Additional reason for visit: Dizziness." The report goes on to state under Physical Exam:

> UNABLE TO HEAR FOLLOWING AIR LINE EXPLOSION. HAD HEARING TEST BY ENT WORKS IN TIRE SHOP UNABLE TO HEAR AUTO'S IN SHOP
>
> SOME DIZZINESS.
>
> RIGHT EAR CLEAR
>
> RIGHT SIDE HEADACHE
>
> WILL DO CT BRAIN DX SUBDURAL

[R. P. 39 (all capital letters in original)].

We know this language from the report is not boilerplate because the history matches up with the purpose of the visit. As to the physical examination related to the hearing loss, dizziness and headache, the actual examination is in all capital letters.

The rest of the physical examination reported in the medical record is boilerplate. We know this because under Neurologic, the report includes the notation "normal hearing." [R. P. 108]. In reality, Crane's hearing was not normal, as we know from Dr. Ansley's reports and testing. Five days earlier on February 20, 2014, Dr. Ansley diagnosed Crane with "Severe sensorineural hearing

loss." [R. P. 89-90]. And nine days after Dr. Koukos saw Crane for hearing loss, Dr. Ansley reevaluated Crane. On March 6, 2014, Dr. Ansley wrote "He is still having difficulty hearing." He sent him to MUSC for an ABR to "Rule out sensorineral hearing loss." [R. P. 92]. The hearing loss was confirmed by the second audiogram on the same day. [R. P. 93].

Applying the same analysis to Dr. Ky's March 31, 2014 report, we can see the History of Present Illness has no mention of hearing loss, headaches or dizziness. The history is entirely devoted to "[t]he patient is a 37 year old male who presents with a complaint of RIGHT RIB PAIN." [R.p. 98 (all capital letters in original)]. Similarly, the physical examination is entirely normal except for "*Tenderness noted to palp over right rib. No edema, erythema or lacerations noted to abdomen.*" [R.p. 99 (italics in original).

A medical report from a primary care doctor addressing an entirely unrelated medical condition is not substantial evidence that the work-related hearing loss had resolved or returned to baseline and that the patient had reached MMI. This is particularly so when, as here, later records from *specialists in hearing loss* confirm with objective testing that "severe" and "profound" hearing loss is still present many months later. See 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); Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]").

Interestingly, the Appellate Panel notes Dr. Rogers "found Claimant to be at maximum medical improvement;" yet disregarded his opinion as unreliable – perhaps because Dr. Rogers found "It is my medical opinion beyond a reasonable degree of medical certainty that Mr. Crane's

profound bilateral hearing loss is permanent and that hearing acuity cannot be restored by natural means." [R.p. 51]. The Appellate Panel seems to have relied on the single commissioner's internet research and personal medical opinions rather than the actual medical evidence in the record.[2] See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding); Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring)(hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional.").

The two medical records from the unrelated rib injury are not substantial evidence to support the Appellate Panel's finding that Crane reached MMI on March 31, 2014 with full recovery of his hearing. The Panel's guess that Crane's hearing loss must have somehow resolved because it was not mentioned one way or the other is pure speculation. The Panel arbitrarily ignored and misread the later reports from Dr. Rogers and Dr. Cassone finding it permanent. [R. p. 51, 164-165]. As such, rehearing should be granted, and this case should be reversed and remanded for a proper finding of MMI and determination of permanent hearing loss.

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[2]Rather than rely on the medical evidence in the record, the Commission went outside the record and did its own research on the internet. Of particular note is the Commission's statement that "Although not dispositive in this case, perforations [of the eardrum] rarely cause permanent hearing loss, *according to these websites*." [R.p. 54, Finding of Fact 54 (emphasis added)]. The trier of fact, whether the Commission, a judge or a jury, cannot base its findings of fact on independent research. It must rely on the evidence presented. Cf. State v. Harris, 530 S.E.2d 626, 340 S.C. 59 (2000)("courts should stress to jurors that they may not conduct independent research or investigation, but must rely solely on the judge's instruction for the law and the evidence presented in court for the facts."). In this case, the records from audiologist Ronald Lunn, and Drs. Rogers, Ansley and Cassone all document hearing loss, with Mr. Lunn, Dr. Rogers and Dr. Cassone finding it permanent. [R. p. 51, 164-165].

2. Danny Crane requires additional treatment for his hearing loss as additional testing and cochlear implants will tend to lessen his period of disability.

The Commission's finding that Crane is not entitled to additional medical treatment is entirely based on the erroneous finding that his hearing loss resolved and he reached MMI on March 31, 2014. The evidence shows otherwise. Appellant believes the Court may have overlooked or misapprehended the medical evidence in the record.

On August 19, 2014, Dr. Cassone stated "He was sent for audiogram and this showed a profound hearing loss in each ear." Dr. Cassone added "He may be a candidate for a cochlear implantation and this should be considered. He should be considered disabled because of this" [R.p. 165]. Despite this unmistakably clear pronouncement from Dr. Cassone (Dr. Ansley's partner), the Appellate Panel inexplicably and arbitrarily found "that the new evidence does not serve to help Claimant's cause." [R.p. 57, Finding of Fact 42].

The Appellate Panel erred in substituting its own medical opinion for the medical opinions of the treating and examining doctors. See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding.). There were no medical opinions contradicting or disagreeing with Dr. Koukas, Mr. Lunn, Dr. Ansley, Dr. Rogers and Dr. Cassone. See, Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]"). Whether the Appellate Panel was relying on its own internet research or on records from the unrelated rib injury, there is no substantial evidence supporting the Appellate Panel's finding limiting medical treatment

to March 31, 2014. Indeed, it is quintessentially arbitrary to make Defendants pay for medical treatment unrelated to the work-related injury.

Respectfully, Appellant believes the Court overlooked the fact that the rib injury records are unrelated to the compensable hearing loss. As treatment for a rib injury can have no bearing on whether Crane requires more treatment for his hearing loss (nor can internet research), Appellant requests rehearing be granted and additional medical treatment be ordered.

3. The Appellate Panel arbitrarily found Crane not credible based on its own misreading of the evidence and use of "sit and squirm jurisprudence."

The Court affirmed the Appellate Panel's finding that Crane was not a credible witness. From the outset, Appellant acknowledges that South Carolina traditionally holds a determination of credibility is solely for the Appellate Panel and could not be reversed by the appellate courts. However, in the instant case, the finding of credibility is the product of the single commissioner's "hunch or intuition." See Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring)(hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional."). This puts the Court in a difficult position. Either the credibility finding must be reversed or, as this Court did in Burnette, the underlying case must be reversed on the medical evidence, thus obviating a need to address the credibility findings. See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(declining to address credibility issue because Appellate Panel's factual findings were based on the single commissioner's own medical opinion unsupported by medical evidence in the record). Appellant requests that the Court grant rehearing to either address and reverse the credibility finding or to reverse on other grounds as it did in Burnette.

4. The Court overlooked or misapprehended the unrefuted evidence that Crane has suffered "profound" hearing loss and should be considered "disabled."

The Appellate Panel found "Claimant has not proven any permanency, as Dr. Rogers' report is unreliable. More importantly, Claimant's own family doctor found Claimant's hearing normal after the accident, and offered no opinion to the contrary." [R.p. 56, Finding of Fact 39]. As noted earlier in this Petition, the Appellate Panel appears to base this finding on a report from a medical examination which the Commission found to be for an unrelated rib injury. And as the Appellate Panel found, "Strikingly absent are any references to hearing loss . . ." " [R. P. 48, Finding of Fact 10(b)]. *Nowhere* in this report is there any statement that Crane's hearing was normal – nor is there a statement that his hearing was abnormal. The report never mentions hearing loss one way or the other because the doctor was seeing the patient solely for a rib injury. 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."). Furthermore, the report is not from "Claimant's own family doctor." The report is from Dr. Mol Ky; not Dr. Koukos. [R.p. 95-100]. Dr. Koukos is Crane's family doctor. [R.p. 221, lines 11-16].

Conversely, every doctor and audiologist who actually saw Crane for hearing loss after Dr. Ky saw him for the rib injury opined he had severe to profound hearing loss as shown by the Pure Tone Audiogram. Dr. Rogers opined to "a reasonable degree of medical certainty that Mr. Crane's profound bilateral hearing loss is permanent and cannot be restored by natural means." [R. pp. 115-120]. Audiology testing on August 19, 2014 "suggested a right profound hearing loss, while the left ear suggests a profound to severe hearing loss." [R. p. 164, lines 4-6]. After reviewing the

audiologist's report and examining Crane, Dr. Cassone wrote:

> Danny Crane is referred by Disability Determination services. The patient has a long standing hearing loss following a sudden injury to his ears when a container blew up in a work related injury. There was an extremely amount of noise and he had sudden ringing in his ears and hearing loss. He has had previous audiometric evaluations. He has had balance problems ever since and has significant difficulty being able to work because of both the hearing loss and the dizziness.

Dr. Cassone added "He should be considered disabled because of this." [R. p. 165, lines 23-25].

Even if the Commission can wholly reject Dr. Rogers' opinion as unreliable, it cannot also reject the opinion of Dr. Cassone. Our law allows the Commission some leeway as the trier of fact in weighing evidence. It does not permit the Commission to simply ignore uncontradicted medical evidence – especially when there are consistent opinions from multiple providers. Nor does it permit the Commission to make its own medical opinions without evidentiary support. Yet, that is exactly what the Appellate Panel did here. The finding that Crane suffered no permanent hearing loss is entirely speculative and should be reversed by this Court.

5. Temporary Total Disability should be paid on a running award.

The Court correctly reversed the Appellate Panel's finding that Crane was not entitled to temporary total disability. However, in limiting the period of compensation to the Appellate Panel's unsupported MMI date, the Court may have overlooked that Crane was not actually at MMI. Appellant recognizes that this argument rests on a reversal of the MMI finding argued in Section 1 of this Petition.

"The term 'maximum medical improvement' means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct.App.2006). Notably, Dr.

Cassone opined "He may be a candidate for a cochlear implant and this should be considered." [R. P. 165].

Appellant requests that the Court reverse the finding on MMI and find that Crane should be paid temporary compensation until he reaches MMI. Curiel v. Env. Management Services, 655 S.E.2d 482, 376 S.C. 23 (2007)(" temporary total disability benefits are available from the date of injury through the date of maximum medical improvement"). The case should be remanded to the Commission to determine if Crane is at MMI based on Dr. Rogers' opinion or Dr. Cassone's opinion. Alternatively, if Crane is at MMI, then an award of permanent disability should be entered. Curiel.

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 and the finding of MMI on March 31, 2014. Crane should be provided medical testing and treatment, along with temporary total disability compensation on a running award. Alternatively, Crane could be found at MMI with permanent hearing loss and disability May 19, 2014 (per Dr. Rogers) or on August 14, 2014 (Dr. Cassone).

Respectfully Submitted,

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March 1, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I, Katherine R. Carter, am a paralegal to Stephen B. Samuels and I have caused the **Petition for Rehearing** to be served upon the below parties by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on March 1, 2018, addressed as follows:

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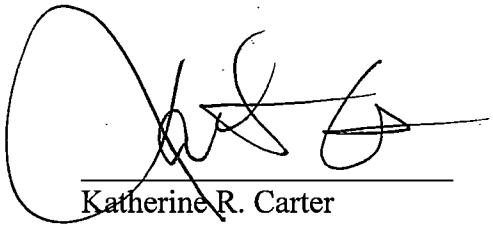

Katherine R. Carter

March 1, 2018
Columbia, South Carolina

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March 1, 2018

Via Hand Delivery
Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
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RE: Danny B. Crane v. Raber's Discount Tire Rack, *et. al.*
Appellate Care No. 2015-002116

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Petition for Rehearing** in the above-referenced matter. Also enclosed is a check in the amount of $25.00 for the filing fee. Please date stamp the extra copy of the Petition for our records.

By copy of this letter and enclosure to Matthew Story and Leslie B. Boodry, counsel of record for the Carrier, and James Raber, *pro se* Employer, we are serving them with a copy of the **Petition for Rehearing** as indicated by the enclosed 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
Litigation Paralegal

/krc
Enclosure(s) as stated

cc: Steve Chandler, Esquire
Matthew J. Story, Esquire
Leslie B. Boodry, Esquire
James Raber, Raber's Discount Tire Rack