THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1708221

Appellate Case No. 2019-000556

Isaac D. Brailey, Claimant, ... Appellant,

v.

Michelin North America, Inc., (US7), Employer,
and Safety National Casualty Corp., Carrier, ... Respondents.

INITIAL BRIEF OF APPELLANT

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

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

1. Brailey met his burden of proof by showing by medical evidence that he suffered a compensable injury by accident [In Reply to Brief of Respondent, pages 23-30].

To qualify for benefits under workers' compensation, the employee must prove an "injury by accident arising out of and in the course of employment . . . " S.C. Code Ann. § 42-1-160 (A) (2007). Respondents argue there was no injury by accident because "any issue with [Brailey's] back on June 24, 2017, from heavy lifting was not an unlooked for or unexpected event." Respondents base their theory on the allegation that Brailey "had back issues during the entire time that he worked for Richtex . . . he then had back issues the entire time he worked for Michelin." [Respondents' Brief, page 25].

These factual allegations miss the important point. Brailey *did indeed* have back pain for the roughly two weeks he worked for Richtex – *twenty years ago in 1997.* However, that episode of back pain resolved. He then worked a physical job at Westinghouse for 16 years where he "lift[ed] pellet containers and push[ed] carts of pipe wrenches and steel rods weighing up to 800 pounds." [Respondents' Brief, page 8]. Brailey had no back pain, no back injuries, no workers' compensation claims and no difficulty working for the next twenty years – *not until he injured his back at Michelin.* Respondents would have this Court believe Brailey had continuous ongoing back problems beginning in 1997 and never stopping. This is simply not so.

The issue of whether an employee sustained an "injury by accident" within the South Carolina Workers' Compensation Act is a question of law. As such, this Court has authority to review whether the Appellate Panel's determination that the "June 24, 2017 incident is not compensable" is an error of law. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App.

1996).

Respondents posit that an injury by accident requires "an unlooked for or unexpected event." [Respondents' Brief, page 25]. This is not the law. In Pee, our Supreme Court explicated that "some jurisdictions . . . held there must be some unusual or unlooked-for mishap resulting in injury to constitute an accident; other jurisdictions held *no mishap was required for an accident so long as there was an unexpected injury occurring while the employee was performing his usual duties in his customary manner*. We chose the latter definition, focusing on the unexpected nature of the injury rather than requiring that the event causing the injury be unexpected." Pee v. AVM, INC., 352 S.C. 167, 573 S.E.2d 785 (2002)("Employer's contention that the cause of the injury must be unexpected is incorrect. ")(emphasis added).

The Court further added that "the injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing. Therefore, if *an injury is unexpected from the worker's point of view*, it qualifies as an injury by accident." Id. In Pee, the Court specifically noted that, as in the instant case, "there is no evidence Claimant intended or expected to be injured as a result of her . . . work activity." Id.

We know Brailey had no intention or expectation of being injured not merely because of his testimony, but primarily because of the medical evidence. Prior to joining Michelin, Brailey had no problems with his back since the brief episode of back pain in 1997. He started work at Michelin around April 17, 2017. Before starting work, he was cleared for full unrestricted duty by Dr. Tomarchio, Michelin's company doctor. [Exhibit C1].

The "heavy lifting at work" on his new job caused low back pain "for the past several days" resulting in a visit to the emergency room on June 11, 2017. He was diagnosed with lumbar strain

and given a muscle relaxer and pain medication. He was again cleared for full duty work. [APA pages 13-15].

Two days later, on June 13, 2017, Brailey was still feeling sore, so he went on his own to his family doctor (as instructed by the ER). Dr. Marom "discussed likely strained muscles due to heavier work load at new job. no emergent signs/symptoms. . . . need for strengthening up of core muscles and proper lifting techniques. " [APA pages 7-11]. Dr. Marom cleared him for work.

Brailey consulted with three doctors – two of whom saw him when he was having back pain from his new job. All three doctors cleared him for full duty work with Michelin. He could not have been more diligent.[1] If you have been told by multiple doctors that you have no increased risk of injury and have been cleared to work in a new job whose physical demands make your back hurt, then you cannot intend or expect to suffer an injury from that job. No reasonable person could have such an intent or expectation on such evidence. Brailey proved that the June 24, 2017 "incident" was in fact a compensable injury by accident.

