APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1708221

ISAAC BRAILEY, EMPLOYEE. . . . . CLAIMANT/APPELLANT

VS.

MICHELIN NORTH AMERICA, INC. (US7)
AND SAFETY NATIONAL CASUALTY CORP. . . . . DEFENDANT/RESPONDENT.

Appellate Panel Review Hearing
held in Columbia, South Carolina,
on October 22, 2018, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order

filed, February 28, 2019

APPEARANCES: CLAIMANT/APPELLANT represented by Stephen B. Samuels, Esquire, of Columbia, South Carolina; and

DEFENDANT/RESPONDENT represented by Grady L. Beard, Esquire, of Columbia, South Carolina.

STATEMENT OF THE CASE

This is an appeal by Isaac Brailey ("Appellant" or "Claimant") from the Decision and Order of Commissioner Avery B. Wilkerson, Jr., filed on July 10, 2018.

This claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 50 filed by the claimant on October 4, 2017. It is the position of the claimant that he sustained an injury by accident to his back which affects one of his legs, out of and in the course of his employment with defendant-employer on June 24, 2017. He alleges he had a "new job, not an injury kind of pain" when he went to the doctor on June 11, 2017, and June 13, 2017. The claimant contends he has not reached maximum medical improvement. Accordingly, the claimant now seeks a finding of compensability; compensation for temporary total disability; past, present, and future medical care related to his low back injury and left leg; and designation of Dr. Boyd as the authorized treating physician.

The defendants deny the claimant sustained any compensable injuries, as alleged. The defendants take the position that the claimant's back condition is unrelated to any work accident. Rather the defendants maintain the wealth of evidence fails to support the existence of a work-related accident. Moreover, the medical evidence supports the claimant was complaining of problems prior to June 24, 2017, and the claimant has a longstanding history of pre-existing back problems including evidence he was previously restricted from doing the type of work he claims caused his injury until seen by a surgeon and withheld this information from his employer. Further, the defendants assert the defenses of Notice and Fraud in the Application for Employment. Therefore, defendants assert the claimant is not entitled to any benefits under the Act.

The Hearing in this matter was held before Commissioner Avery B. Wilkerson, Jr. ("Hearing Commissioner") in Columbia, South Carolina, on March 23, 2018. By way of Decision and Order filed on July 10, 2018, the Hearing Commissioner determined (1) the claimant failed to meet his burden of proving he sustained a compensable injury to his back and left leg on June 24, 2017; (2) the defendants successfully proved the claim was barred by the fraud in the application for employment defense as articulated by *Cooper*

v. McDevitt & Street Co.; (3) Defendants successfully proved the elements of *Capers v. Flautt*; and (4) the claimant intentionally and willfully caused injury to himself. The claimant was therefore denied any benefits under the Act.

Within the statutory period, the claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Full Commission Appellate Panel ("Appellate Panel") on October 22, 2018. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the undersigned members of the Appellate Panel and has since been under study and consideration. Specifically, the claimant respectfully requests the Appellate Panel to reverse the Decision and Order of the Hearing Commissioner in its entirety based upon the following grounds:

1. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant did not sustain an injury by accident arising out of and in the course of his employment at Michelin.

2. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant's testimony was not credible.

3. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant was unclear as to the date of the accident when his testimony, confirmed by medical records and employer records, confirmed that after some back pain from his work at Michelin, he suffered an acute injury by accident on June 24, 2017.

4. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant did not report back pain from his work to Michelin prior to his work accident.

5. Whether the Single Commissioner erred as a matter of fact and law in finding Dr. Boyd did not provide causation when Dr. Boyd's opinion was explicit as to causation to a reasonable degree of medical certainty.

6. Whether the Single Commissioner erred as a matter of fact and law in finding Defendants proved the elements of the *Cooper v. McDevitt and Street* defense, as Claimant did not make a material misrepresentation on his application for employment; that Employer relied on the physical examination clearing Claimant for work (confirmed later by Dr. Izard); and there is no evidence of a causal connection between any alleged misrepresentation and the ultimate work-related injury.

7. Whether the Single Commissioner erred as a matter of fact and law in finding "The claimant has failed to carry his burden of proof of an accident being sustained on June 24, 2017."

8. Whether the Single Commissioner erred as a matter of fact and law in finding that the separate incident occurring on June 24, 2017 after which Claimant was unable to return to work was not compensable.

9. Whether the Single Commissioner erred as a matter of law in finding this claim was barred by *Capers v. Flautt* when no factual findings were made to support such a defense and when the defense does not apply to this case in that there was no evidence that Claimant knew or could have known that he would injure his back at Michelin.

10. Whether the Single Commissioner erred as a matter of fact and law in finding stale medical records of a minor injury to a different part of Claimant's back from 25 years ago could support any defense or denial of this claim.

11. Whether the Single Commissioner erred as a matter of fact and law in finding this claim was barred by "the claimant intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same."

EVIDENCE OF THE CASE

The members of the Appellate Panel have carefully considered all the evidence presented by the parties in this claim, including the hearing testimony of the claimant, Jermaine Lemon, Troy Lowman, Nurse Christie Sirois, and Mark Gross, the deposition testimony of Scott B. Boyd, MD, and the medical records and exhibits submitted through the APA. From this evidence, the following is specifically noted:

A. HEARING TESTIMONY

1. Claimant

The claimant was fifty-one years old at the time of the hearing. (H.T. 38). He stated he was separated from his wife and had one dependent child. (H.T. 38-39). He attended two semesters of college at South Carolina State University. (H.T. 39). He previously worked for Richtex, South Carolina Department of Juvenile Justice, United Parcel Service, Lutheran Family Services, The Babcock Center, Dupont, and Inland Container Company. (H.T. 39). He began working at Richtex in 1997. (H.T. 39). In his position at Richtex, he lifted bricks and loaded them on a monorail. (H.T. 40). The position at Richtex caused him pain in the middle of his back, which he reported to his supervisor who sent him for medical treatment. (H.T. 40-

41). He attended physical therapy and was told he possibly had a muscle sprain. (H.T. 42). He settled the workers' compensation claim with Richtex for $2,500.00. (H.T. 43). He never returned to work at Richtex following the claim and denied any recurring pain in the middle of his back. (H.T. 43). He alleged he no longer experienced pain in the middle of his back; instead, the pain was now located on the left side of his back above his hip. (H.T. 41).

After Richtex, he worked at Westinghouse. (H.T. 43). When shown Defendants' APA, p. 17—the "Medical History and Examination Form (Post-Offer/Pre-Placement)" for Westinghouse—he denied ever seeing the document before the hearing, but admitted his name and address were on the form. (H.T. 44). He conceded the document is dated May 16, 2001, around the time he began working for Westinghouse. (H.T. 44). He denied having any back pain at the time the form was completed. (H.T. 44). He admitted he checked the box for "no" when asked if he had any recurrent low back pain. (H.T. 44). While at Westinghouse, he worked in the steels department, rod area, pellet area, and quality control departments. (H.T. 45). The position required lifting containers and pushing carts up to 800 pounds. (H.T. 45). He denied any workers' compensation claims during the time he worked for Westinghouse. (H.T. 46).

When shown the questionnaire in Defendants' APA p. 20-21—the "HealthWorks Questionnaire and Physical Form"—the claimant averred he completed the document in a "pencil whip" or "routine" fashion. (H.T. 47). However, he admitted he included hypertension; high blood pressure; pain, numbness, limit of motion, injury or surgery of the hip, knee, leg, ankle, foot; and "knee pain with weather." (H.T. 47). He admitted that he denied any prior workers' compensation claims on the form. (H.T. 48). He testified that he falsely stated he never had a workers' compensation claim because he forgot about the prior claim with Richtex. (H.T. 48).

He was laid off from Westinghouse for three months before he began working at Michelin. (H.T. 49). He stated his plan was to retire from Michelin. (H.T. 50). When he began at Michelin, he completed training, a physical exam, and a questionnaire. (H.T. 51). When asked about the questionnaire on Defendants' APA,

p. 16, he alleged he filled it in as "quickly as possible." (H.T. 52). He admitted that on the form, he denied having any problems with or ever having treated for back injuries, back ache, or back pain. (H.T. 52-53). He testified that he denied prior issues because he had worked for a "long period" of time without any issue, he had to finish the paperwork, and he interpreted the question as asking if he currently had back issues. (H.T. 54). He claimed Michelin would have hired him even if they knew of his prior back problems. (H.T. 54).

He testified that his position at Michelin involved making "big" tires. (H.T. 55). He stated stretching the rubber in the tires could cause sharp pain in a person's back. (H.T. 59). He eventually felt a "nudge" in his back. (H.T. 64). He admitted he went to the doctor on June 11, 2017, and June 13, 2017, complaining of back pain. He testified he told Jermaine, his trainer, that his back hurt and Jermaine responded that the back pain was something that he would have to get used to and that Jermaine had also experienced back pain. (H.T. 62). The claimant went to the emergency room after he experienced the pain. (H.T. 64). He testified that he did not report to Michelin that he went to the doctor for his back from working because he did not think it was a "big thing as far as it was minor." (H.T. 66). He stated that he reported to his family doctor that he had minor back pain from working, lifting, and stretching. (H.T. 68-69). He claimed he did not recall telling the doctor that his pain was ten out of ten. (H.T. 69).

He stated that on June 24, 2017, he felt a sharp pain in his back as he stretched the rubber on the tires. (H.T. 71). Thereafter, he went to the emergency room. He testified that he arrived at the emergency room at around 9:00 a.m. and before he treated with a doctor, he called Michelin. (H.T. 274). He described conversations he had with Nurse Christie Sirois, Troy Lowman, and Derrick Gibson. (H.T. 73-78, 275). He testified that before he went to the ER, he reported the issue to Jermaine, who told him "yeah, I know that hurt you." (H.T. 71). He alleged he went to the nurse's station and family health center, but could not get assistance; therefore, he went to the emergency room. (H.T. 72-80). However, on redirect, he claimed he originally reported the injury to Troy Lowman. (H.T. 279). He testified Nurse Christy Sirois told him "those doctors over exaggerate, just relax, take Aleve and you can come see Dr. Izard Monday morning." (H.T. 80).

He eventually met with Dr. Izard at Michelin, but claimed he was "not comfortable" with what Dr. Izard told him. (H.T. 82). He stated he did not return to Dr. Izard two days later as requested because he could not drive and there was no person who could have given him a ride to the follow-up appointment. (H.T. 85).

On cross-examination, he admitted that he lied on and falsely completed the post-hire health questionnaire for Michelin. (H.T. 93, 233-37). Further, he admitted that he falsely completed the medical history form when he began working for Westinghouse in 2001, only three and a half years after his back injury at Richtex in 1997. (H.T. 238-42, 245-56). As to Michelin, he admitted that he did not report the prior back issue, any prior heart conditions, or that he was seeing a cardiologist. (H.T. 109, 125). He did not report his prior gout issues, prior right knee issues, or being on disability. (H.T. 126-129, 141). He also admitted that he did not list Richtex Bricks on his employment application for Michelin. (H.T. 136-38).

He admitted he went to Lexington Medical Center and his family doctor, Dr. Marom, complaining of back pain only five weeks after he began working at Michelin and the first two weeks of the job had been classroom training. (H.T. 94-95). He admitted he did not report the pain that he thought was coming from doing heavy work at Michelin or the fact that he received prescription medication for the issue to any of his bosses or management. (H.T. 96-97, 101-03, 106, 122-24, 250, 270, 282). He admitted he went through training on safety, injuries, and reporting workers' compensation claims. (H.T 97, 101). He claimed he went to the doctor on June 11, 2017, and June 13, 2017, for "minor" pain in his back. (H.T. 104-05, 254). However, he conceded ten out of ten level pain is not minor and is actually the worst pain one could have. (H.T. 255, 272). He admitted that he did not file a workers' compensation claim when his pain was reportedly ten out of ten, yet he filed a claim when the pain was only three out of ten. (H.T. 281). He acknowledged the medical reports from the June 13, 2017 office visit state he complained of lower back pain for the prior two weeks. (H.T. 115-17). He claimed he did not recall reporting ten out of ten pain to the doctor. (H.T. 117). Yet, he later admitted he reported ten out of ten pains to the doctor. (H.T. 123). He admitted that he falsely told his family doctor that he never had prior back pain. (H.T. 118).

As to his visit to the hospital on June 24, 2017, the claimant disputed the testimony of Nurse Sirois and Troy Lowman. (H.T. 148-53, 194-95, 200, 283). He admitted that he did not tell any person at Michelin that he was injured, and he was going to the hospital. (H.T. 255). He admitted that when he met with Dr. Izard on June 26, 2017, he falsely stated he had never had any prior back problems or prior knee surgery. (H.T. 154-56). He admitted that instead of returning to Dr. Izard as requested, the claimant went to the emergency room on his own on June 27, 2017. (H.T. 157-60). He admitted he did not return to Dr. Izard because he did not want to go to Dr. Izard. (H.T. 202). He admitted he was offered transportation to the appointment with Dr. Izard, but he refused. (H.T. 209).

He claimed he told Michelin he could not return to work and was going to the emergency room on June 27, 2017. (H.T. 160-61). He did not return to work when his restrictions ended three days after the emergency room visit; instead, he went to Doctors Care. (H.T. 169). He did not report to Doctors Care that this was a workers' compensation injury or that he had previously met with Michelin's doctor, Dr. Izard. (H.T. 171-72). He did not return to any doctor between June 30, 2017, and July 24, 2017. (H.T. 177-78). He saw Dr. Boyd on July 24, 2017, where he reported the prior back pain from "twenty-five" years prior. (H.T. 183-84). He did not answer the question on the Lexington Physical Therapy (PT) form asking if the injury was work-related. (H.T. 186-87). He disagreed with the PT note discharging him from care and stating he had significantly improved and his potential for further improvement was excellent. (H.T. 188-89).

He disputed that similarly to the current claim, he was injured shortly after he began physical work at Richtex. (H.T. 210-12, 221-24). When confronted with the medical report from his workers' compensation claim with Richtex which stated, "I also discussed with this gentleman in no uncertain terms, if he has been having back pain for three weeks, the entire time he has been working for Richtex, if he does not respond very well and very fast to some conservative treatment, it might be in his and Richtex's best interest for him to find new employment," the claimant alleged that was the first time he was aware of that doctor's opinion. (H.T. 218-19). He claimed he could not recall if he went to an orthopedic surgeon in 1997 either though the

doctor noted, "I believe it certainly would be prudent for both myself and Richtex Bricks to send him to an orthopedic surgeon." (H.T. 228, 250). He disputed the doctor's opinions and report. (H.T. 228-29). He admitted that he did not tell any of his subsequent employers about his restriction of no heavy lifting following Richtex. (H.T. 230). He admitted he did not tell Dr. Scott Boyd about being placed under restrictions or his prior back injury. (H.T. 231).

2. Jermaine Ante Lemon

Lemon was thirty-seven years old and had worked at Michelin for ten years at the time of the hearing. (H.T. 289). At the time of the hearing, he worked in "Confin," but he previously worked in "PAP" until December 2017. (H.T. 289). He stated PAP was difficult work and takes time to get use to performing. (H.T. 291-94). When he first began at Michelin, he would have aches and pains but denied ever taking any over-the-counter medication such as aspirin or Advil. (H.T. 291). He trained the claimant to work at Michelin. (H.T. 295). He acknowledged the claimant was a hard worker and did well in training. (H.T. 295). He stated the claimant had difficulty doing the job in terms of the steps for how to complete the job. (H.T. 295). Lemon did not believe or think the claimant was injured as Lemon stated the claimant never reported any injuries to him or spoke with him about any aches or pains he experienced. (H.T. 295, 301). Further, he never saw the claimant have any aches or pains. (H.T. 295). He did not know if the claimant worked on June 24, 2017. (H.T. 296).

On cross-examination, he confirmed he never lied on his application for employment at Michelin, truthfully completed the post-hire questionnaire, expected Michelin needed to know whether he could perform his duties, and believed it was important to be truthful in his answers. (H.T. 297-98). He believed a person who was told by a surgeon that he could not perform heavy lifting, could not perform the job of the PAP. (H.T. 298-99). He testified the claimant never told him he had to leave a job in 1997 because of his back issues or that the doctor told him to meet with a surgeon before he could perform any heavy lifting. (H.T. 298). He stated he would want to have known if a co-worker was physically capable of performing the PAP job because

if they were not, he could get injured as well. (H.T. 298). He testified Michelin asked questions on the questionnaire and rely on truthful answers to prevent other employees from getting injured. (H.T. 298-301).

3. Troy Alton Lowman

Lowman was a Training Manager who had been employed by Michelin for thirty-six years. (H.T. 329). He was responsible for on-boarding new employees and insuring training occurs and is properly conducted. (H.T. 329). He stated he had authority over new hires up until they reach "validation." (H.T. 329). Validation means the employee can do the job safely with good quality while developing speed. (H.T. 329). He stated the claimant never successfully completed validation. (H.T. 329). He explained the training at Michelin includes a discussion on workers' compensation and reporting claims. (H.T. 331).

He testified that the proper protocol for if an accident occurs at Michelin was to notify the shift manager and safety spoke and complete an accident investigation. (H.T. 332). The employees were trained that if the medical department was not open, they were to go directly to security because Michelin's security officers are trained Emergency Medical Technicians. (H.T. 332). The employees were instructed not to go to the family health center for work-related injuries. (H.T. 332).

He first became aware the claimant was filing a workers' compensation claim on June 24, 2017, around lunchtime. (H.T. 333). The claimant called him and told him he was at hospital for a work injury. (H.T. 334, 347). Lowman believed the claimant had already been seen by a doctor when the claimant called Lowman. (H.T. 334). He stated he was not aware that the claimant attended Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, claiming he was injured at work. (H.T. 336, 338, 352). Lowman stated the proper procedure would have been for the claimant to report those injuries to the manager or safety spoke. (H.T. 336-37). He testified the claimant had ample opportunity to notify him of the alleged injury but failed to do so. (H.T. 337-38). He stated he would have wanted to know of the claimant's back pain because of its impact on the safety of Michelin, the claimant's co-workers, and other members of the claimant's team. (H.T. 338).

On cross-examination, he confirmed that the claimant should have reported any back pain that hindered his ability to do his job. (H.T. 343). He testified that when the claimant called Lowman from the hospital on June 24, 2017, the claimant was asked to report the accident to security, which in turn would generate an accident investigation. The claimant was asked to report back to Michelin Security to let them know of his issue, which would have initiated the accident report and investigation. (H.T. 349). He testified that the claimant never returned to Michelin; however, if he had returned, they would have completed an accident report. (H.T. 351). Lowman testified the claimant never returned Lowman's phone calls after that initial call in the hospital. (H.T. 352, 356). He reiterated that he would have wanted to know of the claimant's reports of back pain on June 11 and June 13, 2017. (H.T. 353-54). He testified that had he known of the back issues, he would have secured medical treatment for the claimant and determined whether he was capable of performing the job. (H.T. 353-55).

4. Nurse Christie Sirois

Sirois is employed by Palmetto Health, Healthworks and physically works at Michelin as the plant nurse for five years. (H.T. 363). On Saturday, June 24, 2017, she received a call from the shop manager, Tyrone Gilmore, asking her if she knew anything about the claimant and his alleged injury and she did not. (H.T. 364). She contacted the claimant and asked him about the incident. (H.T. 365). She stated she told him he did not follow the proper protocol in seeking treatment. (H.T. 367). Further, she testified he was "vague" in describing how the accident allegedly occurred. (H.T. 367, 373).

Similarly to Lowman and Lemon, she confirmed that if a Michelin employee goes to the doctor or the hospital or anywhere and claims to be having back pain to the point that it is ten out of ten back pain and he or she relates the pain to the job that they do out at Michelin, that is something that should have been reported to Sirois, the BUL (Business Unit Leader), the safety spoke, the manager, or someone else on staff. (H.T. 369). She testified that the claimant's alleged pain was not reported before June 24, 2017. (H.T. 368). She opined it was not safe for the claimant to continue his job if he had ten out of ten pains in his back. (H.T.

368). She stated that if the claimant had reported the prior back pain, she would have brought him in for an assessment and referred him to Dr. Izard for further evaluation. (H.T. 369). When the claimant finally contacted her on June 24, 2017, she scheduled him an appointment with Dr. Izard for the following business day. (H.T. 369). She attended the visit with the claimant. (H.T. 370). The claimant was supposed to return to Dr. Izard two days later but did not return. (H.T. 370). She testified that if an applicant wanted a job at Michelin bad enough, they could provide false information in order to pass the initial medical examination. (H.T. 385-90).

5. Mark Stephen Gross

Gross testified that he had been employed with Michelin for thirty-seven years. (H.T. 397). He was the Safety Manager at the time the claimant was employed with the company. (H.T. 398). As Safety Manager, Gross was notified of any actual or potential workers' compensation claims. (H.T. 398). He described the safety training provided to all new employee. (H.T. 398-99). He stated no person in management at Michelin had any idea the claimant was claiming to have back problems since around the end of May 2017. (H.T. 399). They were not notified that the claimant went to the doctor on June 11 or June 13, 2017. (H.T. 399-400). He confirmed the prior appointments should have been reported to Michelin. (H.T. 400). He would have needed to know that information to make sure the claimant did not hurt himself or anyone else further. (H.T. 414).

He recited the proper procedure for when an injury is reported. (H.T. 400-03). He stated he was informed of the claimant's alleged injury late in the afternoon on June 24, 2017. (H.T. 402). He then explained the proper procedure for filing a workers' compensation claim. (H.T. 403). He stated the claimant never returned to the plant to complete the investigation. (H.T. 404). When the claimant told Gross he could not return for the appointment with Dr. Izard or complete the report or investigation because he did not have transportation, Gross offered to provide the claimant with transportation. (H.T. 404). He testified the claimant responded, "you need to talk to my lawyer" and hung up the phone. (H.T. 405).

Gross outlined the post-offer health questionnaire Michelin requires of every newly-hired employee. (H.T. 406). He stated they rely on the information provided by the employees in the questionnaire. (H.T. 407). He testified that because the claimant did not note he had prior back issues and a prior workers' compensation claim, the company and its doctor were not able to investigate the extent of the prior injury. (H.T. 407). He explained that if he had known about the claimant's prior issues, he would have been concerned. (H.T. 408).

He stated he does not believe any of the claimant's allegations in this claim. (H.T. 417). He relies on the employees to be truthful in completing the post-offer health questionnaire for the safety of all employees. (H.T. 418). Further, he explained it is impossible for the plant doctors to conduct thorough investigations and examinations if an employee lies on the questionnaire. (H.T. 419). He testified the claimant lied on his questionnaire in contrast to Lemon who truthfully completed his questionnaire. (H.T. 422-23, 428-29).

B. APA SUBMISSIONS:

1. Medical Evidence

After his injury while working for Richtex, the claimant began treatment with Thomas Norris, III, MD. (Defendants' APA #1, p. 1-2). On December 4, 1997, Dr. Norris, noted the claimant had been "working for Richtex for three weeks and of note he has had back pain for three weeks. This has been worsening over the past couple of days since a possible injury while lifting some bricks on Tuesday of this week." (*Id.*). Dr. Norris instructed the claimant not to complete any heavy lifting and to return to the clinic in one week. Further, the medical record from the visit states as follows:

> I also discussed with [the claimant] in no uncertain terms if he has been having back pain for three weeks, the entire time he has been working for Ric[h]tex, if he does not respond very well and very fast to some conservative treatment it might be in his and Ric[h]tex's best interest for him to find new employment.

The claimant met with Dr. Norris again on December 11, 1997. Dr. Norris's medical notes from that appointment states as follows:

> He had noted back pain and soreness for three weeks. Then he reported this vague episode of lifting some bricks and he felt that he may have injured himself at that time although he denied any significant change at the time of this incident. Of note, three days after he saw me, he was at Doctors Care wanting a second opinion, although he was not following my instructions.

Further, Dr. Norris stated as follows:

> [The claimant] mentions that he knows something is wrong with his back and he wants to go to a back specialist. It seems today that [the claimant] and I have a very difficult time communicating and I certainly feel that with him having only been an employee three weeks at Richtex, and mentioning a back specialist after he had been improving on the therapy I had recommended, he may very well be in a litigation thought process.. . . I believe it certainly would be prudent for both myself and Richtex bricks to send him to an orthopaedic surgeon.

Finally, Dr. Norris stated the following:

> [I]t seems he wants to be evaluated by a back specialist. I feel like Dr. Bethea at Moore Clinic would certainly put this to rest most expediently, however, as stated above, I don't feel that Richtex nor myself need to undertake any liability with this young man who, in my opinion, is unable to perform the job required at Richtex and he was even told this the very first day. I restated that today. I will place him on no heavy lifting until he sees the surgeon.

(*Id.*).

On January 3, 2017, the claimant went to his primary care physician, Dr. Eric Marom for an exam regarding essential hypertension, obesity, gout, screening for colorectal cancer, and erectile dysfunction. (Claimant's APA #1, p. 1). Under history of present illness, the medical record notes, "thinks [he] has had 2 periods of gout, had significant foot pains, R foot, could not walk on it, diagnosed at drs care, pains near first toe." (Claimant's APA #1, p. 1). The record notes a history of right knee arthroscopy and that he was currently employed in quality control at Westinghouse. (Claimant's APA #1, p. 3).

On June 11, 2017, the claimant visited Lexington Medical Center complaining of "back pain after lifting at work." (Claimant's APA #2, p. 13). He complained the low back pain had persisted for the past several days. (Claimant's APA #2, p. 13). He reported that he was doing heavy lifting at work prior to the onset of the pain. (Claimant's APA #2, p. 13). The doctor prescribed cyclobenzaprine and tramadol. (Claimant's APA #2, p. 14).

On June 13, 2017, the claimant returned to Dr. Marom complaining of lower back pains for the past two weeks. (Claimant's APA #1, p. 7). The record notes, "has had new job at Michelin, moving heavy stuff-there now for about 2 weeks, pain is 10/10 w/certain movements, says feels sharp, no radiation into legs." (Claimant's APA #1, p. 7). Further, the record provides that the claimant reported he had never had pain there in the past and had suffered no recent injury or trauma. (Claimant's APA #1, p. 7). He was taking cyclobenzaprine, hydrochlorothiazide, and tramadol, among other medications. (Claimant's APA #1, p. 7).

On June 24, 2017, at 9:07 a.m., the claimant reported to Lexington Medical Center Emergency Room. (Claimant's APA #3, p. 16). He complained of lower back pain "since he was working last night, states does a lot of lifting/pulling and started hurting then." (Claimant's APA #3, p. 16). In consultation with the social worker, the claimant had questions about a possible workers' compensation claim. (Claimant's APA #3, p. 17, 22). The physician determined he was negative for gait problems and had a normal range of motion. (Claimant's APA #3, p. 19). The physician advised him to follow-up with Dr. Brett Gunter the next day to make an appointment. (Claimant's APA #3, p. 19). The doctor excused him from work for three days and advised he could return to work on June 28, 2017. (Claimant's APA #3, p. 25).

The claimant completed a "HealthWorks Post-Injury Questionnaire" on June 26, 2017, before meeting with Dr. Stephen Izard at Michelin. (Claimant's APA #4, p. 26-30). On the form, the claimant reported the injury occurred on June 24, 2017, while he was stretching rubber and moving bobbins. (Claimant's APA #4, p. 26-30). He denied ever injuring this part of his body. (Claimant's APA #4, p. 26). Following an evaluation, Dr. Izard opined the claimant presented a significant degree of symptom

amplification and magnification. (Claimant's APA #4, p. 30). Dr. Izard returned the claimant to regular duty and ordered the claimant to follow-up with him two days later on June 28, 2017. (Claimant's APA #4, p. 30).

On the following day, June 27, 2017, the claimant went to Lexington Medical Center Emergency Room complaining of back pain and urinary retention. (Claimant's APA #5, pp. 34-35). The doctor noted he had a normal gait. (Claimant's APA #5, p. 35). An X-ray of the lumbar spine showed no fracture subluxation. (Claimant's APA #5, p. 37).

The claimant did not return to Dr. Izard on June 28, 2017, as instructed. On June 30, 2017, the claimant went to Doctors Care, complaining of back pain. (Claimant's APA #6). He did not answer the questions on the intake form addressing whether the injury was a workers' compensation claim. (Claimant's APA #6, p. 44). The doctor told him he "really didn't have much to offer" the claimant as the claimant was already taking NSAIDs, muscle relaxers, and pain medications. (Claimant's APA #6, p. 45). The doctor referred him to an orthopedic specialist.

On July 24, 2017, the claimant met with Dr. Scott Boyd's physician assistant, Luis Valdes, PA, at Lexington Brain and Spine Institute. Valdes ordered an MRI and physical therapy. (Claimant's APA #7, p. 55). The claimant reported to Dr. Boyd that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment." (Claimant's APA #7, p. 58). Dr. Boyd gave him an injection, ordered physical therapy, and placed him out of work. (Claimant's APA #7, p. 60-71). The claimant did not answer the question on the physical therapy intake form asking whether the injury was related to a work accident. (Claimant's APA #8, p. 73).

In a medical questionnaire dated November 29, 2017, Dr. Boyd opined the claimant injured his lumbar spine at Michelin on June 24, 2017, the injury resulted in radiculopathy down the claimant's left leg, the claimant should remain out of work pending further treatment, and the claimant had not reached maximum medical improvement. (Claimant's APA #7, p. 71).

2. Deposition of Scott Boyd, MD

Dr. Boyd testified Valdes is his physician's assistant whom the claimant met with during the claimant's visits at the office. (Boyd Depo p. 5). Dr. Boyd supervised Valdes' work. Dr. Boyd testified the claimant presented for evaluation of an injury he stated occurred at work when he was lifting some heavy materials. The claimant reported to Dr. Boyd's office that he felt a sharp pain in his low back. He was seen at urgent care and then the emergency room, prescribed medications and told to follow up with Dr. Boyd. (*Id.*). Dr. Boyd testified the claimant told Mr. Valdes he was injured on June 24, 2017. (Boyd Depo p. 6). Dr. Boyd stated the later conducted MRI showed a herniated disk, but there was no way to tell from looking at the MRI scan how long the issue had been present. (Boyd Depo p. 9, 25-26). Dr. Boyd testified that as of September 14, 2017, the claimant was improving, and his pain level was down to a three out of ten. (Boyd Depo p.12). Dr. Boyd stated that all of his responses on the questionnaire he completed for the claimant were based in part on the history given to him by the claimant. (Boyd Depo p.16-17). Dr. Boyd admitted the history of accident given to him was different than that given to Internal Medicine. (Boyd Depo p. 20). On 6/13/17, claimant had the worst pain someone could experience. There was no recent trauma causing back problems per the 6/13/17, report. (Boyd Depo p. 21). The 6/24/17, hospital ER report makes no mention of radiating pain per Dr. Boyd. (Boyd Depo p. 24). He testified he cannot be certain as to when the current injury occurred. (Boyd Depo p. 27). Dr. Boyd opined the claimant began having back problems with pain because of increased physical exertion with his position at Michelin started in April 2017. Dr. Boyd believed the claimant got progressively worse and "at some point, somewhere around June 24th, something changed where he began having a slightly different set of symptoms . . . ." (Boyd Depo p. 43). Dr. Boyd opined that more likely than not, the claimant injured his lumbar spine at Michelin, including "some episode on June 24th." (Boyd Depo p. 44). Finally, Dr. Boyd testified it was his impression when he first saw claimant that the problems had begun on 6/24/17, and claimant had no issues before then. (Boyd Depo p. 54).

3. Exhibits

The claimant had a workers' compensation claim for a low back injury that occurred on December 4, 1997, while he worked for Jannock LTD D/B/A Richtex Brick. (Claimant's Exhibit G, p. 89; Defendant's Exhibit D, p. 8).

On May 16, 2001, the claimant completed the "Medical History and Examination Form (Post-Offer/Pre-Placement)" for Westinghouse Electric Corporation. (Defendant's Exhibit F, p. 17-21). The claimant denied ever having had a work-related injury or illness. (Defendant's Exhibit F, p. 19). He denied ever being restricted medically from doing any part of his job. (*Id.*). He stated he never had any pain, numbness, limited motion, or injury of the back. (*Id.* at 20.). He denied ever having a work injury, workers' compensation claim, or receiving a settlement for any injury. (*Id.*). He denied any permanent restrictions or limitations. (*Id.*). He also denied having had a previous job with similar physical demands. (*Id.*).

Similarly, on March 21, 2017, the claimant executed the "Michelin Confidential Health Questionnaire for Post-Offer Examination." (Defendant's Exhibit E, p. 16). He denied any prior back injury, backache, back pain. (*Id.*). He denied ever experiencing a medical problem that affected his ability to perform work. (*Id.*).

In her work notes, Nurse Christie Sirois noted the claimant stated that on June 24, 2017, around 5:30 am, he was working on PAP when his back started to ache. (Claimant's Exhibit F, p. 88). He stated the back pain worsened as he continued to work. The claimant stated he left work and went to Michelin Family Health, but they were closed. He then went to Lexington Medical Center Emergency Room (LMC). Nurse Sirois noted the claimant did not report the injury to anyone at Michelin until after being released from LMC. She stated LMC diagnosed the claimant with lumbar strain and prescribed Percocet and Flexeril but did not complete diagnostic testing. Shop manager, Tyrone Gilmore, contacted Nurse Sirois to see if she spoke with the claimant. (Claimant's Exhibit F, p. 88).

She called the claimant on June 24, 2017, around 3:57 pm. The claimant told her he was seen at LMC for lower left back pain that started on June 24, 2017, while stretching and pulling rubber. The claimant rated pain at a ten and denied any numbness, tingling, radiating pain, or other symptoms. The claimant also

denied anything specific that started the pain at work and denied anything personal outside of work. She scheduled the claimant an appointment with Dr. Izard at Healthworks on June 26, 2017, at 8:00 am for further evaluation. Nurse Sirois noted that during the June 26, 2017 visit with Dr. Izard, Dr. Izard opined there seems to be a significant degree of symptoms amplification and magnification by the claimant. (Claimant's Exhibit F, p. 88).

After the claimant contacted Nurse Sirois on June 28, 2017 and told her he went back to LMC on June 27, 2017, and would not attend his appointment with Dr. Izard, Nurse Sirois explained to the claimant the workers' compensation process and that he had not properly notified medical of any of his appointments. The claimant angrily stated that he did notify medical and "he did not have to get into this with" her. She advised him to speak with his supervisor immediately, but he would not let her talk and disconnected the call. (Claimant's Exhibit F, p. 88).

After careful review in the instant case of all grounds raised, the evidence in the record, and oral arguments from both counsel, the Commission finds that, by unanimous vote, the Decision and Order of the Hearing Commissioner is Affirmed in its entirety with minor Amendments.

FINDINGS OF FACT

After careful review of the evidence presented by the parties, including the hearing testimony of the claimant, Jermaine Lemon, Troy Lowman, Nurse Christie Sirios, and Mark Gross, the deposition testimony of Scott B. Boyd, MD, and the medical records and exhibits submitted through the APA, WE FIND AS A FACT THAT:

1. The Hearing Commissioner sent the Order instructions to the parties on April 17, 2018, via email. The Hearing Transcript was not completed until June 5, 2018, per Certificate of the court reporter.

2. We find the claimant is not credible. This Finding is based upon the greater weight of the evidence in the record, the testimony of the claimant, the testimony of representatives from Michelin, as well as the Hearing Commissioner's observations of the claimant at the hearing. Specifically, the greater weight of the evidence shows that a couple of weeks after he began working for Richtex in 1997, the claimant had a very similar incident. In that claim, the claimant alleged back pain after he began

physical work with the company. At Richtex, as in the current claim, instead of following the treating doctor's orders, the claimant sought treatment at Doctors Care.

As further evidence of the claimant's lack of credibility, the claimant omitted information about a former employer – an employer for which he had a workers' compensation claim for a back injury – from his employment application for Michelin. The claimant also denied any prior workers' compensation claims, which is untrue. Moreover, he repeatedly attempted to justify his answers during his testimony. We find that while testifying, the claimant gave confusing answers when asked direct questions by his attorney. As noted by the Hearing Commissioner throughout the proceeding, the claimant provided vague responses when questioned by defense counsel. He would not answer defense counsel's questions, rambling through responses. (H.T. 227).

3. We find the claimant was unclear as to the actual date of the alleged accident or incident and his reasons for waiting to file a claim. (H.T. 265-69). He believes the alleged accident could have occurred on June 24, 2017; however, the medical records are inconsistent with his testimony. This Finding is based upon the greater weight of the evidence in the record and the testimony of the claimant.

4. We find that on June 11, 2017, the claimant reported ten out of ten pain; however, he did not file a workers' compensation claim for any date but June 24, 2017. (H.T. 259-60). The medical records are not consistent with his testimony. Moreover, claimant never notified anyone at Michelin he had ten out of ten pain in his back which he felt was caused by his work, but instead he returned to the same work he felt was causing his problems unbeknownst to Michelin. This Finding is based upon the greater weight of the evidence in the record and the testimony of the claimant.

5. We find Dr. Boyd provided restrictions of no heavy lifting. However, we find causation is not provided in the medical records because Dr. Boyd had no knowledge of the extent of claimant's prior back issues. This Finding is based upon the greater weight of the evidence in the record, the deposition testimony of Dr. Boyd, and the testimony of the claimant.

6. We find the medical records; records from Richtex Brick and Westinghouse; along with the testimony of Mark Gross; the evidence supports the defense of fraud in the application for employment. (Claimant's Exhibit G, p. 89; Defendants' Exhibit D, p. 8; Defendants' Exhibit E, p. 16; Claimant's APA #4, p. 26).

7. We find based on the greater weight of the evidence there is clearly fraud in the application. The claimant completed the post-hire medical questionnaire for Michelin on March 21, 2017. The claimant with knowledge falsely stated he never had prior back issues. The employer would not have hired the claimant for the position in which he was working had the claimant provided truthful information. This finding is based upon the greater weight of the evidence in the record, including but not limited to the post-hire medical questionnaire, the medical records, the testimony of the claimant, Jermaine Lemon, Troy Lowman, and Mark Gross.

8. We find the claimant understood all questions on the post-hire questionnaire and authenticated his signature. Claimant understood the cautionary language and understood that false answers could result in his loss of workers' compensation benefits and employment. This finding is based upon the

greater weight of the evidence in the record, including but not limited to the post-hire medical questionnaire, the medical records, and the testimony of the claimant.

9. We find the claimant knowingly and willfully made a false misrepresentation as to his prior back condition. We find the defendant-employer relied on the claimant's misrepresentations on his post-hire medical questionnaire. We find a causal relationship exists between claimant's prior back problems and the subsequent back problems arising from his alleged work-related accident. This finding is based upon the testimony of all witnesses and the medical evidence in the record.

10. This claim is denied in its entirety based on evidence of numerous issues relating back to 1997 through 2017. The claimant has failed to carry his burden of proof of an accident being sustained on June 24, 2017, due to his lack of credibility, the lack of sufficient medical evidence to support his allegations, and, moreover, due to medical evidence to the contrary. We find the claimant was unable to return to work after June 24, 2017, due to a previous incident. We find the June 24, 2017, incident is not compensable based upon the greater weight of the evidence and the other reasons stated within this Finding.

11. We find that prior to the Hearing, defense counsel Grady Beard prepared to a motion to reconvene the deposition of Dr. Scott B. Boyd. Defense counsel sought to have this motion granted prior to the Hearing, stating counsel for the claimant, Stephen Samuels, noted reasons not to grant the motion. At the end of the hearing, Attorney Beard sought to withdraw the motion and Attorney Samuels requested to have the motion granted. At the end of the hearing, the Hearing Commissioner found the motion is denied.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of this Appellate Panel that:

1. Under §42-1-130, claimant was a covered employee at the time in question; however, pursuant to §42-1-130 and *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), the claimant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits under the South Carolina Workers' Compensation Act.

2. Under §42-1-140, defendant-employer was a covered employer under the Act.

3. Pursuant to *Cooper*, the following three factors must be present before a false statement in an employment application will vitiate the employer-employee relationship and bar an employee from benefits: (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 injury. All three elements were met in this case.

4. Under §42-1-160, the claimant did not sustain compensable injury to his low back while under the employ of the defendant-employer on June 24, 2017, as alleged. Claimant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented. Moreover, the claim would be barred under ***Capers v. Flautt***.

5. Under §42-9-60, assuming claimant actually sustained an injury by accident on June 24, 2017, to his low back, as alleged, the claimant intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same.

6. Under §42-9-30, the claimant did not sustain permanent partial disability with regard to his low back.

7. Under §42-15-60, the claimant is not entitled to medical treatment.

ORDER

IT IS, THEREFORE, ORDERED, that the Decision and Order of the Hearing Commissioner filed in the above-captioned matters on January 18, 2018, is hereby **UNANIMOUSLY AFFIRMED WITH AMENDMENTS.**

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Commissioner Gene McCaskill
For the Appellate Panel

Commissioner Susan S. Barden

Commissioner T. Scott Beck

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on February 27, 2019