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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

REPLY BRIEF OF PETITIONER

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Respondents seek to characterize Petitioner's appeal as a plea for this Court to substitute its judgment for that of the Appellate Panel. This approach is understandable, given the Court's historical deference to credibility findings made by the Appellate Panel. However, the fact remains that arbitrary credibility findings should not be allowed to trump positive evidence. If the Commission dislikes a particular claimant, it can simply fall back on a credibility finding to punish a deserving but unpopular, unlikeable or unconventional person. When this happens, we are no longer operating under the rule of law; we have devolved. As this Court stated in the last century:

> The law is made to protect the weak and oppressed and to reach down its mighty arm and lift up those who are in need of its assistance. It is made to curb the strong and the mighty and to force them to treat those not so fortunate with justice and equity. When the law fails in these functions, it ceases to be law and is a mockery.

White v. Metcalf, 177 S.E. 371, 374, 174 S.C. 350 (1934).

There must be protection afforded to those whose claims are denied by the arbitrary exercise of authority. The power to determine credibility cannot be the magic bullet that will shoot down the evidence of a compensable injury, such that it cannot be challenged on appeal. This protection can only come from this Court. The Court should recognize that administrative agency credibility findings are not sacrosanct. They must be subject to robust appellate review and when, as here, those findings are arbitrary and capricious, the Court must act to avoid injustice.

This is not to say the Court should abandon its deference to the position of a trial judge, hearing commissioner or jury who can hear and observe live testimony. Only that it makes no sense to give the Appellate Panel sitting in an appellate capacity plenary authority to make its own credibility finding, yet insulate that finding from appellate review by our highest court.

While not explicitly stating that the Commission's credibility findings can be reversed, this Court has reversed when testimony given dispositive credibility and weight by the Commission was

"pure speculation and conjecture." Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). See, also Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court."(emphasis added)); Breeden v. Weinberger, 493 F.2d 1002, 1010 (4th Cir.1974)("[Administrative 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."). This case now presents the need and opportunity for the Court to directly address this issue. The Court should explicate a rule that credibility findings are not sacrosanct and can be reversed when unsupported by substantial evidence. The Court should also adopt the Federal Rule holding that the "sit and squirm" jurisprudence applied in the case at bar is inherently suspect, unreliable and arbitrary.

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

The Commission found "any injury Claimant sustained in the accident at issue resolved by March 31, 2014." [App. 67, Finding of Fact 11(b)]. Respondents argue the Commission's finding that Crane's hearing loss "had resolved or returned to baseline . . . on March 31, 2014" is supported by substantial evidence, thus the finding of MMI on that date should be affirmed. [Brief of Respondents, page 11].

There is no *competent* medical evidence Crane's hearing loss had resolved. The boilerplate notations from unrelated medical visits are not evidence Crane's hearing had returned to normal – not unless one is wilfully blind to the obvious. A commissioner cannot leave his or her common sense at the door. The Single Commissioner cobbled together various – often trivial – observations to bootstrap some justification for a finding of MMI with complete resolution of Crane's deafness.

Respectfully, any conclusions reached by the exercise of this *unusual finesse of reasoning* cannot survive meaningful appellate review.[1] See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). This method of analysis – focusing on trivial minutiae to the exclusion of qualified expert opinions on the ultimate issue – is merely the Commission's lay speculation about a complex medical diagnosis it does not fully understand exercised arbitrarily to punish a claimant it does not like. 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).

Respondents assert the two medical records for the unrelated rib injury provide substantial evidence for the finding of MMI.[2] Crane went to the emergency room on March 16, 2014. [App. pp. 99-104, 106]. He followed up on March 31, 2014, where he was seen by Dr. Mol Ky; not his regular doctor, Dr. Koukos. [App. pp. 114-6]. On the visits for the rib injury, the Commission

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[1] The phrase is drawn from an older decision observing that stretching evidence to find a mere scintilla of evidence defies common sense and reason. "Whilst adhering to the scintilla rule, this court has recognized a rule supplemental to the scintilla rule, which is thus propounded in the case of National Bank v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581, 582 (1934): 'If it be conceded that there may be deduced by a process of *unusual finesse of reasoning* that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.'" Radcliffe v. Southern Aviation Sch., 209 S.C. 411, 40 S.E.2d. 626 (1946).

[2] Respondents assert that it is inconsistent for Petitioner to refer to the treatment for the rib injury as unrelated when "Petitioner attributes [the fall resulting in the rib injury] to dizziness and balance issues caused by this accident." [Brief of Respondents, page 13]. It is not that the broken rib was unrelated to dizziness. It is that the treatment by Dr. Ky was for a broken rib; not deafness or dizziness. Dr. Ky did not examine or treat Petitioner for deafness, ergo any references to normal hearing are unaltered boilerplate inherent in electronic medical records. It is common knowledge that doctors do not perform complete physical examinations for every past or present ailment on every visit. If you go to the doctor because you have the flu, you get treated for the flu.

found:

> Srikingly absent are any references to hearing loss (Claimant's tympanic membranes are "clear and mobile."), memory loss, headaches, dizziness, bleeding, or psychological difficulty. For these reasons, we find that any injury sustained in the accident at issue resolved by March 31, 2014. [App. Page 67, Finding of Fact 10 (b).

Is this really substantial evidence? Is there really anything to weigh here? Did Dr. Ky really examine Crane's tympanic membranes?

It is *fundamentally implausible* that Crane's tympanic membranes could have been completely undamaged on March 31, 2014, when Dr. Rogers's detailed physical examination (none of which was boilerplate electronic records) "demonstrates apparently 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." [App. Page 137]. And it is *fundamentally impossible* for Crane's deafness to have *completely disappeared* when the third Pure Tone Audiogram showed he still suffered from severe and profound hearing loss five months later. [App. pp. 183-5]. At some point objective truth and common sense must prevail. 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.").

There is *no* evidence to support the Commission's finding that Crane reached MMI with "any injury . . . resolved" on March 31, 2014. On August 19, 2014, Dr. Cassone (Dr. Ansley's partner) wrote "He was sent for audiogram and this showed a profound hearing loss in each ear. . . . He reads lips. He may be a candidate for cochlear implantation and this should be considered. He should probably have yearly audiometric evaluations. He should be considered disabled because of this." [App. page 184]. The recommendation for a cochlear implant confirms Crane's testimony on the

reason for the ABR testing.[3] [App. p. 220, lines 5-19].

Crane may very well be at MMI. Dr. Rogers opined he was at MMI and his hearing could not be restored by natural means, although also opined he would also need "probably vestibular rehabilitation." [App. pages 138-139]. Dr. Cassone opined he was disabled. [App. page 184]. As such, there is evidence he is at MMI – but with profound deafness and disability. The Commission and the Court of Appeals must be reversed on both points.

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 Appellate Panel'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, compounded by the arbitrary disregard of the recommendations from Dr. Ansley, Dr. Cassone, Dr. Rogers, and Audiologist Lunn. Respondents argue this merely goes to the weight of the evidence. [Brief of Respondent, page 16].

Dr. Ansley referred Crane to MUSC for ABR testing. [App. pp. 111-2]. Dr. Cassone and Audiologist Lunn made similar recommendations, with Dr. Cassone specifying evaluation for cochlear implants. [App. Pages 183-185], Dr. Rogers opined "Mr. Crane will require continued medical management to include but not be limited to routine office visits, medications, psychological counseling and therapy (cognitive behavioral therapy) as well as probably vestibular rehabilitation." [App. Page 139].

The Appellate Panel refused to order any of this treatment. As to the ABR test, the Appellate Panel (echoing the Hearing Commissioner) stated "Because the video shows an incident/accident,

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[3] It appears Dr. Cassone did not know that Dr. Ansley had made the same diagnosis and similar recommendations six months earlier. He makes no mention of Dr. Ansley's reports, yet his opinion is virtually identical.

we might have ordered the more objective test that Claimant, *for a reason now abundantly clear,* has avoided. However, Claimant's audiogram testing shows inconsistencies, and Claimant – not Defendants – has the burden of proof." [App. P. 68, Finding of Fact 9]. This was fundamentally arbitrary, as it conclusively shows that the Commission denied medical treatment ordered by the audiologist, the neurologist and the two otolaryngologists who personally examined and tested Crane. There was no other evidence, yet the Commission denied the treatment because it found Crane not credible. Denying treatment in this manner shows that the credibility finding is a legal fiction; merely a proxy for punishing someone the Commission disliked and deemed not worthy.

Respondents argue denial of treatment was warranted because the Appellate Panel found Crane to be at MMI. This argument fails because it is well-established that a finding of MMI does not preclude additional medical treatment. See, e.g. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 581, 514 S.E.2d 593, 597 (Ct. App. 1999) (holding the Commission may require additional medical care and treatment even if the claimant has reached maximum medical improved if such treatment would tend to lessen the period of disability).

As to the ABR testing, Respondents argue that it should not be provided because ABR testing was ordered due to inconsistencies in Pure Tone Audiograms. [Brief of Respondents, pp. 16-17]. In a letter to Disability Determination Services, Audiologist Lunn wrote that "Findings of the assessment conducted on August 19, 2014 suggest a right profound hearing loss, while the left ear suggests a profound to severe hearing loss.." He noted some tests could not be obtained due to equipment limits. He "recommended that Mr. Crane be seen for the administration of auditory brainstem response studies, as a means for obtaining more object [sic] measures of his hearing and permit a truer estimate of his hearing." [App. P. 183].

Nothing in Lunn's letter justifies denying further testing. Lunn never suggests testing should

not be done because of inconsistencies and the limits of the equipment. He says just the opposite: Crane should be tested *because* of the inconsistencies; because they need a *truer estimate* of his hearing. And nowhere do *any* of the doctors suggest Crane is feigning deafness, malingering or doing anything improper, such that he should be denied treatment for his deafness.

Crane proved his entitlement to additional testing and treatment. The Appellate Panel should be reversed and additional treatment should be ordered, including but not limited to ABR testing for cochlear implants.

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

In their Brief, Respondents set forth many of the alleged "behaviors"by Crane at the hearing which, in their view, show he is not a credible witness. Respondents cite no case law, and never address the Commission's use of "sit and squirm jurisprudence." Respondents provide no reason why this Court should not follow the federal courts holding that a disability 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). Nor do they dispute that a credibility finding must be supported by substantial evidence; that findings cannot be based on "pure speculation and conjecture;" and that credibility findings are not sacrosanct. See, Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability); Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court."(emphasis added)); Breeden v. Weinberger, 493 F.2d 1002, 1010 (4th Cir.1974)("[Administrative 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.").

As the Court reviews the record in this case, two things should be kept in mind. First, Petitioner advised the Hearing Commissioner from the outset that he would be able to hear testimony, albeit with some difficulty. The courtroom was quiet and he wore a hearing aid in one ear. 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]. When one reads the transcript, there is nothing to indicates any intent to dissemble, exaggerate or be inconsistent.

Secondly, none of the medical providers doubted Crane suffered ongoing hearing loss and dizziness from the accident. Every doctor who treated him for this injury considered him disabled. [App. pp. 126, 128, 142,138-139, 184]. The Appellate Panel disregarded all the medical evidence in this case – despite it being overwhelmingly favorable to Crane. See McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986)(holding that an administrative decision is not supported by substantial evidence where the ALJ acknowledges only the evidence favorable to the decision and disregards contrary evidence).

This leaves us trying to make sense of a decision where the Appellate Panel would have denied the entire case had the accident not been shown on video surveillance. The view of the Hearing Commissioner is aptly demonstrated by this passage:

> An incident/accident does not always equate to or result in a permanent injury. Claimant's "display" and evasiveness at the hearing (among other problematic issues) make us seriously question whether or not there was an actual injury. One cannot help but question 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, we find

> Claimant sustained an injury to his ears on the date of the accident. [App. P. 63, Finding of Fact 3].

It is disturbing that the only item of evidence the Commission was willing to believe is the security camera video. The medical evidence showing profound hearing loss from *three* Pure Tone Audiograms *required* by the Commission's regulations means nothing. The opinions of two ENT specialists mean nothing. The opinion of the neurologist means nothing – in the Commission's eyes he is no more credible than Crane.