Respondents then turn to searching for perceived inconsistencies in Brailey's left-sided radiculopathy symptoms. Each example cited by Respondents is either not an inconsistency or is

---

[1]Respondents find fault with Brailey because "he never reported these visits or medical problems to Michelin and therefore, he never provided Michelin with the proper notice of any issues pursuant to South Carolina law and Michelin's policies and procedures." [Respondents' Brief, page 25]. Brailey did tell his trainers his back hurt. He never told them he was going to the doctor because he was told "your back going to be hurting. It just take time to get used to it." [Brailey dep tr. Page 36, lines 12-21]. Brailey had no intention of making a workers' compensation claim. He merely wanted to make sure he was okay to keep working – which was confirmed by his doctors.

Moreover, it is not as if Michelin would have provided treatment, changed his job or taken him out of work. When Brailey went to Michelin's company doctor *after* the accident, Dr. Izard told him not to take the pain medication and "not to follow up with the neurosurgeon." He was told his "recommended work status is Regular Duty. . . . The employee is given no work restrictions at this time." [APA pages 30-32].

easily explainable. The June 24, 2017 report does indeed state "does not radiate" and "no numbness in extremities. However, he does report "lower back pain to left side." [APA page 18]. The absence of documented radiculopathy is explained in the follow-up report three days later where it states "here on Saturday for the same. Did not recognize numbness until he was reading discharge instructions." [APA page 33].

The reference to *numbness in his right leg* on the June 27, 2017 report appears to be a typographical error as Brailey was diagnosed with *left sided sciatica.* When asked about the reference to right leg numbness, Dr. Boyd testified "I believe that could be either a patient reporting error or a physician recording error, as everywhere else in the records at other – it seems to be left-sided." [Boyd dep. Tr. Page 40, lines 15-18]. Dr. Boyd added "I just want to say that it seems like he's been pretty consistent her. One other thing I want to say is if I ask a patient, Does your pain radiate, they may not fully understand that, what that means, and so may not know how to respond. Admittedly, though, the physician [in the June 24, 2017 report] did not note any sort of radicular symptoms, but he did feel like it was appropriate to refer to neurosurgery." [Boyd dep. Tr. Page 447, line 23-page 48, line 6]. As to a report of radiation down the right leg in September 14, 2017 report for an injection, Dr. Boyd again testified "I think that could be a typographical or recording error." [Boyd dep. Tr. Page 48, lines 16-24].

The critical fact here is the diagnosis. Dr. Boyd testified the MRI scan showed "The most prominent finding was a large paracentral disk extrusion at L4-5 with a large superiorly migrated extruded fragment likely compressing the nerve next to it." [Boyd dep. Tr. Page 9, lines 9-17]. He added the radiating pain "should be on the left side, the same side as the disk herniation." [Boyd dep. Tr. Page 26, lines 3-9]. This is a diagnosis and opinion which can only be made by Dr. Boyd.

It is error for the Commission to disregard his opinion on this point. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence).

Tellingly, Respondents claim "Appellant invests Dr. Boyd's testimony on causation with more significance than it merits." They assert Dr. Boyd's:

> wavering testimony does not change the fact that substantial evidence supports the Commission concluding Appellant did not sustain a compensable injury by accident on June 24, 2017, allegedly from heavy lifting was not an unlooked for or unexpected event as Appellant alleged significant back problems that he attributed to work long before that date.

[Respondents' Brief, page 26].

There is no need to disparage Dr. Boyd. His testimony did not waver. He listened to the questions from the attorneys, he reviewed documents, and he gave complete concise answers. Respondents may not like his opinions, but they cannot argue with them, for he consistently testified to a reasonable degree of medical certainty that the work accident of June 24, 2017 caused the herniated disc. [Boyd dep. Tr. Page 43, line 8-page 45, line 4; APA page 71]. Dr. Boyd added "I believe that, more likely than not, he injured his lumbar spine at his employment including some episode on June 24th. [Boyd dep. Tr. Page 44, line 15-page 45, line 4]. And of course, the argument on an "unlooked for or unexpected event" is simply not the law.

Respondents argue Dr. Boyd's testimony is "similar to testimony relied upon by the claimant in *Jones v. Pacific Corp.*" Respondents go on to argue that the claimant lost her case in Jones because "the *doctors'* testimony was inconsistent." [Respondent's Brief, page 27 (emphasis added)]. Jones is easily distinguishable. In Jones, the claimant was seen by Dr. Poole, Dr. Hodge and three

other doctors. The court observed "Claimant saw many doctors after her accident on August 7, 1997, and there is *conflicting testimony* as to whether the *doctors* believed that the accident caused Claimant's subsequent back problems." Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003)(emphasis added).

