THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

ARGUMENT

1. The appellate panel arbitrarily found Crane not credible based on its own misreading of the evidence and use of "sit and squirm jurisprudence." [In Reply to Respondent's Return at pages 9-11].

Respondents argue that the commission's credibility findings are "based upon inconsistencies between the Petitioner's testimony, objective medical records, and the Single Commissioner's observation of Petitioner during the June 26, 2014 hearing." Respondents add "The Appellate Panel's findings of fact as to Petitioner's credibility are corroborated by medical records from multiple distinct providers, Petitioner's own appearance and testimony at the hearing, and are not clearly erroneous in view of this substantial evidence in the record." [Return at pages 9, 11]. Petitioner acknowledges there are minor inconsistencies in the record. However, one could say that about every record on every appeal. As Ralph Waldo Emerson famously wrote: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Self-Reliance, Ralph Waldo Emerson.

To ask for complete consistency in all things is too much to expect in any proceeding – particularly when we are dealing with a complex medical diagnosis made by different doctors. While the commission is charged with resolving inconsistencies, credibility findings should not be applied slavishly, formulaically and arbitrarily as a proxy for determining facts from evidence. In this case, the Single Commissioner – affirmed by the appellate panel – relied on *sit and squirm jurisprudence* in lieu of examining the actual evidence of hearing loss and disability. Despite the fact Crane's ability to testify in a quiet room with a hearing aid was fully explained from the outset of the hearing, the commissioner persisted in setting herself against him.

More importantly for this case, the objective medical testing showed severe and profound hearing loss. The hearing loss persisted on three separate tests perform by the same audiologist. The

single commissioner erred in elevating her gut instinct over objective medical evidence. 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."). If the hearing process is to have any level of administrative, such rank speculation cannot be allowed to trump actual evidence of injury and disability.

Furthermore, the inconsistency relied on by the commission is not even real. The commission relied on an unrelated medical record for an unrelated rib injury to somehow conclude that Crane's hearing loss had completely resolved.

Petitioner appreciates that a credibility determination is treated with considerable deference by this Court. Nonetheless, a credibility determination cannot be so sacrosanct that it can never be reversed on appeal. 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)). Every factual finding by an adminstrative agency is subject to review and correction by the appellate courts. This case warrants review by the Supreme Court precisely because it exposes how an arbitrary credibility finding can be misused to render any outcome the trier of fact desires to be "appeal proof." A credibility finding should be used lightly to resolve conflicts in testimony between different witnesses. To use it as a sword to strike down a meritorious claim supported by objective medical testing is quintessentially an arbitrary exercise of judicial authority. It is time for this Court to exercise it's authority, deliberation and wisdom to draw the line between the correct use and the arbitrary use of a credibility finding. For these reasons, this is an important and novel question for which the writ of certiorari should be issued.

2. The Appellate Panel erred in finding Danny Crane had reached MMI and was not entitled to additional medical treatment and disability compensation.

Respondents content the Appellate Panel correctly found Crane had reached MMI with no need for medical treatment and compensation on March 31, 2014. Respondents contend these findings are supported by "the medical records and petitioner's lack of credibility." [Return page 12].

This again points out how an arbitrary credibility finding becomes the elephant in the room, for if this Court is powerless to address it, then the Commission can simply include an unfavorable credibility finding and never be reversed. The issue has become much more important in recent years because it is a relatively new development. While the Commission has always made credibility findings *when necessary* to resolve conflicts in the evidence, a credibility finding to ensure a denial of benefits is not amenable to review and correction by the appellate courts is a newer (and worrisome) practice.

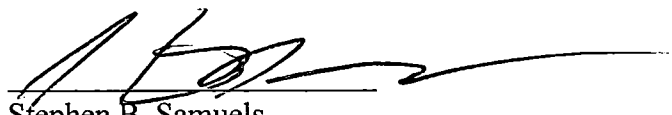
As to medical records, this again goes to the illusory contradiction between Dr. Ky's March 31, 2014 medical record for the rib injury and all the other records showing hearing loss and dizziness. It strains credulity to believe that Crane's deafness spontaneously resolved itself on March 31, 2014 without time or treatment. It becomes even less logical when the same hearing loss was present four months later, proven by the third Pure Tone Audiogram on August 19, 2014. On that date, 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]. 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].

Every finding by the Workers' Compensation Commission must be supported by substantial evidence. If a finding is logically impossible, it cannot be based on evidence. "Inferences of fact, like fullbacks on football teams, do not ordinarily run backward." Hite v. Ed Smith Lumber Mill, Inc., 420 S.E.2d 860, 309 S.C. 185 (Ct. App. 1992). The Commission's finding that the hearing loss resolved on March 31, 2014 is logically impossible and must be reversed. Therefore, the Petition should be granted.

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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July 2, 2018
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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 **Reply to Return to Petition for a Writ of Certiorari** 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 July 2, 2018, addressed as follows:

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