Crane's testimony is wholly disregarded. He is accused of faking an injury – despite overwhelming evidence. He tried to go back to work after the accident – as he had done when he previously "cut my hand and went to Dr. Koukos and had it sewed up, I had went right back to work." [App. P. 224, lines 2-9]. And what incentive would he have to fake an injury? He had a good job, his employer liked him, he was well paid, and he had a wife and six children to support. What expectation could he have that he would even receive compensation? His employer was uninsured for workers' compensation!

This leave us with the inescapable conclusion that the Commission got it wrong. The positive evidence is disregarded for hunches and speculation about Crane's motives. This is sit and squirm jurisprudence. This cannot stand. This cannot be allowed to happen again to other injured workers who put their fates and futures in the hands of the Commission.

The Court should reverse the Commission's arbitrary credibility finding. Furthermore, the Court should address the issue squarely and adopt the rules of the federal courts concerning appellate review of factual findings on credibility when used as a proxy to disregard evidence favorable to the claimant.

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

Respondents contend the Appellate Panel's finding of no permanent injury (specifically no hearing loss) is merely a question of weighing the evidence. They contend the Appellate Panel's reliance on the March 2014 medical records for the rib injury was a proper weighing of the evidence which cannot be reversed on appeal. [Brief of Respondents, pages 22-24].

The issue over the rib injuries will not be further belabored. Let us say only that there is nothing to weigh. The evidence of permanent hearing loss and dizziness is consistent from all treating medical providers. 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]").

Should the Court find Crane is at MMI, then he should be deemed to have suffered profound hearing loss with dizziness as stated by Doctors Cassone and Rogers.

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.

Respondents contend this issue is not ripe because the court of appeals remanded to the Appellate Panel "to determine whether Crane was out of work as a result of the accident and whether he was entitled to TTD." [App. P. 3-4]. Respondents also concede that Crane should be paid TTD from March 6, 2014 to March 31, 2014 – with TTD ending on the date the Commission found Crane

to be at MMI. [Brief of Respondents, page 24].

Crane worked at most two days after the accident. His payroll records show his last paycheck was on February 21, 2014 for $190.00. [App. P. 180]. He testified he worked a couple of days for a half day, but was unable to continue due to hearing loss. He stated he tried to work with an amplifier in his ear, but the amplified noise of the tire shop gave him headaches, and he could not hear to work without it. [App. P. 217, line 24-29, line 7; p. 34, line 15-p. 35, line 7; P. 226, line 7-p. 59, line 20].

Dr. Ansley wrote Crane out of work through April 1, 2014 (one day longer than the Commission's MMI date). [App. P. 142]. Presumably Dr. Ansley would have written another work note had Crane been able to get the ABR test and return to Dr. Ansley. On August 19, 2014, Dr. Cassone opined "He should be disable because of this." [App. Page 184]. There is no medical evidence Crane is able to return to work.

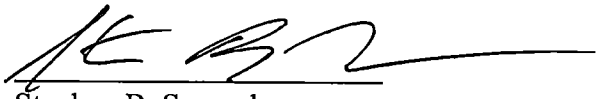
Temporary disability benefits are triggered "[w]hen an employee has been out of work due to a reported work-related injury . . . for eight days[.]" S.C. Code Ann. § 42–9–260(A) (2007). Even though Respondents never started temporary benefits, they were legally required to do so. As a matter of law, when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation or wages in lieu of compensation. See S.C. Code Ann. § 42-9-190 (2005); S.C. Code Ann. § 42-9-200 (2007)("if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of disability").

Given the overwhelming medical evidence that Crane remains disabled due to his deafness and dizziness, he is entitled to TTD from February 21, 2014 and continuing as a matter of law.

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,



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PROOF OF SERVICE

I certify that I, Angi Samuels, am a paralegal to Stephen B. Samuels and I have caused a copy of the **Reply Brief of Petitioner** to be served by United States mail, with sufficient postage affixed thereto and return address clearly marked on August 5, 2019, addressed as follows:

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