In Jones, five different doctors offered conflicting opinions as to causation. The Court was bound to defer to the Commission's weighing of the evidence. Here there is nothing to weigh. The only medical testimony comes from Dr. Boyd. There is no conflicting testimony. The doctors from two emergency room visits and Doctors Care also diagnosed Brailey with a work-related back injury. [APA pages 16-25, 33-51]. Even Dr. Izard – who misdiagnosed Brailey with a urinary tract infection – "explained to the employee that at the worst he has a back strain which should require only treatment with NSAID's and a muscle relaxant." The back strain was also a misdiagnosis, yet is at least consistent with a work-related injury as stated by every other doctor. [APA pages 26-32].

Finally, Respondents speculate that Dr. Boyd might have opined differently had he been shown the two reports from 1997 authored by Dr. Norris. This is pure speculation. Respondents suggest the 1997 records are similar to the June 11 and June 13, 2017 reports. If so, then they have no additional probative value, as Dr. Boyd reviewed the two June 2017 reports. His opinion remained that the herniated disc occurred in the work accident of June 24, 2017.

Brailey proved that the June 24, 2017 incident was a compensable injury by accident. The Court should reverse the findings and conclusions of the Appellate Panel.

2. Respondents cannot prove the elements of the *fraud in the application* defense [In Reply to Respondents' Brief at pages 16-23].

The parties agree as to the three elements which must be proven by the employer to render the employment relationship voidable. This Court has authority to take its own view of the evidence – a review which will show Respondents do not meet their burden.

A. The employee must have knowingly and wilfully made a false representation as to his physical condition.

Respondents argue the facts in this case are similar to those in Brayboy. This is not really accurate, as Brayboy is quite different in the material points. Respondents first allege that "Brayboy's employment application included disclaimers similar to those outlined in Appellant's post-hire questionnaire." [Respondents' Brief, page 17]. Both do indeed contain disclaimers. However, the Michelin Declaration and Authorization is neither specific nor conspicuous. Conversely, the disclaimer in Brayboy is boldfaced with an explicit warning that a workers' compensation claim will be barred by a misrepresentation as to :

> ***If I do not give accurate and truthful information on this Medical History Questionnaire, which forms the second and final part of my employment agreement, the entire employment agreement shall be considered null and void.***
>
> **MISREPRESENTATIONS AS TO PREEXISTING PHYSICAL OR MENTAL CONDITIONS MAY CAUSE FORFEITURE OF YOUR WORKERS' COMPENSATION BENEFITS.**

Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009)(capitalization, bold and italics in original).

Workforce put its employees on notice of the potential consequences of a misrepresentation. This shows Workforce intended its employees to understand what they were signing. If there were

a later injury resulting from putting an employee into a job he could not physically, Workforce could void the employment relationship with a clear conscience.

Conversely, Michelin gave no such notice to its employees. Brailey and other Michelin employees only learn that a misrepresentation or omission – even one as minor as a lumbar strain twenty years ago – will bar a workers' compensation claim after they have been injured. Workforce wanted its employees to make informed decisions *before* they got injured; Michelin wanted to trap its employees *after* they suffered injuries.

The conspicuousness of a disclaimer is not a minor issue. The Cooper defense is a common law defense drawn not from workers' compensation, but from employment law. If certain conditions are met, the employer can void the employment relationship. Employment law contains an extensive body of caselaw on disclaimers which can alter the employment relationship. The courts require disclaimers to be conspicuous to ensure that employees are making informed decisions. Slipping a disclaimer into an employment document is disfavored, as it deprives the employee of free will and can result in the type of "gotcha" we have in the instant case.

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 616 S.E.2d 694 (2005). If an employer wishes to issue policies or documents without altering the at-will relationship, the employer must insert a conspicuous disclaimer into the document. The South Carolina Supreme Court "has held that a disclaimer appearing in bold, capitalized letters, in a prominent position, is conspicuous."[2] Id. It cannot be gainsaid that Michelin's disclaimer fails this

---

[2]The legislature codified this rule in 2004:

It is the public policy of this State that a handbook, personnel manual, policy,

test.

No one disputes Michelin's authority to terminate its at-will employees. The issue here is that Michelin seeks to *retroactively* void an employment relationship solely to evade liability for a workers' compensation claim. Before allowing that extraordinary step, the Court should require a conspicuous disclaimer as a matter of fundamental fairness and straight dealing. Cf. Simpson v. Msa of Myrtle Beach, Inc., 644 S.E.2d 663, 373 S.C. 14 (2007)("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

Michelin also seeks to equate Brailey's omission with Brayboy's far more consequential omissions. Brayboy's preexisting conditions included a back injury in the Navy resulting in a 20% disability rating; and a prior work accident resulting in a 5% permanent impairment rating. The court stated "*Notably*, since the 1970s, Brayboy has received benefits from the Department of Veterans' Administration (VA)."). Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009)(emphasis added). The court added "The willful nature of Brayboy's false responses pervades the record." Id.

On the other hand, