THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

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

Danny B. Crane, ... Petitioner,

v.

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

BRIEF OF PETITIONER

Stephen B. Samuels
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

R. Stephen Chandler
Law Offices of R. Stephen Chandler, LLC
P.O. Box 948
Bamberg, SC 29003
(803) 245-1800
Steve@BambergLaw.com

Attorneys for Petitioner

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STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Petitioner, Danny Crane, on February 19, 2014. As Crane's employer, Raber's Discount Tire Rack (Raber), was uninsured for workers' compensation, the South Carolina Uninsured Employer's Fund (Fund) was added as a party.

Crane filed a Form 50 (Request for Hearing) on March 11, 2014. Crane alleged injuries to his "Head/brain, Ears (hearing) and face." He sought medical treatment and temporary total disability compensation. [App. p. 79]. Crane had received limited evaluation and treatment for hearing loss by an ENT specialist and a neurologist.

The Fund timely filed a Form 51 (Employer's Answer to Request for Hearing) on March, 2014. The Fund made a general denial of all issues. [App. pp. 80-81].

Raber filed an untimely Form 51 (Employer's Answer to Request for Hearing) on May 5, 2014. Raber admitted it had notice of the injury; alleged Crane was an independent contractor rather than an employee; alleged Crane "was working on his personal vehicle at the time of the accident;" and denied the injury alleging "Claimant has no objective medical evidence to support hearing loss." [App. p. 82].

A hearing was held before Commissioner Susan S. Barden on June 26, 2014. Crane was the sole witness who testified at the hearing. Commissioner Barden advised the parties of her decision immediately after the hearing. A preliminary Decision and Order was drafted but not signed.

On December 16, 2014, Petitioner filed a Motion to Submit Additional Evidence with a supporting Affidavit. [App. pp. 181-6]. The additional evidence included a report from an ENT, Dr. Rocco Cassone, and an updated Pure Tone Audiogram with a report from the audiologist.

Commissioner Barden granted the Motion and considered the additional evidence in her Decision and Order. [App. pp. 42-3, 57].

Commissioner Barden issued a Decision and Order on April 30, 2015. Commissioner Barden held:

> Based upon the foregoing, it is hereby:
>
> ORDERED, ADJUDICATED, AND DECREED that Employer is subject to the Act.
>
> IT IS FURTHER ORDERED that Claimant is entitled to be reimbursed for the Emergency Room visit on the date of the accident, the CT scans and associated visits, the two visits with Dr. Ansley, and the February 25, 2014, and March 31, 2014, visits to Barnwell Family Practice.
>
> IT IS FURTHER ORDERED that Claimant is not entitled to any future medical or psychological benefits.
>
> IT IS FURTHER ORDERED that Claimant is not entitled to any temporary total disability payments as a result of the incident.
>
> IT IS FURTHER ORDERED that Claimant is not entitled to any permanent impairment as a result of the incident as any injuries resolved or returned to baseline.
>
> AND IT IS SO ORDERED.

Petitioner timely filed a Form 30 (Notice of Appeal) on May 12, 2015. [App. pp. 188-9]. On appeal to the Appellate Panel, Crane withdrew the brain injury claim. The appeal went forward on the claim for hearing loss, vestibular problems and depression.

The Appellate Panel heard oral arguments on July 21, 2015. The Appellate Panel issued a Decision and Order on October 1, 2015, in which it summarily affirmed the decision of the Single Commissioner. [App. pp. 60-78].

Petitioner timely appealed to the South Carolina Court of Appeals. The court affirmed in part and reversed in part in an unpublished decision. Crane v. Raber's Discount Tire Rack, Op. No. 2018-UP-85 (S.C.Ct.App. filed February 14, 2018). [App. pp. 1-3].

Petitioner timely filed a Petition for Rehearing on March 1, 2018. [App. pp. 4-14]. The Petition for Rehearing was denied on April 26, 2018. [App. pp. 15-6].

Petitioner timely filed his Petition for Writ of Certiorari with this Court on May 23, 2018. Respondents filed their Return to Petition for Writ of Certiorari on June 20, 2018. Petitioner filed his Reply on July 2, 2018.

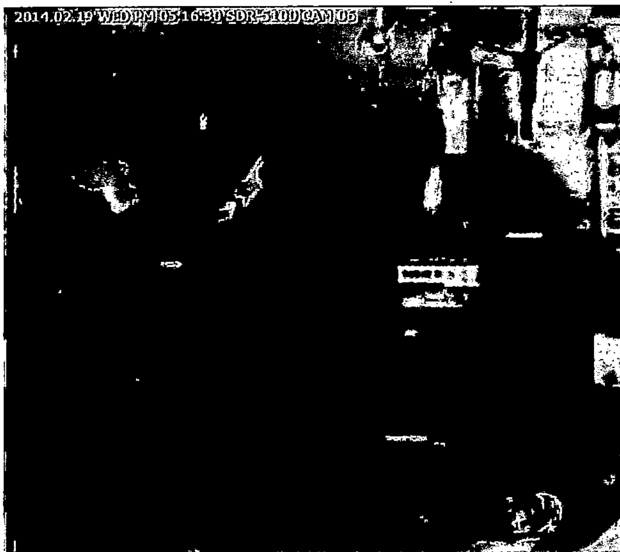
The Court issued the Writ on April 22, 2019.

STATEMENT OF THE FACTS

The Petitioner, Danny Crane, was employed as a mechanic for James Raber d/b/a Raber's Discount Tire Rack. Crane had worked for Raber since July 2013.

This case arises out of a work-related accident occurring on February 19, 2014. As Crane was working, he heard a hissing noise from an air-powered tire changer. He went to investigate. He bent down to try to locate the air leak, when the high-pressure 3" diameter hose exploded near his face. [App. p. 214, line 24-p. 217, line 15].

Security cameras recorded the incident and the immediate aftermath. [App. p. 143 (CD)]. At 5:16:30, Crane was bending over the machine looking for the leak.[1]



The hose blew in the next second.

[1] The time stamps on the video appear to be one hour ahead.

Crane immediately stood up and backed away from the tire changer. He bent over in pain and put his hands over his ears.

After a few moments, Crane stood up. Crane's supervisor (with the clipboard) came over to help him. The supervisor put his head close to Crane's head to try to talk to him because Crane could not hear anything.

Crane then pulled out his cellphone and texted his wife to "come get me." [App. p. 251, line 22-p. 63, line 1].

After about two minutes, Crane went back to the tire changer. He retrieved the hat which had been knocked off his head and spent approximately eight minutes repairing the tire changer. At 4:27 pm (5:27 per the time stamp on the video), he got up from behind the tire changer, walked away and lit a cigarette. After smoking the cigarette, Crane continued attempting to work until his wife arrived to take him to the emergency room.

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

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

on 2/20/14 and he agreed." [App. p. 94]. The discharge diagnosis was "CONDUCTIVE HEARING LOSS MIDDLE EAR." [App. p. 95].

Crane saw the ENT, Dr. Ansley, on February 20, 2014. On physical exam, Dr. Ansley noted "Bilateral tympanic membrane perforations . . . He does seem to be having difficulty hearing. He was sent for an audiogram which showed a severe sensorineural hearing loss in bilateral ears." [App. p. 108]. On the Pure Tone Audiogram performed at Dr. Ansley's office, the audiologist wrote "Repeat HE in few days – possible TTS."[2]

Crane had the CT scan on February 25, 2014. The reason for the exam was "Sudden hearing loss. Patient states he had a tire changer with 150 PSI blow up in his face last week with loss of hearing both ears." The impression was normal, although the radiologist noted "If the patient has sensorineural hearing loss, consider further evaluation with MRI brain and internal auditory canals."[3] [App. pp. 97-108].

Crane also saw his family doctor, Dr. Koukos, on February 25, 2014. On physical exam, Dr. Koukos wrote: "Unable to hear following air line explosion. Had hearing test by ENT. Works in tire shop. Unable to hear auto's in shop. Some dizziness. Right ear clear. Right side headache." Dr. Koukos ordered another CT scan. [App. pp. 126-7].

On March 6, 2014, Crane returned to Dr. Ansley for repeat "evaluation of his ears. He is still having difficulty hearing." The Pure Tone Audiogram showed a downward shift (worsening) of

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[2] TTS (temporary threshold shift is a temporary shift of the auditory threshold. The damage can become permanent (permanent threshold shift, PTS) if sufficient recovery time is not allowed for before continued sound exposure. When the hearing loss is rooted from a traumatic occurrence, it may be classified as noise-induced hearing loss, or NIHL.

[3] Sensorineural hearing loss (SNHL) is a type of hearing loss in which the root cause lies in the vestibulocochlear nerve (cranial nerve VIII), the inner ear, or central processing centers of the brain. Sensorineural hearing loss can be mild, moderate, or severe, including total deafness.

Crane's hearing. He was referred to MUSC for "ABR study to obtain more objective measure of his hearing."[4] [App. pp. 111-2]. Crane was unable to obtain the ABR as his family medical insurance did not cover MUSC. [App. p. 220, lines 5-22]. He only worked two partial days after the accident, so had no income. [App. p. 217, line 23-p. 218, line 7].

The second CT scan (ordered by Barnwell Family Medicine) was done on March 17, 2014. The indication was "Constant headache, hearing loss." The impression was a "Normal unenhanced head CT." [App. p. 125].

On March 26, 2014, Crane lost his balance getting out of the shower. He fell onto the toilet and cracked a rib. He was seen at Barnwell County Hospital. [App. pp. 99-104, 106]. He followed up with Barnwell Family Practice for the rib injury on March 31, 2014. He was not seen by his regular doctor, Dr. Koukos. He was seen by Dr. Mol Ky. [App. pp. 114-6].

Crane was evaluated by a neurologist, Dr. David Rogers, on May 19, 2014. On physical examination, Dr. Rogers reported "Patient demonstrates apparent healed 60% tear of right tympanic membrane. More complete approximately 80% tear in the left tympanic membrane. Both TMs were injected, left being affected more greatly than right." Dr. Rogers also reviewed the Pure Tone Audiogram results and assigned impairment ratings. He opined to "a reasonable degree of medical certainty that Mr. Crane's profound bilateral hearing loss is permanent and cannot be restored by natural means." [App. pp. 134-9].

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

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

The case was tried on June 26, 2014, before Commissioner Susan Barden. At the time of the trial, Crane had purchased an in-ear amplifier at Walgreens. He wore the amplifier in his left ear - which still retains some hearing. His right ear is completely deaf. The amplifier allowed him to hear most of the questions asked of him during the trial. [App. p. 208, lines 11-5]. However, the problem with the amplifier is that very loud sounds – such as the noise in a tire changing business – are so loud they give him headaches. He cannot work with the amplifier in, but without it, he cannot hear cars coming in or normal speaking. [App. p. 24 (Barden Order); p. 206, line 24-p. 207, line 2; p. 208 lines 11-5; p. 217, lines 23-9; p. 245, line 18-p. 248, line 20].

Several times in the hearing, Crane asked the questioner to speak up or repeat a question because he could not hear it. [App. p. 207, line 4; p. 213, line 11; p. 232, line 16; p. 248, line 25]. He also was asked by the Commissioner to speak up several times because he spoke so softly that he could not be heard. [App. p. 212, lines 11-3; p. 227, lines 5-12; p. 229, lines 10-2].

Commissioner Barden stopped the trial after Claimant rested without hearing any defense witnesses. She advised the parties that Claimant had proven his case as to being an employee subject to the Act, such that no further evidence on the employment issue was necessary. She further advised the attorneys that she did not consider Crane a credible witness.

After the initial proposed Order was drafted, Claimant filed a motion to submit additional evidence. [App. pp. 181-7]. Commissioner Barden granted the Motion. The additional evidence was considered in her revised order. [App. pp. 42-3, 57].

The additional evidence was an updated Pure Tone Audiogram done on August 19, 2014 by Ronald Lunn, the same audiologist who did the first two Audiograms, along with reports from the audiologist and an ENT, Dr. Rocco D. Cassone (Dr. Ansley's partner at Carolina Ear, Nose and Throat Clinic). [App. pp. 183-5].

Dr. Cassone wrote:

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

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

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

Commissioner Barden issued her Decision and Order on April 30, 2015. [App. pp. 20-59]. She found the uninsured Employer subject to the Act. She further ordered "that Claimant is entitled to be reimbursed for Emergency Room visit on the date of the accident, the CT scans and associated visits, the two visits with Dr. Ansley and the February 25, 2014, and March 31, 2014, visits to Barnwell Family Practice." [App. p. 59]. She denied all future medical treatment and temporary total disability compensation. She specifically found "Claimant is not entitled to any permanent impairment as a result of the incident as any injuries resolved or returned to baseline." [App. p. 59]. She denied Crane's request to be sent for ABR testing.

The Appellate Panel affirmed, adopting Commissioner Barden's Findings of Fact verbatim.

The court of appeals Affirmed in Part, Reversed in Part, and Remanded. The court reversed the denial of temporary total disability compensation, holding Crane was entitled to TTD from

March 6, 2014 to the date he reached MMI. The court affirmed the Commission's finding that Crane reached MMI on March 31, 2104. [App. pp. 1-3].

This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs appellate review of the full commission's decision. Lark v. Bi–Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Under this standard, the appellate court can reverse or modify the decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C.Code Ann. § 1–23–380(A)(5) (Supp. 2011). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

Two principles form the lens through which the court reviews decisions of the workers' compensation commission. First is the guiding principle undergirding our workers' compensation system that the Act is to be liberally construed in favor of the claimant. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973). The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Instead, "[an award] must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

A "credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court." Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)(emphasis added). "[A]dministrative findings based on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained." Breeden v. Weinberger, 493 F.2d 1002, 1010 (4th Cir.1974). See, also Stallcup v. Carolina Wood

Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.").

ARGUMENT

1. Danny Crane has not reached MMI for his compensable hearing loss with headaches and dizziness due to his work accident.

The Appellate Panel erred in finding Danny Crane's injuries had resolved or returned to baseline. In so doing, the commissioners ignored and overlooked the medical evidence, instead relying on the single commissioner's arbitrary perception of Crane's ability to testify with an amplifier in his better ear. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed); Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992)(Johnson, J., concurring)(hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional.").

Both the court of appeals and the commission fell into a logical trap, leading them to a false conclusion. The court of appeals affirmed the appellate panel's finding that Crane had reached maximum medical improvement (MMI) on March 31, 2014, holding this finding was supported by substantial evidence. The appellate panel found "Claimant reached maximum medical improvement on March 31, 2014." [App. p. 75, Finding of Fact 39]. The date corresponds with a visit for an unrelated rib injury by Dr. Mol Ky. [App. pp. 114-6]. The appellate panel seems to have concluded – despite a complete lack of supporting evidence in the record itself [5] – that this visit was also for hearing loss.

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[5] Further confirmation that Dr. Ky's evaluation was limited to addressing rib pain is found in the commission's remarkable statement that "Strikingly absent are any references to hearing loss (Claimant's tympanic membranes are 'clear and mobile'), memory loss, headaches, dizziness, bleeding, or psychological difficulty." [App. p. 67, Finding of Fact 10(b)]. Illogically, the commission places great reliance on a medical record wholly unrelated to the compensable hearing loss.

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

The Appellate Panel ordered "Claimant is entitled to receive reimbursement for the medical treatment he received through (and including) the March 31, 2014 visit, with the exception of the March 26, 2014 Emergency Room visit for the unrelated rib injury." [App. p. 67, Finding of Fact 11]. Surely if the emergency room visit is unrelated, then so necessarily must the follow up visit for "RIGHT RIB PAIN." [App. p. 114]. A medical evaluation for an unrelated condition cannot be substantial evidence supporting a finding that the employee reached MMI with no impairment for a compensable injury. The absence of evidence of continuing hearing loss in Dr. Ky's report is not evidence that the hearing loss was absent.

The specific flaw in the appellate panel's reasoning arises from the commission's failure to separate genuine medical treatment notes from boilerplate default notations inherent in electronic medical records. The March 26th emergency room visit and the March 31st visit with Dr. Ky had nothing to do with hearing loss. Crane specifically went to those providers solely for rib pain from a fall in the bathroom (which he attributed to balance problems caused by the accident). It is not possible to discern why the single commissioner developed such a negative impression of Crane, but the choice of March 31st as an MMI date seems chosen to punish him for bringing a claim the single commissioner felt was "questionable."

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

UNABLE TO HEAR FOLLOWING AIR LINE EXPLOSION HAD HEARING TEST BY ENT WORKS IN TIRE SHOP UNABLE TO HEAR AUTO'S IN SHOP

SOME DIZZINESS.

RIGHT EAR CLEAR

RIGHT SIDE HEADACHE

WILL DO CT BRAIN DX SUBDURAL

[App. p. 126].

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

The rest of the physical examination reported in the medical record is boilerplate. We know this because under Neurologic, the *same* report includes the notation "... normal hearing..." [App. p. 127]. In reality, Crane's hearing was not normal, as we know from Dr. Ansley's reports and testing. Five days earlier on February 20, 2014, Dr. Ansley diagnosed Crane with "Severe sensorineural hearing loss." [App. p. 108]. And nine days after Dr. Koukos saw Crane for hearing loss, Dr. Ansley reevaluated Crane. On March 6, 2014, Dr. Ansley wrote "He is still having difficulty hearing." He sent him to MUSC for an ABR to "Rule out sensorineural hearing loss." [App. p. 111]. The hearing loss was confirmed by the second Pure Tone Audiogram on the same day. [App. p. 112].

Applying the same analysis to Dr. Ky's March 31, 2014 report, we can see the History of Present Illness has no mention of hearing loss, headaches or dizziness. The history is entirely devoted to "[t]he patient is a 37 year old male who presents with a complaint of RIGHT RIB PAIN." [App. p. 117]. Similarly, the physical examination is entirely normal except for "*Tenderness noted to palp over right rib. No edema, erythema or lacerations noted to abdomen.*" [App. p. 118].

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

A medical report from a primary care doctor addressing an entirely unrelated medical condition is not substantial evidence that the work-related hearing loss had resolved or returned to baseline and that the patient had reached MMI. This is particularly so when, as here, later records from *specialists in hearing loss* confirm with objective testing that "severe" and "profound" hearing loss is still present many months later. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing commission's factual finding because "rank speculation" is not substantial evidence); Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]").

Interestingly, the appellate panel notes the neurologist, Dr. Rogers, "found Claimant to be at maximum medical improvement," yet disregarded his opinion as unreliable – perhaps because Dr. Rogers opined "It is my medical opinion beyond a reasonable degree of medical certainty that Mr. Crane's profound bilateral hearing loss is permanent and that hearing acuity cannot be restored by natural means." [App. p. 138]. Dr. Rogers' opinion (and the other medical opinions) do not support the decision the single commissioner sought to render. The appellate panel seems to have relied on the single commissioner's internet research and personal medical opinions rather than the actual medical evidence in the record. See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is

not evidence and cannot form the basis of a finding);[6] Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring)(hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional.").

The Commission could have found Crane to be at MMI on May 19, 2014 based on Dr. Roger's report. [App. pp. 134-140]. Or it could have found he reached MMI on the third ENT evaluation done by Dr. Cassone on August 19, 2014. [App. p. 184]. Or, based on the recommendations for further testing by Dr. Cassone and audiologist Lunn, it could find Crane is not at MMI. These are the only possible findings regarding MMI that could have been made from the evidence in the record. Anything other finding is arbitrary, capricious and unsupported by substantial evidence.

The two medical records from the unrelated rib injury are not substantial evidence to support the appellate panel's finding that Crane reached MMI on March 31, 2014 with full recovery of his hearing. The appellate panel's guess that Crane's hearing loss must have somehow resolved because it was not mentioned one way or the other is pure speculation. The appellate panel arbitrarily ignored and misread the later reports from Dr. Rogers and Dr. Cassone finding the hearing loss to be permanent. [App. pp. 119; 183-4]. As such, this case should be reversed and remanded for a proper finding of MMI and determination of disability due to dizziness and permanent hearing loss.

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[6] The hearing commissioner in the case *sub judice* also heard Burnette.

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

The commission's finding that Crane is not entitled to additional medical treatment is entirely based on the erroneous finding that his hearing loss had fully resolved and he reached MMI on March 31, 2014. The evidence shows otherwise. Petitioner believes the appellate panel and the court of appeals overlooked or misapprehended the medical evidence in the record.

On March 6, 2014, Crane saw Dr. Ansley for repeat "evaluation of his ears. He is still having difficulty hearing." The Pure Tone Audiogram showed a downward shift (worsening) of Crane's hearing. He was referred to MUSC for "ABR study to obtain more objective measure of his hearing." [App. pp. 111-2]. Crane was unable to obtain the ABR as his family medical insurance did not cover MUSC. [App. p. 220, lines 5-22; p. 234, lines 1-21]. Despite Crane's consistent testimony as to the wholly legitimate reasons he was not able to obtain the ABR study (and his expressed desire to undergo the test to obtain cochlear implants), the Single Commissioner simply dismisses the prescriptions for the ABR, stating: "Because the video indeed shows an incident/accident, my first inclination might have been to order the more objective test that Claimant, *for a reason now abundantly clear to me*, has avoided." [App. p. 49, Finding of Fact 14]. The Commissioner never explicitly states what this abundantly clear reason may be. The unstated implication seems to be that the "more objective" ABR testing would contradict the objective evidence of hearing loss consistently demonstrated in the previous three pure tone audiograms. Such a conclusion is wholly speculative. Furthermore, impugning someone's character with this sort of innuendo is neither a legitimate means of fact finding nor of determining whether an injured worker should receive treatment ordered by his doctors. See Henry v. Commissioner of Soc. Sec., 802 F.3d 1264 (11th Cir. 2015)(" The ALJ inappropriately assessed the credibility of Dr. Barber's opinion

based on a negative inference from Henry's failure to seek additional medical treatment and without regard for Henry's ability to pay for such treatment.").

On August 19, 2014, Dr. Cassone stated "[Crane] was sent for audiogram and this showed a profound hearing loss in each ear." Dr. Cassone added "He may be a candidate for a cochlear implantation and this should be considered. . . . He should be considered disabled because of this" [App. p. 184]. Dr. Cassone repeated the recommendation made by Dr. Ansley. Yet, even with this unmistakably clear pronouncement from Dr. Cassone (Dr. Ansley's partner), the Single Commissioner and Appellate Panel inexplicably and arbitrarily found "that the new evidence does not serve to help Claimant's case." [App. p. 76, Finding of Fact 42].

The law requires that the employer is to provide and the employee shall accept "an attending physician and any medical care or treatment that is considered necessary by the attending physician . . ." S.C. Code Ann. § 42-15-60 (A)(2007). As this case was denied by the employer, no attending physician had been provided. Crane treated with his own doctors. When addressing this common scenario, the Commission is required to designate the Claimant's physician as the attending physician, select the attending physician, or allow the employer to made the designation. Where, as here, the evidence supports the need for additional testing and treatment, the Commission must follow the evidence and order treatment. See Martin v. Rapid Plumbing, 631 S.E.2d 547, 369 S.C. 278 (Ct. App. 2006)(Commission properly designated employee's choice of doctor as the authorized treating physician in "a situation where the employee feels he still needs treatment and the employer fails to provide it.").

The appellate panel erred in substituting the single commissioner's medical opinion for the medical opinions of the treating and examining doctors. See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted

by the Commission," is not evidence and cannot form the basis of a finding). There were no medical opinions contradicting or disagreeing with Dr. Koukos, Audiologist Lunn, Dr. Ansley, Dr. Rogers and Dr. Cassone. See, Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]"). Whether the appellate panel was relying on its own internet research or on records from the unrelated rib injury, there is no substantial evidence supporting the appellate panel's finding limiting medical treatment to March 31, 2014.[7] Indeed, it is quintessentially arbitrary to make Defendants pay for medical treatment for a rib injury the Commission found to be unrelated, yet deny reimbursement for later medical treatment for the work-related hearing loss.

The Appellate Panel erred in concluding the rib injury records were dispositive evidence that the hearing loss had fully resolved with no need for further treatment. The Appellate Panel committed an error of law when it ignored or overlooked the later records from Dr. Rogers and Dr. Cassone (and the third Pure Tone Audiogram) confirming that Crane still suffered severe permanent hearing loss and dizziness. As treatment for a rib injury wholly unrelated to the occupational injury can have no bearing on whether Crane requires more treatment for his hearing loss, the decision below be reversed and additional medical treatment should be ordered.

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[7] The Single Commissioner found as a fact that her internet research were "credible medical sources," yet rejected the expert medical opinions and observations of the audiologist, the neurologist and the two otolaryngologists who personally examined and tested Crane. [App. p. 56, Finding of Fact 35].

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

The court of appeals affirmed the appellate panel's finding that Crane was not a credible witness. Petitioner acknowledges that South Carolina traditionally holds a determination of credibility is solely for the appellate panel and could not be reversed by the appellate courts. However, even credibility findings must be supported by substantial evidence. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court." (emphasis added)). Cf. Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court."); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998)("Although the general proposition that the jury determines credibility issues is a correct one, there is no issue for the jury when the evidence as a whole admits of only one reasonable inference").

In the instant case, the credibility finding is the product of the single commissioner's "hunch or intuition." See Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring)(hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional."). Rulings of this type have been roundly condemned by the federal courts as inherently unreliable in disability cases. "In 'sit and squirm' jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984).

The inherent unfairness and unreliability of the appellate panel's decision puts the Court in a difficult position. Either the credibility finding must be reversed or, as the court of appeals did in Burnette, the underlying factual findings must be reversed on the medical evidence, thus obviating a need to address the credibility findings. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(declining to address credibility issue because Appellate Panel's factual findings were based on the single commissioner's own medical opinion unsupported by medical evidence in the record). Even if the trier of fact can discount portions of Crane's testimony on credibility grounds, it cannot use Crane's perceived lack of credibility to disregard the consistent medical evidence and opinions of the doctors – particularly when those opinions rest on objective testing results from the Pure Tone Audiogram required in hearing loss cases by the commission's own regulations. See, S.C. Code Ann. Regs. 67–1102 (2007)("The calculation of a hearing handicap is derived from the pure tone audiogram . . .").

The "inconsistency" in Crane's ability to hear observed by the single commissioner is actually confirmation of his hearing loss. The commissioner was informed during pretrial and at the opening of the case that Crane would be able to testify because he had an amplifier in his left ear – along with fairly good discrimination of speech as shown in the Speech Discrimination tests. The commissioner knew from the outset that Crane would likely be able to hear most, but not all, of what was said. [App. pp. 23-4]. This is exactly what happened.

During the hearing, the attorneys sat at counsel table facing the Commissioner. For most of the hearing, Crane sat to the left of the Commissioner between the bench and counsel table. From this position, his better ear was on the side of the attorneys, whereas his totally deaf right ear was facing the Commissioner. When the security video was played, Crane turned around to watch it, thus turning his better ear towards the Commissioner.

Disregarding the video and medical evidence, while substituting an unfounded credibility finding is legal error. The video and medical evidence is unrefuted and confirms that Crane suffered a substantial hearing loss in the work accident. If there were any unanswered questions about his medical condition, then the appropriate action would be to order the ABR testing – not to deny the test based on speculation that his hearing loss had resolved or returned to baseline.

It is undisputed Crane had no preexisting history of hearing loss. Nor is there any doubt that Crane texted his wife to "come get me" immediately after the hose exploded and that she took him to the emergency room. The emergency room documented his complaints of headache and hearing loss/ringing in both ears. [App. pp. 91-5].

Crane was seen by an ENT three times and underwent three Pure Tone Audiograms. The Pure Tone Audiogram is the specific test required by the Commission's regulations for determining loss of hearing. 25A S.C. Code Ann. Reg. § 67-1102 (2007). The test cannot be manipulated – and indeed, the results of the three tests show a level of consistency that could not have been faked.

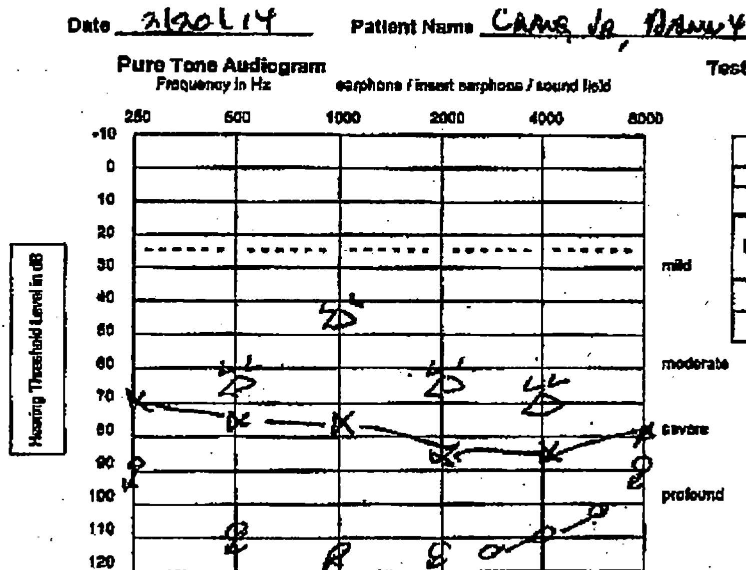
The audiogram is given by an audiologist. The patient wears headphones and is placed in a soundproof room. The audiologist sends electronic tones through the headphones at various levels of pitch and volume. If the patient hears a tone in his left ear, he raises his left arm; a tone in the right ear, he raises his right arm. Because the patient has no way of knowing when the tone is being sent, he cannot manipulate the test. If someone tried to manipulate the test, the audiologist would be able to discern this because the result would not be the consistent pattern shown on Crane's three test results.

The Pure Tone Audiogram *is* an objective test. The ABR is "more objective" because it measures brain wave responses to audio input, thus it does not require the patient to raise his hand

when he hears a tone. The audiologist and ENT ordered the ABR to get a more accurate measure of Crane's hearing loss for a cochlear implant – not because they doubted his credibility.

A comparison of the three Pure Tone Audiograms shows both the severity and consistency of Crane's hearing loss. The first test was done on February 20, 2014 – the day after the accident. The dotted line shows the threshold for hearing loss – test results above the line show normal hearing; below the line shows hearing loss from mild to moderate to severe to profound.

The first test showed profound hearing loss in the right ear and severe hearing loss in the left ear. [App. p. 109].



The second test was done two weeks later, on March 6, 2014. [App. p. 112]. Both tests showed profound hearing loss in the right ear – with the first showing moderate to severe in the left ear. Note the similarity in the pattern in the two tests. Both tests show the same pattern with the values very similar for the right ear (and worse for the left ear in the second test).

Date 8/6/14 Patient Name

Pure Tone Audiogram

Frequency in Hz earphone / insert earphone / sound field

The third test was done six months later on August 19, 2014 (two months *after* the hearing). [App. p. 185]. It too shows a pattern consistent with the previous tests. As the third Pure Tone Audiogram was done six months after the accident, it simply cannot be said that Crane's hearing loss has resolved or returned to baseline.

Date 8/19/14 Patient Name

Pure Tone Audiogram

Frequency in Hz earphone / insert earphone / sound field

Despite the consistent medical evidence of continuing hearing loss in August 2014, the commission found:

> Claimant reached maximum medical improvement on March 31, 2014. Even Claimant's IME found Claimant to be at maximum medical improvement. However, I find that Claimant has not proven any permanency, as Dr. Rogers' report is unreliable. More importantly, Claimant's own family doctor found Claimant's hearing normal after the date of the accident, and offered no opinion to the contrary. [App. p. 75, Finding of Fact 39].

The hearing Commissioner inexplicably puts great weight on "'normal' post-accident hearing" in Dr. Mol Ky's medical records where Crane was seen after he lost his balance and fell in the bathroom at home. [App. pp. 14-116]. Although Dr. Ky is in the same practice as Crane's family doctor, Dr. Koukos, Dr. Ky did not examine and treat Crane for hearing loss. Dr. Ky treated Crane for a broken rib. Dr. Ky is not Crane's "own family doctor."

Furthermore, these are electronic medical records (EMR). The default setting on EMR is normal for every condition. These records document the condition for which the patient was being actively treated at the time – which was a broken rib; not hearing loss. By the same token, relying on internal inconsistencies elsewhere in EMR showing "normal" hearing and no mention of tympanic membranes when Crane did see Dr. Koukos for hearing loss, headaches and dizziness fails to recognize the limitations inherent in EMR. <u>See</u> <u>Burnette v. City of Greenville</u>, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(unqualified medical opinion of a commissioner is not evidence).

The commission's finding that Crane's hearing had returned to baseline on March 31, 2014 when he saw Dr. Ky for his rib injury is entirely speculative. <u>See</u> <u>Hutson v. S.C. State Ports Authority</u>, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing commission's factual finding because "rank speculation" is not substantial evidence). Crane still suffered from hearing loss at the time of the June 26, 2014 hearing. Even more importantly, the third Pure Tone Audiogram done after the hearing showed the profound hearing loss was still present. [App. p. 183]. Dr. Cassone (who, unlike

Dr. Ky, evaluated Crane specifically for hearing loss) confirmed the hearing loss and dizziness had persisted even six months after the accident. [App. pp. 181-2].

It is inexplicable that the hearing commissioner found the August 2014 testing and evaluation "not only does not change my conclusions, it also confirms them. This evidence actually hurts Claimant's case more than it helps." [App. p. 43]. The testing and evaluation confirm persistent hearing loss and disability 2-3 months *after* the original hearing. This is positive medical evidence – consistent with two similar evaluations – confirming ongoing hearing loss using the test required by the regulations. The hearing commissioner read a hidden meaning into the reports that simply isn't there. This truly is rank speculation.

The hearing commissioner emphasizes throughout her order that her decision is largely based on hunches about Crane's motivation as he testified – specifically stating "Claimant's conduct/presentation at the hearing (including prior to opening the record) was more revealing than the substance of his actual testimony." [App. p. 40]. While the general rule requires the appellate courts to give deference to a hearing commissioner or trial judge on issues of credibility due to their ability to personally observe the witness, rulings must nonetheless be based on positive evidence in the record. Furthermore, in workers' compensation, "[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Hamilton v. Martin Color–Fi, Inc., 405 S.C. 478, 487, 748 S.E.2d 76, 81 (Ct. App. 2013). As the Appellate Panel reviews the same cold record reviewed by this Court, it would seem the substance of the testimony and medical evidence must form the basis of the decision. Making conclusions about someone's motivation based on hunches and intuition is quintessentially speculation.

The hearing commissioner questioned Crane's credibility primarily because his ability to hear questions was, in her view, inconsistent. The supposed inconsistency is explained by the hearing

tests. As part of the Pure Tone Audiogram, the audiologist also performed Word Discrimination testing. It is this testing that explains how Crane was able to testify at the hearing – as well as demonstrating why he heard some but not all of the questions asked of him.

The Word Discrimination score is a representation of how well an individual will do with hearing aids. Those with good or excellent scores are expected to do extremely well with hearing aids and will hear very much like an individual with normal hearing. Individuals with poor discrimination scores are expected to have some difficulties even with hearing aids.

Crane's Word Discrimination test scores are shown in order from left to right. [App. pp. 109, 112, 185].

Speech Scores (dB)		
	Right	Left
SRT/SAT	[illegible]	80
Word Discrimination (live voice).	% @	92 % @ 10
MCL		10
UCL		

Speech Scores (dB)		
	Right	Left
SRT/SAT	[illegible]	40
Word Discrimination (live voice).	0 % @ [illegible]	96 % @ [illegible]
MCL		
UCL		

Speech Scores (dB)		
	Right	Left
SRT/SAT	[illegible]	[illegible]
Word Discrimination (live voice).	0 % @ [illegible]	82 % @ 70
MCL		10
UCL		

On February 20, 2015, his Speech Score was 92%. On March 6, 2014, he did even better, with a 96% Speech Score. Six months later, his score on the August 19, 2014 Word Discrimination test was 82%. These tests are deliberately given in a quiet environment – much more akin to the relative peace and quiet of a courtroom versus the chaos and noise of a tire shop.

These test results belie the suggestion that Crane was somehow feigning deafness. They confirm that he is profoundly deaf in his right ear and severely deaf in his left ear.

Word Discrimination testing was not even attempted on Crane's right ear. This makes sense when one looks at the definition for *profound* hearing loss:

> **Profound**: (<90 dB)—May hear some loud sounds, but will be more aware of vibration; may rely on alternate mode of communication such as sign language. Amplification may assist in speechreading, monitoring one's own voice and increasing awareness of environmental sounds.

On the left ear, where the loss is *severe*, word discrimination testing was entirely logical. The definition of severe hearing loss is:

> **Severe:** (70 dB to 90 dB)—Will not hear conversational speech; may be able to identify environmental sounds; great reliance on visual cues and amplification.

Crane was able to testify because he wore an amplifier (hearing aid) in his left ear. The problem for him working is that he cannot hear speech without amplification – and with the amplifier in his ear the loud crashing and mechanical noises are so loud they give him severe headaches.

The medical opinions are consistent with the testing results. No doctor doubted that Crane suffered significant hearing loss as a result of the work accident. The only question was whether they could better treat him by determining the extent and nature of his hearing loss with an ABR test. The suggestion by the hearing Commissioner that Crane "avoided" getting the ABR test "for a reason now abundantly clear to me" is completely unfounded – as well as entirely speculative.[8] [App. p. 30, Finding of Fact 14]. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)("[R]ank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages.").

Crane's family doctor, Dr. Koukos, saw him for the accident on February 25, 2014. On physical exam, Dr. Koukos wrote: "Unable to hear following air line explosion. Had hearing test by

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[8] Crane testified he had been referred for further testing by the ENT specialist "Down in Charleston at M. Something, it was for the cochlear implants, but they can't get me in because of the type of insurance that my wife's got us on; they won't accept it. So they're in the process of trying to switch the H.M.O., is it? I can't remember the exact, but a change in the plan so that they will accept it." Crane added the insurance issue was the reason he had not gone and that, if the testing were arranged, paid for and scheduled, he "Most definitely" would go to the test. [App. p. 220, lines 5-19]. On cross-examination about scheduling the test, Crane again explained his doctor "Tried to [set up an appointment for him]. They won't accept my insurance, not until we – they get everything swapped around with the insurance plan to go down there." [App. p. 234, lines 1-11].

ENT. Works in tire shop. Unable to hear auto's in shop. Some dizziness. Right ear clear. Right side headache." [App. pp. 107;126-7].

The first ENT, Dr. Ansley, examined Crane on February 20, 2014 – the day after the accident. Dr. Ansley recorded "Bilateral tympanic membrane perforations. . . . He does seem to be having difficulty hearing. He was sent for an audiogram which showed a severe sensorineural hearing loss in bilateral ears." [App. p. 108]. On the return visit on March 6, 2014, Dr. Ansley recorded "He is still having difficulty hearing." Dr. Ansley referred Crane for the ABR test at MUSC to return after completing the test. [App. p. 111]. As previously noted, Crane was unable to undergo the test due to insurance problems.

The neurologist, Dr. Rogers, confirmed Dr. Ansley's observations of tympanic membrane perforations, reporting "Patient demonstrates apparent healed 60% tear of right tympanic membrane. More complete approximately 80% tear in the left tympanic membrane. Both TMs were injected, left being affected more greatly than right." Dr. Rogers also reviewed the Pure Tone Audiogram results and assigned impairment ratings. He opined to "a reasonable degree of medical certainty that Mr. Crane's profound bilateral hearing loss is permanent and cannot be restored by natural means." [App. pp. 134-140]. The hearing commissioner rejected Dr. Rogers' report as unreliable; yet – as to hearing loss and balance problems – his report is consistent with every other doctor who saw Crane for these conditions.

As to the post hearing evidence, the hearing Commissioner completely misapprehends or disregards Dr. Cassone's report. She states "Even more striking than this physician's [Dr. Cassone's] record is the fact that Claimant then later **(September 2014)** underwent another audiological evaluation with another provider (*i.e.*, not Dr. Ansley)." [App. p. 42 (emphasis in original)]. This is simply incorrect. All three of Crane's audiological evaluations were done by the

same audiologist. All three tests showed profound hearing loss in the right ear and serious hearing loss in the left – with good speech recognition in the left ear with amplification.

As to seeing "another provider," a quick look at the records shows Dr. Cassone is Dr. Ansley's partner in the Carolina Ear, Nose and Throat Clinic in Orangeburg. [App. pp. 113, 183]. It's the same practice!

More importantly, Dr. Cassone agrees with all the other doctors. Dr. Cassone wrote:

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

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

The hearing Commissioner wrote "I find it compelling that there are not causation statements in evidence from Claimant's two treating providers (Drs. Koukos and Ansley). <u>Instead, Claimant traveled by car approximately 3 hours to Greenville to obtain the IME opinion from Dr. Rogers.</u>" [App. p. 57, Finding of Fact 41 (emphasis in original)]. As this Court has previously observed, "[t]he nature and timing of [an employee's] visits do not discredit [a doctor's] medical opinion." <u>Cranford v. Hutchinson Constr.</u>, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012). <u>Cf.</u> <u>Henry v. Commissioner of Soc. Sec.</u>, 802 F.3d 1264 (11th Cir. 2015)("The ALJ inappropriately assessed the credibility of [physician's] opinion based on a negative inference from [claimant's] failure to seek additional medical treatment and without regard for [claimant's] ability to pay for such treatment."). The Commission arbitrarily disregarded Dr. Rogers' uncontradicted opinion for no valid reason – when there was no conflicting medical evidence.

More importantly, there *are* causation statements from Drs. Kassahun, Koukos, Ansley and Cassone – all of whom are treating doctors. Dr. Kassahun wrote: "Patient had tire blow up while working and now has difficulty hearing on both ears." [App. p. 93]. Dr. Ansley wrote "He had a machine blow up in his face a couple of days ago and he is having some difficulty hearing." [App. p. 108]. Dr. Koukos wrote "Unable to hear following air line explosion." [App. p. 126]. Dr. Cassone wrote "The patient has a long standing hearing loss following a sudden injury to his ears when a container blew up in a work related injury." [App. p. 184]. These causation statements cannot be ignored – particularly when there is video of the accident, no prior history of hearing problems, an immediate trip to the emergency room, and three Pure Tone Audiograms showing significant hearing loss. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"). The hearing commissioner goes to great lengths to impugn Crane's motivation and character, even implying that but for the video evidence of the accident, she would have denied the claim altogether. It is unfortunate that the hearing commissioner took such a view of this case. Sometimes it is difficult to recognize that a person with a profound hearing loss – probably aggravated by depression and the inability to work – is still able to testify *with use of a hearing aid.* While it may be counterintuitive for a deaf person to understand most spoken speech in a quiet courtroom, the medical evidence (and use of a hearing aid) explains this conundrum.

Here, the Single Commissioner and Appellate Panel engaged in so-called "sit and squirm" jurisprudence when they discounted Crane's testimony and medical evidence about loss of hearing based on the Single Commissioner's lay "Impressions" of Crane's ability to hear and understand the questions he was being asked. The Single Commissioner wrote: "Claimant's inconsistent

performance at the hearing as to what he can allegedly hear/not hear is the most persuasive evidence of all." [App. p. 49, Finding of Fact 14]. She further wrote:

> Claimant's "display" and evasiveness at the hearing (among other problematic issues) make me seriously question whether or not there was an actual injury. One cannot help but question that if Claimant had legitimate, causally-related hearing loss, he would have felt no need to "perform" at the hearing. However, because there was an incident (captured by video) and for which Claimant went to the Emergency Room, I find that Claimant sustained an injury to his ears on the date of the accident.

[App. p. 43, Finding of Fact 1].

Rulings of this type have been roundly condemned by the Federal Courts as inherently unreliable.[9] "In 'sit and squirm' jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984).

This approach "will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel." Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant "over-exaggerated his complaint about sitting for extended periods" was "unreasonable under the law and this Court does not accept them."). A hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional." Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring).

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[9] The Federal Courts employee the same *substantial evidence* standard of review employed by our appellate courts. Henry v. Commissioner of Soc. Sec., 802 F.3d 1264 (11th Cir. 2015)(under the substantial evidence standard, court will affirm the agency's decision if there exists "such relevant evidence as a reasonable person would accept as adequate to support a conclusion.").

Cf., Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

As lawyers, we are taught to reach factual conclusion based on consideration of the evidence – not form a hypothesis only to disregard the evidence that doesn't support the initial hypothesis. The "sit and squirm" methodology ensures arbitrary and unpredictable rulings based on gut feelings and intuition – rulings ultimately based on speculation which must be subject to review and reversal by the appellate courts. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)("To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it."); Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air."); Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.").

The Court should find Crane suffered hearing loss as a matter of law. The evidence of ongoing hearing loss and balance problems is overwhelming, such that the commission's findings are not supported by substantial evidence. When the only evidence in the record shows that the existence of a work-related injury, the Commission's findings must be reversed as unsupported by substantial evidence. See, e.g., McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992); Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct.App. 1995). See also Potter v. Spartanburg Sch. Dist.

7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)(commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion).

Petitioner acknowledges that our appellate courts have been reluctant to second guess the Commission's findings on credibility. There are valid reasons to give considerable deference to the trier of fact, given the ability of the trial judge or hearing commissioner to observe the demeanor of the witnesses. And indeed, a determination of the credibility of witnesses is critical to fact finding when there is a conflict in the testimony Yet, at some point, even a credibility determination can be so unfair, so unreasonable and so unjust that it cannot be supported by substantial evidence. When the trier of fact uses an unfavorable credibility finding as a proxy for disregarding competent medical evidence, then it has ventured deep into the speculative world of sit and squirm jurisprudence. When, as here, the trier of fact relies on gut impressions, hunches and intuition to ignore uncontradicted medical evidence and positive testimony, there cannot be a fair trial. The trier of fact can simply couch any arbitrary result as a credibility finding, insulated from any check on its authority, unassailable under any circumstance. The inability to review credibility findings simply invites abuse. People who are deemed undeserving, regardless of the merits of their *claim*, will be denied because of perceived flaws in their *character*.

Use of such an arbitrary and unreliable methodology would "turn the Act on its head and violate the stated policy behind it." Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012). It should be anathema to our judicial process for *any* finding – even a credibility finding – to be so sacrosanct as to be immune from judicial review. Trial judges have great liberty to reject and overrule arbitrary and capricious jury verdicts. The only similar check on administrative agencies is found in the right of appeal.

The Federal Courts recognized this fundamental injustice. While still remaining faithful to the substantial evidence standard of review, they took the next logical step by adopting judicial review of credibility findings and rejecting those findings based on sit and squirm jurisprudence. This Court has the opportunity to correct this injustice at the state level. Petitioner respectfully requests that the Court follow the Federal Courts and adopt true judicial review of credibility findings based on *sit and squirm* jurisprudence. Petitioner further requests that the Court reverse the findings of the Commission and remand for an award of medical treatment and compensation.

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

The Appellate Panel found "Claimant has not proven any permanency, as Dr. Rogers' report is unreliable. More importantly, Claimant's own family doctor found Claimant's hearing normal after the date of the accident, and offered no opinion to the contrary." [App. p. 75, Finding of Fact 39]. As noted earlier in this Brief, the Appellate Panel appears to base this finding on a report from a medical examination which the commission found to be for an unrelated rib injury. And as the Appellate Panel found, "Strikingly absent are any references to hearing loss . . ." [App. p. 67, Finding of Fact 10(b)]. *Nowhere* in this report is there any statement that Crane's hearing was normal – nor is there a statement that his hearing was abnormal. The report never mentions hearing loss one way or the other because the doctor was seeing the patient solely for a rib injury. See Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air."). Furthermore, the report is not from "Claimant's own family doctor." The report is from Dr. Mol Ky; not Dr. Koukos. [App. pp. 114 - 8]. Dr. Koukos is Crane's family doctor. [App. p. 240, lines 11-6].

Conversely, every doctor and audiologist who actually saw Crane for hearing loss *after* Dr. Ky saw him for the rib injury opined he had severe to profound hearing loss as shown by the Pure Tone Audiogram – including testing months after the June 26, 2014 hearing. Dr. Rogers opined to "a reasonable degree of medical certainty that Mr. Crane's profound bilateral hearing loss is permanent and . . . cannot be restored by natural means." [App. pp. 134-140]. Audiology testing on August 19, 2014 "suggest[ed] a right profound hearing loss, while the left ear suggests a profound

to severe hearing loss." [App. p. 183]. After reviewing the audiologist's report and examining Crane, Dr. Cassone wrote:

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

Dr. Cassone added "He should be considered disabled because of this." [App. p. 184].

Even if the commission can wholly reject Dr. Rogers' opinion as unreliable, it cannot also reject the opinion of Dr. Cassone. Nor cannot it reject three Pure Tone Audiograms, all of which show severe to profound hearing loss. [App. Pp. 109, 112, 185]. Our law allows the commission considerable leeway as the trier of fact in weighing evidence. It does not permit the commission to simply ignore uncontradicted medical evidence – especially when there are consistent opinions from multiple providers. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)(commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion). Nor does it permit the commission to base findings of fact on its own lay medical opinions without evidentiary support. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(reversing commission because unqualified medical opinion of a commissioner is not substantial evidence). Yet, that is exactly what the Appellate Panel did here. The finding that Crane suffered no permanent hearing loss is entirely speculative and should be reversed by this Court.

5. Danny Crane should be placed on a running award of temporary total disability compensation.

The court of appeals correctly reversed the appellate panel's finding that Crane was not entitled to temporary total disability. However, in limiting the period of compensation to the Appellate Panel's unsupported MMI date (March 31, 2014), the court overlooked that Crane was not actually at MMI. Petitioner recognizes this argument rests on a reversal of the MMI finding argued in Argument 1 of this Brief.

"The term 'maximum medical improvement' means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct.App.2006). Notably, Dr. Cassone opined "He may be a candidate for a cochlear implant and this should be considered." [App. P. 184]. This recommendation implies Crane may not be at MMI.

Petitioner requests that the Court reverse the finding on MMI and find that Crane should be paid temporary compensation until he reaches MMI. See Johnson v. Rent–A–Center, Inc., 398 S.C. 595, 730 S.E.2d 857 (2012) (employee entitled to temporary total disability benefits where employee had not returned to work after being put under medical restrictions); Curiel v. Env. Management Services, 655 S.E.2d 482, 376 S.C. 23 (2007)(" temporary total disability benefits are available from the date of injury through the date of maximum medical improvement"). The case should be remanded to the commission to determine if Crane is at MMI based on Dr. Rogers' opinion or Dr. Cassone's opinion. Alternatively, if Crane is at MMI, then an award of permanent disability should be entered based on the evidence from Dr. Cassone that "He should be considered disabled because of this." [App. p. 184].

CONCLUSION

For the foregoing reasons, the Court should affirm in part and reverse in part. The Court should affirm the findings that Crane was an employee who suffered a work-related injury and that he is entitled to temporary total disability compensation until he reaches MMI. The Court should reverse the finding of MMI, reverse the denial of medical treatment and temporary total disability after March 31, 2014 and the finding that Crane suffered no permanent hearing loss or dizziness. Crane should be provided medical testing and treatment, along with temporary total disability compensation on a running award.

Respectfully Submitted,

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

R. Stephen Chandler
LAW OFFICES OF R. STEPHEN CHANDLER, LLC
P.O. Box 948
Bamberg, SC 29003
(803) 245-1800
Steve@BambergLaw.com

Attorneys for Petitioner

May 27, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

Appellate Case No. 2018-000959

Danny B. Crane, ... Petitioner,

v.

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

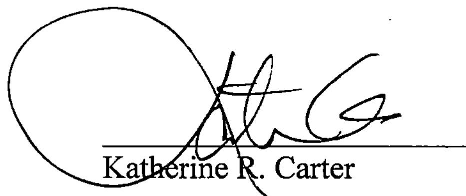
PROOF OF SERVICE

I certify that I, Katherine R. Carter, am a paralegal to Stephen B. Samuels and I have caused a copy of the **Brief of Petitioner** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on May 30, 2019, addressed as follows:

Matthew J Story, Esquire
Daniel Ranaldo, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive Suite 200
Charleston SC 29492-7595

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

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



Katherine R. Carter

May 30, 2019
Columbia, South Carolina