THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 2018-UP-85 (S.C.Ct.App. filed February 14, 2018)

Danny B. Crane, ... Petitioner,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the court of appeals on April 26, 2018. [R. p. 15].

QUESTIONS PRESENTED

This workers' compensation case presents important questions about the decision making process at the workers' compensation commission in hearing loss and dizziness cases. More specifically, it addresses whether the appellate panel can rely on a commissioner's own lay medical opinions and arbitrary credibility findings to disregard consistent, uncontradicted expert medical opinions based on objective testing results. The case raises novel issues not heretofore decided by this Court, to wit: (1) the doctrine of "sit and squirm" jurisprudence relied on for appellate review of disability determinations by the federal courts; and (2) whether a credibility finding can be reversed as unsupported by substantial evidence. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court." (emphasis added)).

The case also raises the question of whether *a lack of evidence* in an unrelated medical record can be used to support a finding of maximum medical improvement. This issue deals with a situation where the employee goes to a doctor for an unrelated medical condition (a broken rib) in the midst of treatment for his severe work-related hearing loss. The Commission misinterpreted boilerplate electronic medical records making no mention of hearing loss as evidence that the hearing loss had fully resolved. Later audiological testing and evaluations by an ENT showed the employee still suffered severe and profound hearing loss.

The specific questions presented for certiorari are:

1. Did the court of appeals err in affirming the appellate panel's finding that Crane reached maximum medical improvement on March 31, 2014, where the appellate panel erroneously relied on a medical record for an unrelated rib injury, while later medical records and hearing tests showed continuing hearing loss, dizziness and disability?

2. Did the court of appeals err in affirming the appellate panel's finding that Crane was not entitled to additional medical care when the physicians who actually treated Crane recommended an auditory brainstem response test (ABR) with follow up treatment to determine whether the hearing loss resulted from inner ear damage or from brain injury, and whether Appellant should undergo a cochlear implant?

3. Did the court of appeals err in affirming the appellate panel's finding that Crane was not a credible witness where the credibility finding was arbitrary, capricious and unsupported by substantial evidence due to the use of unreliable "sit and squirm" jurisprudence?

4. Did the court of appeals err in affirming the appellate panel's finding that Crane sustained no permanent disability when three Pure Tone Audiograms showed profound and severe hearing loss, and every doctor who evaluated Crane for hearing loss opined it was severe and permanent?

5. Did the court of appeals err in holding Crane was not entitled to temporary disability compensation after March 31, 2014, when uncontradicted medical evidence showed he remained disabled due to severe hearing loss and dizziness due to his work accident?

STATEMENT OF THE CASE

This appeal from the workers' compensation commission arises out of a work-related accident occurring on February 19, 2014. Petitioner Danny Crane was employed as a mechanic for James Raber d/b/a Raber's Discount Tire Rack. Crane had worked for Raber since July 2013.[1]

Crane was injured when he bent down to locate an air leak from an air-powered tire changer. The high-pressure 3" diameter hose exploded near his face bursting his ear drums. [R. p. 214, line 24 - p. 217, line 15]. Security cameras recorded the incident and the immediate aftermath. [R. p. 143 (CD)]. Crane immediately texted his wife to take him to the emergency room.

Crane's wife took him to Barnwell County Hospital. He was checked in at 5:05 p.m. Under Reason for Visit, the triage nurse wrote: "Air tank exploded at Raber tire. Not able to hear. Pain in right ear and right side of face. Happened approx. 30 min ago. Rt [illegible] pain." [R. p. 91].

The ER physician (Dr. Kassahun) recorded a chief complaint of "ear injury" which is "still present." The doctor wrote: "Patient had tire blow up while working and now has difficulty hearing on both ears." The patient was in "moderate" pain with "hearing loss/ringing" in both ears. [R. p. 94]. The Clinical Impression was "Hearing Loss - acute R/L." Crane was "advised to see ENT on 2/20/14 and he agreed." [R. p. 94]. The discharge diagnosis was "CONDUCTIVE HEARING LOSS MIDDLE EAR." [R. p. 95].

Crane saw the ENT, Dr. Ansley, on February 20, 2014. On physical exam, Dr. Ansley noted "Bilateral tympanic membrane perforations . . . He does seem to be having difficulty hearing. He

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[1] Raber claimed he was not required to carry workers' compensation insurance because his workers were independent contractors; not employees. The commission held the workers were employees and Raber was an uninsured employer subject to the Act. Raber has not appeared in this appeal. The Uninsured Employer's Fund was directed to pay benefits to Petitioner. This finding was not appealed and is not at issue in this Petition.

was sent for an audiogram which showed a severe sensorineural hearing loss in bilateral ears."[2] [R. p. 108].

Crane had the CT scan on February 25, 2014 for: "Sudden hearing loss. Patient states he had a tire changer with 150 PSI blow up in his face last week, with loss of hearing both ears." [R. pp. 97-98].

Crane also saw his family doctor, Dr. Koukos, on February 25, 2014. On physical exam, Dr. Koukos wrote: "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." Dr. Koukos ordered another CT scan. [R. pp. 126-127].

On March 6, 2014, Crane returned to Dr. Ansley for repeat "evaluation of his ears. He is still having difficulty hearing." The Pure Tone Audiogram showed a downward shift (worsening) of Crane's hearing. He was referred to MUSC for "ABR study to obtain more objective measure of his hearing."[3] [R. pp. 111-112]. Crane was unable to obtain the ABR as his family medical insurance did not cover MUSC. [R. p. 220, lines 5-22]. He only worked two partial days after the accident, so had no income. [R. p. 217, line 23 - p. 218, line 7].

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[2] The commission's regulations state: "The calculation of a hearing handicap is derived from the pure tone audiogram . . ." S.C. Code Ann. Reg. 67-1101 (B)(2010). Dr. Ansley's audiologist tested Crane's hearing with the pure tone audiogram required by the regulation.

[3] The auditory brainstem response (ABR) is an auditory evoked potential extracted from ongoing electrical activity in the brain and recorded via electrodes placed on the scalp. The ABR is used for newborn hearing screening, auditory threshold estimation, intraoperative monitoring, determining hearing loss type and degree, and auditory nerve and brainstem lesion detection.

ABR is particularly used to determine suitability and effectiveness of cochlear implants – which are used to treat patients diagnosed with "severe or profound sensorineural hearing loss."

On March 26, 2014, Crane lost his balance getting out of the shower. He fell onto the toilet and cracked a rib. He was seen at Barnwell County Hospital. [R. pp. 99-104, 106]. He followed up with Barnwell Family Practice for the rib injury on March 31, 2014. He was not seen by his regular doctor, Dr. Koukos. He was seen by Dr. Mol Ky. [R. pp. 114-116]. Although Dr. Ky neither treated nor examined Crane for hearing loss, the commission used Dr. Ky's report to find "any injuries Claimant sustained on the date of the accident resolved." [R. p. 68, Finding of Fact 16].

Crane was evaluated by a neurologist, Dr. David Rogers, on May 19, 2014. On physical examination, Dr. Rogers reported "Patient demonstrates apparent healed 60% tear of right tympanic membrane. More complete approximately 80% tear in the left tympanic membrane. Both TMs were injected, left being affected more greatly than right." Dr. Rogers also reviewed the Pure Tone Audiogram results and assigned impairment ratings. He 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. 134-139].

The case was tried on June 26, 2014, before Commissioner Susan Barden. At the time of the trial, Crane had purchased an in-ear amplifier at Walgreens. He wore the amplifier in his left ear - which still retains some hearing. His right ear is completely deaf. The amplifier allowed him to hear most of the questions asked of him during the trial. However, the problem with the amplifier is that very loud sounds – such as the noise in a tire changing business – are so loud they give him headaches. He cannot work with the amplifier in, but without it, he cannot hear cars coming in or normal speaking. [R. p. 24; p. 206, line 24 - p. 207, line 2; p. 208, lines 11-15; p. 217, lines 23-29; p. 245, line 18 - p. 248, line 20].

Commissioner Barden stopped the trial after Petitioner rested without hearing any defense witnesses. She advised the parties that Petitioner had proven his case as to being an employee

subject to the Act, such that no further evidence on the employment issue was necessary. She further advised the attorneys that she did not consider Crane a credible witness.

After the initial proposed order was drafted, Petitioner filed a motion to submit additional evidence. Commissioner Barden granted the Motion. The additional evidence was considered in her revised order.

The additional evidence was an updated Pure Tone Audiogram done on August 19, 2014 by the same audiologist who did the first two Audiograms, along with reports from the audiologist and an ENT, Dr. Rocco D. Cassone (Dr. Ansley's partner at Carolina Ear, Nose and Throat Clinic).

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's IMPRESSION/RECOMMENDATION was: "He reads lips. He may be a candidate for a cochlear implantation and this should be considered. He should probably have . . . audiometric evaluations. He should be considered disabled because of this." [R. p. 184].

The audiologist repeated the recommendation for ABR studies "as a means for obtaining more objective measures of his hearing, so as to obtain a true estimate of his hearing. Findings of the assessment conducted on August 19, 2014, suggest a right profound hearing loss, while the left ear suggests a profound to severe hearing loss." [R. p. 183].

Commissioner Barden issued her Decision and Order on April 30, 2015. She found the uninsured employer subject to the Act. She further ordered "that Claimant is entitled to be reimbursed for the Emergency Room visit on the date of the accident, the CT scans and associated visits, the two visits with Dr. Ansley, and the February 25, 2014, and March 31, 2014, visits to

Barnwell Family Practice." [R. p. 59]. She denied all future medical treatment and temporary total disability compensation. She specifically found "Claimant is not entitled to any permanent impairment as a result of the incident as any injuries resolved or returned to baseline." [R. p. 40]. She denied Crane's request to be sent for ABR testing.

Petitioner appealed to the appellate panel. The appellate panel affirmed the single commissioner on October 1, 2015. [R. pp. 60-78].

Petitioner timely appealed to the court of appeals. The court affirmed in part and reversed in part in an unpublished decision. Crane v. Raber's Discount Tire Rack, Op. No. 2018-UP-85 (S.C.Ct.App. filed February 14, 2018). The Petition for Rehearing was denied on April 26, 2018.

ARGUMENT

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

Both the court of appeals and the commission fell into a logical trap, leading them to a false conclusion. The court of appeals 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. The appellate panel found "Claimant reached maximum medical improvement on March 31, 2014." [R. p. 56, Finding of Fact 39]. The date corresponds with a visit for an unrelated rib injury by Dr. Mol Ky. [R. pp. 114-116]. The appellate panel seems to have concluded – despite a complete lack of supporting evidence in the record itself [4] – that this visit was also for hearing loss.

The commission concluded that because there was no mention of hearing loss or dizziness in Dr. Ky's report, the condition must have completely resolved. The commission employed fallacious reasoning for *Absence of evidence is not evidence of absence.*

The appellant panel 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." [R. p. 67, Finding of Fact 11]. Surely if the emergency room visit is unrelated, then so necessarily must the follow up visit for "RIGHT RIB PAIN." [R. p. 114 (*sic*)]. A medical evaluation for an unrelated condition cannot be substantial evidence supporting a finding that the employee reached MMI with no impairment for

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[4] 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. 67, Finding of Fact 10(b)]. Illogically, the commission places great reliance on a medical record wholly unrelated to the compensable hearing loss.

a compensable injury. The absence of evidence of continuing hearing loss in Dr. Ky's report is not evidence that the hearing loss was absent.

The specific 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 records. 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 a simple way to determine what is boiler plate and what is new. Consider Dr. Koukos' 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. 126 (*sic*)].

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 *same* report includes the notation ". . . normal hearing . . ." [R. p. 127]. 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. 108]. 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 sensorineural hearing loss." [R. p. 111]. The hearing loss was confirmed by the second Pure Tone Audiogram on the same day. [R. p. 112].

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. 117 (*sic*)]. 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. 118 (*sic*)]. Although there is a mention of "normal external auditory canals, with tympanic membranes clear and mobile," this reference appears to be boilerplate. And even if it is based on an actual physical exam (an amazingly thorough one for a rib injury), there is no indication as to whether Crane's hearing was normal or impaired.

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 the neurologist, Dr. Rogers, "found Claimant to be at maximum medical improvement;" yet disregarded his opinion as unreliable – perhaps because Dr. Rogers opined "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. 138]. Dr. Rogers' opinion (and the other medical opinions) do not support the decision the single commissioner sought to render. 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. 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 appellate 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 appellate panel arbitrarily ignored and misread the later reports from Dr. Rogers and Dr. Cassone finding the hearing loss to be permanent. [R. pp. 119; 183-184]. As such, the Writ should be granted, and this case should be reversed and remanded for a proper finding of MMI and determination of disability due to dizziness and permanent hearing loss.

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 had fully resolved and he reached MMI on March 31, 2014. The evidence shows otherwise. Petitioner believes the appellate panel and the court of appeals overlooked or misapprehended the medical evidence in the record.

On August 19, 2014, Dr. Cassone stated "[Crane] 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. 184]. 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 case." [R. p. 76, Finding of Fact 42].

The appellate panel erred in substituting the single commissioner's 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.[5]). There were no medical opinions contradicting or disagreeing with Dr. Koukos, 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

[5] The instant case was decided by the same single commissioner who decided Burnette.

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 for an unrelated rib injury, yet deny reimbursement for later medical treatment for the work-related hearing loss.

Respectfully, Petitioner believes the appellate panel erred in concluding the rib injury records were dispositive evidence that the hearing loss had fully resolved with no need for further treatment. The appellate panel committed an error of law when it ignored or overlooked the later records from Dr. Rogers and Dr. Cassone (and the third Pure Tone Audiogram) confirming that Crane still suffered severe permanent hearing loss and dizziness. As treatment for a rib injury wholly unrelated to the occupational injury can have no bearing on whether Crane requires more treatment for his hearing loss, Petitioner requests the Writ 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 of appeals affirmed the appellate panel's finding that Crane was not a credible witness. Petitioner 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, even credibility findings must be supported by substantial evidence. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court." (emphasis added)). Cf. 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."); Collins v. Bisson Moving & Storage,

Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998)("Although the general proposition that the jury determines credibility issues is a correct one, there is no issue for the jury when the evidence as a whole admits of only one reasonable inference").

In the instant case, the credibility finding 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."). Rulings of this type have been roundly condemned by the federal courts as inherently unreliable in disability cases. "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." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984).

The inherent unfairness and unreliability of the appellate panel's decision puts the Court in a difficult position. Either the credibility finding must be reversed or, as the court of appeals did in Burnette, the underlying factual findings 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). Even if the trier of fact can discount much of Crane's testimony on credibility grounds, it cannot use Crane's perceived lack of credibility to disregard the consistent medical evidence and opinions of the doctors – particularly when those opinions rest on objective testing results from the Pure Tone Audiogram required in hearing loss cases by the commission's own regulations. See, S.C. Code Ann. Regs. 67–1102 (2007)("The calculation of a hearing handicap is derived from the pure tone audiogram . . .").

Petitioner requests that the Court issue the Writ to either address and reverse the credibility finding or to reverse on other grounds as the court of appeals 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 date of the accident, and offered no opinion to the contrary." [R. p. 75, 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. 67, 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. pp. 114 - 118]. Dr. Koukos is Crane's family doctor. [R. p. 240, 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 – including testing months after the June 26, 2014 hearing. 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. 134-140]. Audiology testing on

August 19, 2014 "suggest[ed] a right profound hearing loss, while the left ear suggests a profound to severe hearing loss." [R. p. 183]. 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. 184].

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 considerable 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 base findings of fact on its own lay 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 of appeals 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 (March 31, 2014), the court overlooked that Crane was not actually at MMI. Petitioner recognizes this argument rests on a reversal of the MMI finding argued in Argument 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.

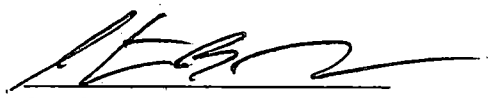
Cassone opined "He may be a candidate for a cochlear implant and this should be considered." [R. P. 184]. This recommendation implies Crane may not be at MMI.

Petitioner requests that the Court issue the Writ to 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 based on the evidence from Dr. Cassone that "He should be considered disabled because of this." [R. p. 184].

CONCLUSION

For the foregoing reasons, the Court should issue the Writ of Certiorari. After briefing and oral argument, 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 on May 19, 2014 (per Dr. Rogers) or on August 14, 2014 (per Dr. Cassone).

Respectfully Submitted,



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May 23, 2018
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 caused the **Petition for a Writ of Certiorari** and **Appendix** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on May 23, 2018, addressed as follows:

Matthew J Story, Esquire
Leslie B. Boodry, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive Suite 200
Charleston SC 29492-7595

Raber's Discount Tire Rack/
James Raber
1009 Dunbarton Blvd.
Barnwell, SC 29812

Lisa C. Glover, Esquire
SC Uninsured Employers Fund
PO Box 210039
Columbia, SC 29221

Katherine R. Carter

May 23, 2018
Columbia, South Carolina

SAMUELS

STEPHEN B. SAMUELS
ATTORNEYS AT LAW

May 23, 2018

VIA HAND DELIVERY
Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Danny B. Crane v. Raber's Discount Tire Rack, *et al.*
Appellate Case No.: 2015-002116

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of our **Petition for a Writ of Certiorari** in the above-referenced matter along with our check in the amount of One Hundred ($100.00) Dollars as payment of the filing fee. We have also enclosed two (2) copies of the **Appendix**, one of which is unbound per Rule 267(d).

By copy of this letter and enclosure to Matthew J. Story, Leslie B. Boodry, and Lisa C. Glover, counsel of record for the Respondents, we are serving a copy of our **Petition for a Writ of Certiorari** and **Appendix** upon them as indicated by the attached Proof of Service. We are also providing a copy of our **Petition for a Writ of Certiorari** to the South Carolina Court of Appeals pursuant to Rule 242(c).

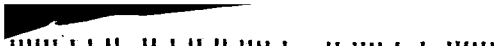
If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration. With kindest regards, I am

Yours very truly,

Katherine R. Carter
Litigation Paralegal

/krc
Enclosure(s) as stated

cc: Mathew J. Story, Esq.
Leslie B. Boodry, Esq.
Lisa C. Glover, Esq.
R. Stephen Chandler, Esq.
James Raber d/b/a Raber's Discount Tire Rack
The Honorable Jenny Abbott Kitchings



SAMUELS
LAW FIRM

1320 RICHLAND STREET
COLUMBIA, SC 29201

RECEIVED
MAY 25 2018
SC Court of Appeals

Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201