THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AVERY B. WILKERSON, APPELLATE PANEL CHAIRMAN, COMMISSIONER

WCC File No. 0818219

Joe A. Osmanski, Employee, ... Appellant,

v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier ..... Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION APPLIED THE CORRECT LEGAL STANDARD FOR FRAUD IN THE APPLICATION?

II. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT'S CLAIM IS BARRED DUE TO FRAUD IN THE APPLICATION?

III. WHETHER CLAIMANT IS BARRED FROM ARGUING ON APPEAL THAT S.C. CODE ANN § 42-9-35(D) SHOULD APPLY TO THIS CLAIM?

IV. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT'S CLAIM WAS BARRED BECAUSE IT WAS NOT UNEXPECTED FROM CLAIMANT'S POINT OF VIEW?

STATEMENT OF THE CASE

Appellant Joseph A. Osmanski ("Claimant") alleges he incurred a work-related injury on November 1, 2008, when a box containing a recliner fell, causing his left arm to be pulled straight down and thereby injuring it. (R. p. 162, line 14 – p. 163, line 15).

Prior to the November 1, 2008 claim, Claimant suffered a 1987 work-related accident. Although he injured multiple body parts in the 1987 accident, his left arm was the most significantly injured. (R. p. 115, line 18 – p. 116, line 10). As a result of the 1987 accident, Claimant was treated by several physicians, including Dr. Larry Chidgey at the University of Florida, who was his primary treating physician. (R. p. 196, line 1 – p. 197, line 21) (R. p. 139, lines 18-21) (R. pp. 443-465) (R. pp. 466-484). Claimant underwent multiple surgeries, including a left total elbow replacement. (R. p. 116, lines 11-22) (R. p. 281, line 17 – p. 282, line 18).

Following his recovery from the above-referenced surgery, the Claimant was assigned an impairment rating of 14 percent for his left arm and 6 percent for his right shoulder for a combined rating of 20 percent. (R. p. 465). Claimant was given permanent lifting restrictions of 10 to 15 pounds for the left arm, (R. p. 283, line 16 – p. 284, line 20) (R p. 285, line 2 – p. 287, line 6) (R. p. 288, line 24 – p. 289, line 23), which Claimant admitted he was aware of. (R. p. 145, line 14 – p. 146, line 16). Claimant was specifically and repeatedly warned by Dr. Chidgey that he was not to stress the left arm and should permanently restrict his activities. (R. pp. 457, 463-465). After Claimant's elbow surgery, Dr. Chidgey "again stressed the importance of limited use of [Claimant's] left arm to increase the longevity of this prosthesis," that Claimant "will **always** have a 15 pound weight limit restriction for the left upper extremity," and Claimant "should also

avoid situations where he might fall or excessively stress his left arm. We stressed this multiple times today, and the **patient stated he understands**." (R. p. 463) (emphasis added). Although Dr. Chidgey testified that the Claimant's work restrictions were permanent unless things changed, Dr. Chidgey also testified that there was no medical evidence to suggest that the Claimant's condition had changed between March 2002 and the date of the Claimant's alleged November 2008 work-related accident. (R. p. 289, lines 13-23). Claimant received benefits for the 1987 injury, and ultimately settled his workers' compensation claim with his employer for approximately $86,000. (R. p. 200, lines 2-25).

In 2006, Claimant applied for work with Respondent Watkins & Shepard Trucking, Inc. ("Employer") as a truck driver and furniture deliveryman. (R. p. 120, lines 10-19). Claimant completed multiple forms during his application process where he denied having any prior injuries or impairment. (R. p. 384) (R. p. 485) (R. p. 486). Claimant admitted at the hearing that, prior to accepting employment, he knew the job required him to lift 100-150 pounds, which was outside of the permanent lifting restrictions Dr. Chidgey had placed on him. (R. p. 154, lines 3-16). Claimant admitted that his job required him to use both arms. (R. p. 217, lines 5-8). Claimant testified that he knew he was subject to the lifting restrictions imposed by Dr. Chidgey when he applied for work with Employer, and that the restrictions had not been lifted by a medical provider. (R. p. 146, lines 5-25) (R. p. 147, lines 7-17). Claimant confirmed that, although he was aware of these restrictions, (R. p. 147, lines 1-17), he knew Employer was not. (R. p. 155, lines 4-20). Although Claimant agreed that, "it would have been a good idea" to have told Employer about his prior injury to and lifting restrictions on his

left arm, (R. p. 150, line 22 – p. 151, line 2), he openly admitted that he did not "bother telling them" because he did not think it was specifically asked of him and because he thought he could perform the job. (R. p. 150, line 12 – p. 151, line 4) (R. p. 147, line 13 – p. 149, line 17). Although he marked "no" on forms provided to Employer that asked whether he had any impairment, (R. p. 384) (R. p. 485) (R. p. 486), he admitted at the hearing that his left arm was, in fact, impaired. (R. p. 152, lines 1-11). Although Claimant testified that he could not recall giving the phone interview that was the source of the Post Job Offer Questionnaire, (R. p. 384), he never denied that the interview took place. He simply said that he could not recall. (R. p. 130, line 25 – p. 131, line 1) (R. p. 150, lines 7-15). With respect to the portion of the D.O.T. physical form that he filled out in October 2006, Claimant explained that he checked "no" to the question asking whether he had any impairment because he said he understood the form to be asking only for the prior five years. (R. p. 152, line 12 – p. 153, line 20). However, Claimant admitted he had been treated by Dr. Chidgey within the five years prior to filling out this form. (R. pp. 460-462, 464-465). With respect to an affirmative action form on which Claimant marked that he did not have any impairment, (R. p. 486), Claimant testified that he "answered no that I'm not disabled. That's what I answered to," despite the fact that he acknowledged he had an impairment. (R. p. 168, line 4 – p. 169, line 23).

As part of the hiring process, Dr. Albert James Osbahr examined Claimant on October 30, 2006. (R. p. 315, Osbahr Depo. p. 6, lines 6-8). Although Dr. Osbahr noticed an impairment to Claimant's left arm, (R. pp. 315-316, Osbahr Dep. p. 9, lines 23 – p. 10, line 1), he had no information regarding whether Claimant had suffered a previous accident or had undergone surgery on his left elbow, and did not know that

Claimant had been assigned an impairment rating or any lifting restrictions. (R. p. 315, Osbahr Dep. p. 7, line 15 – p. 8, line 24; *see also* R. p. 316, Osbahr Dep. p. 11, lines 20-25). Claimant admitted that he did not inform Dr. Osbahr that he had been placed under lifting restrictions. (R. p. 138, lines 22-24) (R. p. 316, Osbahr Dep. p. 10, lines 11-17). Dr. Osbahr did not note any scarring on Claimant's left arm. (R. p. 318, Osbahr Dep. p. 20, lines 8-21). Specifically, Dr. Osbahr concluded after examining Claimant that, "even though he had the impairment, it appeared he could use his arm for the purposes of driving a truck." (R. p. 318, Osbahr Dep. p. 21, lines 7-8). Dr. Osbahr was not provided with Claimant's job description and was only examining him "overall for truck driving." (R. p. 316, Osbahr Dep. p.11, lines 13-16). Dr. Osbahr had no connection to and was not provided any information regarding a lift test, but only certified that Claimant was able to perform the duties of a commercial motor vehicle driver. (R. pp. 318-319, Osbahr Dep. p. 21, line 17 – p. 22, line 13). Dr. Osbahr was unaware of and did not evaluate Claimant for any pushing, pulling or lifting requirements of his job. (R. pp. 319-320, Osbahr Dep. p. 25, line 23 – p. 26, line 12). Dr. Osbahr testified that he was not certain whether he sent the "long" form, which would have had the notation regarding Claimant's arm impairment, or the "short" form to Employer. (R. p. 318, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (R. pp. 319-320, Osbahr Dep. p. 25, line 6 – p. 26, line 3 (Dr. Osbahr testifying that he cannot confirm whether Employer received the long or the short form)).

Matthew Grandy, the Director of Driver Recruiting and Training, testified that all hiring for Employer is conducted from corporate headquarters in Missoula, Montana. Mr. Grandy testified that, once an application has been received and evaluated, a conditional job offer is extended, after which the company engages in a post job offer

evaluation in order to identify an individual's ability to perform the job. (R. p. 269, Grandy Dep. p. 9, line 5 – p. 10, line 24). Mr. Grandy testified that a conditional offer of employment is contingent upon completion of a drug test, a lift test, a D.O.T. physical, as well as the post-job offer questionnaire administered by the safety department. (R. p. 270, Grandy Dep. p. 10, lines 2-15) (R. p. 272, Grandy Dep. p. 18, line 14 – p. 19, line 1). Mr. Grandy further testified that, had Claimant provided Employer with accurate information regarding the permanent work restrictions that were placed upon Claimant by Dr. Chidgey, Claimant would not have been subjected to a lift test. (R. p. 273, Grandy Dep. p. 25, lines 16-22). Instead, Employer would have conducted further research, including obtaining a copy of Claimant's work release from Dr. Chidgey. (R. p. 273, Grandy Dep. p. 25, line 22 – p. 26, line 7). Mr. Grandy confirmed that Employer would want any medical records documenting Claimant's restrictions in order to conduct a thorough investigation to determine if he was physically capable of performing the job. (R. pp. 273-274, Grandy Dep. p. 25, line 16 – p. 27, line 4).

At the hearing, Claimant denied that his left arm and elbow had been bothering him since the 2002 total elbow replacement. (R. p. 142, lines 15-19). However, just days prior to his alleged November 1, 2008 accident, Claimant told his family doctor that he still had range of motion problems. Claimant later admitted that he had been experiencing limited range of motion and occasional numbness. (R. p. 161, line 17 – p. 162, line 13). In November 2008, Claimant told Dr. McIntosh "it has always been painful, but this is a little more." (R. p. 441) (R. p. 442).

Claimant alleges that, on November 1, 2008, a box containing a recliner weighing 100-150 pounds shifted when he tried to move it. The box came down and straightened

his left arm out, injuring it. (R. p. 132, line 20 – p. 134, line 2) (R. p. 162, line 14 – p. 163, line 15). There were no witnesses to this accident. (R. p. 160, lines 14-16). Interestingly, Claimant did not report this accident when he visited his family doctor 12 days later. (R. p. 156, line 8 – p. 158, line 11) (R. p. 442).

Claimant began seeing Dr. Chidgey in January 2009 for his alleged work-related accident. (R. p. 160, lines 17-20). Dr. Chidgey testified that there were some concerns that Claimant's implant had possibly loosened, as well as the possibility of a biceps tendon rupture. (R. p. 294, line 9 – p. 295, line 8). Dr. Chidgey could not confirm whether there actually was any injury to the biceps. (R. p. 309, line 8 – p. 310, line 8). Claimant testified that the treatment he had undergone dealt primarily with his elbow replacement, or prosthesis. (R. p. 166, lines 5-19).

In July 2009, Claimant filed a Form 50 seeking medical treatment and workers' compensation benefits from Employer and its workers' compensation insurer, Zurich North American Insurance Company (jointly "Respondents"). Respondents filed a Form 51 denying that Claimant suffered a work-related accidental injury as defined by the South Carolina Workers' Compensation Act ("Act") and that his claim was barred because Claimant had engaged in fraud in the application.

A Hearing took place on April 29, 2010 before the Single Commissioner Susan S. Barden. Commissioner Barden determined Claimant did not satisfy his burden to prove a compensable injury to the left upper extremity. (Decision and Order of Single Commissioner Barden, November 10, 2010, R. p. 36). Commissioner Barden further found that Claimant failed to prove that he had sustained an accidental injury pursuant to Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), and that Claimant had

engaged in fraud in the application which barred his claim under Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973). (R. pp. 40-41). Commissioner Barden also expressed doubts about Claimant's credibility. (R. pp. 37-38, 40-42).

Within the proscribed time period, the Claimant submitted a Form 30 Request for Commission Review. The Full Commission heard oral argument on April 18, 2011 and adopted the findings of fact of the Single Commissioner in their entirety, (Decision and Order of the Full Commission, July 26, 2011, R. p. 9) ("Commission Decision"), including that Claimant failed to prove he suffered a work-related injury, that Claimant's alleged injury was not accidental pursuant to Capers, and that Claimant's claim was barred by Cooper v. McDevitt. (R. pp. 10-11, 14-18). The Commission also found Claimant's hearing testimony to not be credible. (R. pp. 10-12, 13-16).

Claimant timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. A reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case."

Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679,681-82 (Ct. App. 2002). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, the Commission is free to believe or disbelieve some or all of the testimony of witnesses. *See*, Holcomb v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) (because the Commission is the trier of fact in workers' compensation cases, it "may believe part or all of a witness's testimony").

ARGUMENTS

I. The Commission applied the correct legal standard for fraud in the application.

Claimant argues that the Commission erred by applying the wrong legal standard to this case, and then urges this Court to supplant the test for fraud in the application as set forth in Cooper v. McDevitt with the general common law test for fraud. However, none of the common law fraud cases cited by Claimant – Outlaw v. Calhoun Life Ins. Co., 236 S.C. 272, 113 S.E.2d 817 (1960) (alleging fraudulent inducement to execute a final release and discharge on a life insurance policy); Hansen v. DHL Laboratories, 316 S.C. 505; 450 S.E.2d 624 (Ct. App. 1994) (alleging fraudulent inducement to sign promissory notes); and Byars v. Cherokee County, 237 S.C. 548; 118 S.E.2d 324 (1961) (alleging fraudulent sale and reconveyance of property) – involved a workers' compensation claim. Fraud in the application is a defense peculiar to workers' compensation and is distinct from claims or defenses alleging common law fraud. The test for fraud in the application is set forth clearly in Cooper v. McDevitt and requires that an employer prove the following: "(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the inquiry." 260 S.C. at 468, 196 S.E.2d at 835. This rule has been applied consistently in workers' compensation claims in South Carolina. *See, e.g.*, Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009) (finding the claimant's arguments that he was entitled to make material misrepresentations on his employment application "because he believed he was fit for construction work . . . a specious

position"); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) (finding claimant lied on an application form where she failed to disclose prior back and leg problems, that her employer regularly relied on the information supplied by applicants in making its hiring decisions, and that there was a causal connection between her failure to disclose her back problems and her alleged back injury); Frederick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009) (claim for back injury denied because claimant falsely indicated on her job application that she had had no prior back injuries).

As the South Carolina Supreme Court pointed out in Brayboy, once an employer establishes the three prongs set forth in Cooper v. McDevitt, the "employment relationship may be vitiated." Brayboy, 383 S.C. at 467, 681 S.E.2d at 569. In other words, once an employer has proven fraud in the application, the employer/employee relationship is deemed to not have existed for workers' compensation purposes. Id., 681 S.E.2d at 569; Frederick, 385 S.C. at 16, 682 S.E.2d at 519-20. If there is no employer-employee relationship at the time of the accident, the Act does not apply and the inquiry is complete. Brayboy, 383 S.C. at 466-67, 681 S.E.2d at 568-69

Claimant cites no workers' compensation cases to support his position that the burden of proof in this case should be clear and convincing evidence. Contrary to Claimant's position, the South Carolina Supreme Court has applied a preponderance of the evidence standard, Brayboy, 383 S.C. at 568, 681 S.E.2d at 466 (stating that the "existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard"), and, with respect to the underlying factual issues, the substantial evidence standard. *See*, Jones, 355 S.C. 413, 586 S.E.2d (applying the substantial evidence

standard to the factual determination that employer met the three-prong test set forth in Cooper v. McDevitt); *see also* Cooper v. McDevitt 260 S.C. at 469, 196 S.E.2d at 835 (finding "ample evidence" supported the finding below that false statements in an employment application barred benefits). In any event, as explained in more detail below, the Commission Decision in this case meets all three evidentiary standards – clear and convincing evidence, preponderance of the evidence and substantial evidence. Therefore, the Commission did not err with respect to the evidentiary standard applied in this case and this Court should affirm.

II. The Commission correctly determined that Claimant's claim is barred due to fraud in the application.

Despite Claimant's arguments to the contrary, the Commission correctly and properly determined that Claimant's workers' compensation claim is barred because he made false representations on his job application. As noted above, the Cooper v. McDevitt defense requires proof that Claimant knowingly and willfully made a false representation as to his physical condition, that Employer relied on the false representation and such reliance was a substantial factor in the hiring, and that a causal connection exists between the false representation and the injury. The Commission's findings on all three of these prongs are supported by substantial evidence – even by clear and convincing evidence – in the record and, therefore, should be upheld by this Court.

Claimant does not argue in his opening Brief either: 1) that he did not make a knowingly false misrepresentation on his job application,[1] or 2) that there was a causal connection between Claimant's misrepresentation and the subsequent injury. He has thus

[1] In addition, Claimant's statement agreeing with "the logic" in Respondents' position regarding the false representations he made in response to Employer's questions, (App. Br. p. 10), is a further concession of this point.

conceded these issues. *See* McClurg v. Deaton, 716 S.E.2d 887, 888 n.2, 2011 S.C. LEXIS 288, ** 5-6, n.2 (2011) (observing that, "[i]t is axiomatic that an issue cannot be raised for the first time in a reply brief"). Because the Commission's findings of fact are amply supported by the record below, (Commission Decision, R. pp. 10-17), and because Claimant has not challenged them on appeal, this Court should affirm the Commission's findings of fact on the first and third prongs of the test for fraud in the application.

Claimant does challenge the Commission's finding that Employer relied on his material representations, arguing that Employer knew Claimant's statements to be false. Claimant's argument is built on a number of factual inaccuracies that are not supported by the evidence and, therefore, ultimately fails. Claimant states that Dr. Osbahr, "found that the Appellant had impairment and problems with the use of his left arm, but certified that he could still perform the job." (App. Br. pp. 6, 12). What the record reveals, however, is that Dr. Osbahr only certified that Claimant had passed his D.O.T. physical and could drive a truck. (R. p. 318, Osbahr Dep. p. 21, lines 7-8). Dr. Osbahr was not provided with Claimant's job description, any information regarding the lift test, and did not evaluate him for any pushing, pulling or lifting requirements of his job. (R. p. 316, Osbahr Dep. p.11, lines 13-16) (R. pp. 318-319, Osbahr Dep. p. 21, line 17 – p. 22, line 13) (R. p. 319-320, Osbahr Dep. p. 25, line 23 – p. 26, line 12).

Claimant also argues that the Commission's conclusion of law that Employer "never had the opportunity to explore the full extent of the Claimant's condition because it was concealed" is in error because it is contradicted by other evidence in the record. (App Br. p. 11). First, to the extent there is conflicting evidence in the record, the Commission's findings will be upheld so long as they are supported by substantial

evidence in the record. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528. Here, substantial evidence supports the Commission's finding. In addition to the forms Claimant filled out denying any impairment and his statements that he had no intention of informing Employer about his left arm impairment and lifting restrictions unless directly asked, there is also testimony by Employer's manager that they knew nothing about Claimant's impairment the entire time he worked for Employer. (R. p. 256, line 18 – p. 258, line 1).

Second, the sentence in the Commission Decision following the one quoted by Claimant reveals that, "[b]ased on the substantial evidence including the medical records of the Claimant and the testimony of Dr. Osbahr, we find that, although Dr. Osbahr on his own discovered some impairment during the examination, **he never knew the full extent**." (Commission Decision, R. p. 20) (emphasis added). All of the credible evidence in the record supports this conclusion. Although Dr. Osbahr noticed an impairment to Claimant's left arm, (R. pp. 315-316, Osbahr Dep. p. 9, lines 23 – p. 10, line 1), Claimant did not reveal to him that he had suffered a previous accident, that he had undergone surgery on his left elbow, or that he had been assigned an impairment rating or was under any lifting restrictions. (R. p. 315, Osbahr Dep. p. 7, line 15 – p. 8, line 24) (R. p. 316, Osbahr Dep. p. 10, lines 11-17) (R. p. 316, Osbahr Dep. p. 11, lines 20-25) (R. p. 138, lines 22-24). Furthermore, although Dr. Osbahr examined Claimant's arm, he did not note any surgical scars. (R. p. 318, Osbahr Dep. p. 20, lines 5-21).[2] Thus, neither Dr. Osbahr nor Employer knew the full extent of Claimant's impairment

[2] Although Claimant testified that he showed Dr. Osbahr his scars, there is no note on the D.O.T. form indicating scarring and Dr. Osbahr testified specifically that he did not notice any scarring. The Commission, which is authorized to determine witness credibility, Rogers, 312 S.C. at 380-81, 440 S.E.2d at 403, determined that Claimant was not a credible witness. (Commission Decision, R. pp. 10-12, 13-16).

but, instead, relied on the representations Claimant made on the forms he filled out during the application process.

Claimant also incorrectly states that Dr. Osbahr reported his impairment findings "directly to the Employer." (App. Br. pp. 6-7). There is no evidence in the record to support this assertion. Instead, Dr. Osbahr testified that he was not certain whether he sent the "long" form, which would have had the information regarding Claimant's arm impairment, or the "short" form to Employer. (R. p. 318, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (R. pp. 319-320, Osbahr Dep. p. 25, line 6 – p. 26, line 3) (Dr. Osbahr testifying that he cannot confirm whether Employer received the long or the short form).

Next, Claimant argues that Mr. Grandy, "testified that Dr. Osbahr's findings of impairment and decreased supination would be serious enough that someone should have followed up with the doctor or the Appellant." (App. Br. pp. 10-11). This assertion again is not supported by evidence in the record. First, the D.O.T. physical form filled out by Dr. Osbahr does not state what normal supination for an elbow is. (R. pp. 343-345). In addition, Mr. Grandy testified that he did not know what normal supination for an arm was. (R. p. 275, Grandy Dep. p. 31, lines 9-23) (R. p. 275, Grandy Depo p. 32, lines 11-17). The testimony cited by Claimant asked Mr. Grandy to *assume* that normal supination was 180 degrees and then, *if* he was made aware of that fact, and was told that an applicant only had half that supination "is that something you would want to follow upon," to which Mr. Grandy replied yes. (R. p. 276, Grandy Dep. p. 35, lines 14-23). Thus, the statement Claimant relies on requires both Mr. Grandy and this Court to assume facts that Employer was not aware of and/or that are not in evidence.

Mr. Grandy did not testify that Employer was aware of Claimant's impairment –

instead, he confirmed that Employer relied on the forms Claimant filled out as well as the post-acceptance interview in order to determine whether he was capable of performing all the functions of his job. (R. p. 269, Grandy Dep. p. 9, line 2 – p. 11, line 12) (R. p. 272, Grandy Dep. p. 18, line 14 – p. 19, line 1). Furthermore, as Mr. Grandy stated, Employer would not have proceeded with the lift test had it known Claimant was under restrictions from his doctor. (R. pp. 273-274, Grandy Dep. p. 25, line 16 – p. 26, line 7).

Finally, Mr. Grandy testified that, "[a]s far as the hiring process, the DOT physical is basically almost a pass/fail thing." (R. p. 275, Grandy Dep. p. 30, lines 8-9). Because Dr. Osbahr was only evaluating Claimant for his ability to drive a truck, and not for the other requirements of his job, and because Claimant himself marked on the D.O.T. form that he did not have any impairments, (R. pp. 343-345), as well as the facts that Claimant denied having any impairment on Employer's Post Job Offer Questionnaire and on an Affirmative Action Program Information form, (R. p. 384) (R. p. 486), the Commission was correct in concluding that Employer relied on Claimant's false representations and that Employer's reliance was a substantial factor in the hiring. The Commission properly concluded that Claimant's claim is barred because of fraud in the application and this Court should uphold the Commission on this basis.

III. Claimant is barred from arguing on appeal that S.C. Code Ann § 42-9-35(D) should apply to this claim.

Although Claimant argues that S.C. Code Ann § 42-9-35(D), Evidence of Preexisting Injury of Condition, should apply to this claim, (App. Br. pp. 13 -14), he did not make this argument to the Commission and, therefore, this issue is not properly before this Court. Robbins v. Walgreens, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (where a specific argument is not raised to the Commission, it is not preserved for

appeal and the appellate court cannot review it); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 843-44 (Ct. App. 1992) (issues not raised to and ruled on by the lower tribunal are not preserved for review); *see also* City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (appellate courts may not address issues raised for the first time on appeal). Therefore, this Court should disregard entirely Claimant's arguments regarding any potential application of S.C. Code Ann § 42-9-35(D) to this claim.

However, even if this Court decides to consider this issue, application of S.C. Code Ann § 42-9-35 to this claim does not dictate a different result. First, the provisions of section 42-9-35(D), or any of the other benefits provisions of the Act, do not even come into consideration if there is no employment relationship at the time of the alleged accident. It is axiomatic that no award can be authorized under the Act unless an employer-employee relationship existed at the time of the alleged injury. *See, e.g.*, Shuler v. Tri-County Elec. Co-op, Inc., 385 S.C. 470, 472, 684 S.E.2d 765, 767 (2009) (observing that the "existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission"); Alewine v. Tobin Quarries, Inc., 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945) (stating that, "[n]o award under the Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which the claim is made. This relation is contractual in character . . ."). As noted above, the result of proving fraud in the application is that the employment relationship is voidable. Cooper v. McDevitt, 260 S.C. at 469, 196 S.E.2d at 836; *see also* Brayboy, 383 S.C. at 467-68, 681 S.E.2d at 569 (holding that the claimant's misrepresentations on his employment application "vitiated his employment relationship

and barred his recovery of workers' compensation benefits"). It was Employer's policy at the time Claimant was hired that, "falsifying . . . any Company record or report, such as an application for employment . . ." constituted grounds for terminating employment. (R. pp. 487-488). Thus, because the employment contract between Claimant and Employer was not enforceable at the time of his alleged accident, no benefits may be awarded in this case.[3] Accordingly, the statutory construction arguments set forth in Claimant's brief simply do not apply and should be disregarded by this Court.[4] There is nothing "illegal" about the fraud in the application defense, as that defense is part of the determination of whether an employer-employee relationship existed at the time of the accident.

Numerous other states have judicially adopted the affirmative defense of fraud or misrepresentation in the application. *See, e.g.*, Ex parte Southern Energy Homes, Inc., 603 So.2d 1036, 1992 Ala. LEXIS 639 (Ala. 1992); Shippers Transp. of Georgia v. Stepp, 265 Ark. 365, 578 S.W.2d 232 (Ark. 1979); City of Homestead v. Watkins, 285 So.2d 394, 1973 Fla. LEXIS 4223 (Fla. 1973); Georgia Elec. Co. v. Rycroft, 259 Ga. 155, 378 S.E.2d 111 (Ga. 1989); Air Mod Corp. v. Newton, 59 Del. 148, 215 A.2d 434 (Del. 1965); Honaker v. Duro Bag Manuf. Co., 851 S.W.2d 481, 1993 Ky. LEXIS 70

[3] The weakness of Claimant's argument is further exposed in his closing sentence, where he asks this Court to apply S.C. Code Ann § 42-9-35(D) over "general contract law/caselaw and find that an **employee** with an undisclosed preexisting injury/condition/impairment is covered under the South Carolina Workers' Compensation Act." (App. Br. p. 14) (emphasis added). For this Court to so find would require that an employer-employee relationship existed at the time of the injury, a finding that has been resolved against Claimant in light of Cooper v. McDevitt and the facts of this case.

[4] There clearly are instances where an employee, who has a pre-existing condition that is not disclosed to his or her employer, is entitled to workers compensation benefits when that pre-existing condition is aggravated by a work-related accident or conditions. However, the cases in which benefits are payable under S.C. Code Ann § 42-9-35(D) would not involve fraud in the application. A number of job applications or processes do not ask for information relating to a person's health or physical condition, in which case, no issue of fraud in the application would arise. In addition, a pre-existing condition may be entirely unrelated to the performance of one's job but still be aggravated by a job-related injury. Thus, the inclusion of S.C. Code Ann § 42-9-35(D) was not a "futile" act by the Legislature; it simply does not apply in this case.

(Ky. 1993); Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 575 N.E.2d 1115 (Mass. 1991); Jewison v Frerichs Const., 434 N.W.2d 259, 1989 Minn. LEXIS 2 (Minn. 1989); Jaynes v. Wal-Mart Store No. 824, 107 N.M. 648, 763 P.2d 82 (N.M App. 1988); Oesterreich v. Canton-Inwood Hosp., 511 N.W.2d 824, 1994 S.D. LEXIS 12 (S.D. 1994); Allred v. Berkline, LLC, 2010 Tenn. LEXIS 626 (Tenn. 2010); Progressive Driver Servs., Inc. v. Talley, 2003 Va. App. LEXIS 286 (Va. App. 2003). The Alabama Supreme Court held that, "[i]t is not a usurpation of the legislative function for this Court to conclude that misrepresentation on an employment application as to prior physical injuries is a bar to recovery of worker's compensation benefits." Southern Energy Homes, 603 So.2d at 1039. The Arkansas Supreme Court explained that, although the Arkansas workers' compensation statute was "silent on the effect of a false representation, except as to 'occupational disease,' . . . public policy requires an obligation on the part of an employee, upon inquiry, to be truthful to an employer about preemployment health conditions." Shippers Transp., 265 Ark. at 368, 578 S.W.2d at 233; *see also* Georgia Elec., 259 Ga. at 158, 378 S.E.2d at 113. Other states hold that evidence that an employee lied about his or her physical condition on a job application amounts to "serious and willful misconduct causing injury," which bars them from recovering workers compensation benefits. *See, e.g.*, Shaw's Supermarkets, 410 Mass. at 844, 575 N.E.2d at 118. As the Alabama Supreme Court observed, "while an employer takes the employee as he finds him, an employer is not required to assume the risk of aggravating a pre-existing injury unless either some notice of the condition is given by the applicant to enable the employer to make an informed hiring decision, or employer does not rely upon the employee's representation." Southern Energy Homes, 603 So.2d

at 1040.[5]

Second, Section 42-9-35(B) provides that "the commission *may* award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability" from a work-related accident. S.C. Code Ann § 42-9-35(B) (emphasis added). This provision is permissive, not mandatory, leaving the Commission discretion to award or not award benefits for a subsequent disability in appropriate cases.

Finally, although Claimant cites Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996), for the proposition that jurisdictional doubts should be resolved in favor of inclusion of workers under the Act, what he fails to acknowledge is that it is equally true that, "a construction should not be adopted that does violence to the specific provisions of the Act." Shuler, 385 S.C. at 473, 684 S.E.2d at 767. Furthermore, Spivey and similar cases involve a determination of whether a claimant meets the four-prong test set forth in South Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 548, 459 S.E.2d 302, 303 (1995). That test is entirely irrelevant to the issues raised in this case. Thus, this Court should disregard any argument made that S.C. Code Ann § 42-9-35(D) applies and, instead, affirm the Commission's determination that Claimant's claim is barred because of fraud in the application.

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[5] Note that none of these cases applied a clear and convincing evidentiary standard to the three-pronged fraud in the application test. Southern Energy Homes, 603 So.2d at 1041 (requiring "material evidence . . . from which a factfinder could find that all three elements were established"); Shippers Transp., 265 Ark. at 368, 578 S.W.2d at 234 (finding employer "adduced ample testimony" to establish two of the three prongs); Air Mod, 59 Del. at 157, 215 A.2d at 440 (applying substantial evidence standard); Jewison v Frerichs Const., 434 N.W.2d at 262 (applying the substantial evidence standard); Jaynes, 107 N.M. at 649, 763 P.2d at 83 (applying the substantial evidence standard); Allred, 2010 Tenn. LEXIS 626 (finding the defense proved by "persuasive evidence").

IV. The Commission correctly determined that Claimant's claim was barred because it was not unexpected from Claimant's point of view.

As an alternative and independent reason for denying this claim, the Commission correctly held that the Capers defense barred the claim because Claimant's injury was not unexpected from his point of view. Although Claimant correctly cites general case law regarding the definition of an accident for workers' compensation purposes, he entirely fails to address the principle set out in Capers and properly relied on by the Commission. In Capers, the claimant had been treated for contact dermatitis while working for a prior employer, but did not reveal his condition on his application with Holiday Inn. While working for Holiday Inn as a dishwasher, he began suffering from contact dermatitis and sought workers' compensation benefits. This Court denied the claim because "the outbreak of dermatitis was not an unlooked for event which Capers did not expect," but instead was "an event which Capers could anticipate given his past experience." 305 S.C. at 256, 407 S.E.2d at 661-62. Similarly, in Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992), this Court determined that the injury to claimant's vascular system was not an injury by accident as defined by our workers' compensation statute because the injury was not unexpected. Instead, the claimant knew standing would worsen his condition but continued to work in a job that required prolonged standing. 308 S.C. at 399-400, 418 S.E.2d at 330-31.

Pee v. AVM, Inc., relied on by Claimant, instructs that the focus should be, "on the unexpected nature of the **injury** rather than requiring that the **event** causing the injury be unexpected." 352 S.C. 167, 171, 573 S.E.2d 785, 787 (2002) (emphasis added). Substantial evidence supports the Commission's factual and legal conclusions that Claimant: 1) knew he was under permanent lifting restrictions; 2) had been warned by

Dr. Chidgey his treating physician "that he should avoid situations where he might fall or excessively stress his left arm;" 3) knew he was impaired and had settled his prior workers' compensation claim for approximately $68,000; and 4) knew prior to accepting the job with Employer that the requirements of his job exceeded his lifting restrictions, and support a finding that Claimant should have expected just such an injury to his elbow. (Commission Decision, R. pp. 10-14) (R. p. 145, line 14 – p. 147, line17) (R. p. 154, line 3 – p. 155, line 20) (R. p. 442) (R. pp. 463-465) (R. p. 283, line 16 – p. 289, line 23) (R. p. 298, line 19 – p. 299, line 2) (R. p. 200, lines 2-25) (R. pp. 489-497).

There can be no legitimate question that Claimant's job involved heavy lifting. Although Claimant's counsel attempted to elicit testimony from Mr. Grandy that, "**most** of the physical requirements of [Claimant's] job is the ability to push and pull," Mr. Grandy explicitly did not agree. (R. p. 276, Grandy Dep. p. 36, lines 16-20) (emphasis added). Although Mr. Grandy did agree that Claimant would have done "more" pushing and pulling than lifting, (R. p. 276, Grandy Dep. p. 36, line 24 – p. 37, line 8), "more" can mean anything slightly over 50 percent and Mr. Grandy was clear that it did not mean "most." The stated requirements of Claimant's job flatly contradict any suggestion that his job did not involve heavy lifting. (R. pp. 489-497). Claimant acknowledged that his job required him to use both arms. (R. p. 217, lines 5-8).

Dr. Chidgey specifically noted that he and Claimant had discussed that, "if you want to try and gain life out of the arthroplasty, you keep your weight to a lower level. If you increase that, you may get away with it." (R. p. 300, lines 8-18). Implicit in this statement is the recognition that you may *not* "get away with it" also. The fact is that Claimant took a calculated risk, got away with it for two years, but ultimately

experienced precisely the type of injury his treating physician specifically warned him about. As the Commission observed, "it would be patently unfair to require [Respondents] to bear the burden for a risk that the Claimant knowingly and willfully chose to take . . ." (Commission Decision, R. pp. 14-15).[6]

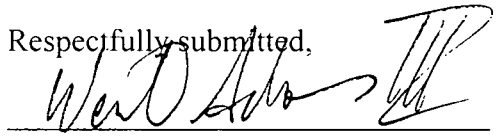
Although Claimant argues there was no testimony or evidence that Claimant expected a box to fall on his arm, it is not the precise manner in which an accident occurs that controls the analysis. Pee, 352 S.C. at 171, 573 S.E.2d at 787. Rather, the key determination in this case is that Claimant, examining the facts from his point of view, should have expected precisely the type of injury he incurred and his claim is therefore barred. Therefore, the Commission did not commit any error of law in determining that Claimant did not prove his injuries were unexpected and this Court should uphold the Commission on this point.

[6] Claimant's assertion that his treating physician opined that "but for" the accident that occurred on November 1, 2008, Claimant would have been able to continue to perform his job indefinitely, (App. Br. p. 13), is nothing more than pure speculation. It is axiomatic that workers' compensation awards may not be based on surmise, conjecture or speculation. Tiller v. National Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court uphold the Full Commission Decision in its entirety.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AVERY B. WILKERSON, APPELLATE PANEL CHAIRMAN, COMMISSIONER

WCC File No. 0818219

Joe A. Osmanski, Employee, ... Appellant,

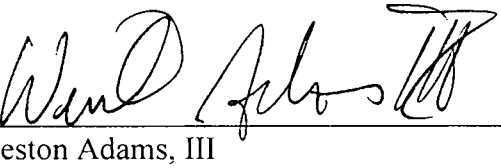
v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier ..... Respondents.

PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents Watkins & Shepard Trucking, Inc. and Zurich North American Insurance Company complies with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief Respondents Watkins & Shepard Trucking, Inc. and Zurich North American Insurance Company complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

June 28, 2012



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and Zurich North American Insurance
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PROOF OF SERVICE

I certify that on the 28th day of June 2012, I served the **Final Brief of Respondents** on Joe A. Osmanski by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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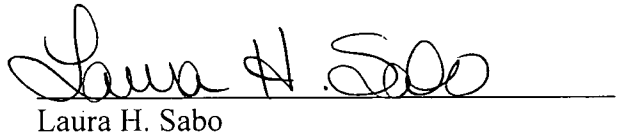

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June 28, 2012

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: Joe A. Osmanski v. Watkins & Shepard Trucking, Inc. and Zurich North America
Date of Accident: November 1, 2008
WCC File No.: 0818219
Our File No.: 20675.09021
Claim No.: 2800063420-001
Appeal Tracking No. 2011-196087

Dear Ms. Kitchings:

Enclosed for filing please find the original and 16 copies of the Final Brief of Respondents Watkins & Shepard Trucking, Inc. and Zurich North American Insurance Company in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service. Please file these documents and return a clocked in copy to my courier.

Yours truly,

McAngus Goudelock & Courie, LLC

Weston Adams, III

WA/lhs
Enclosures

cc: Kevin B. Smith, Esq.
Beth Gregory, Zurich North America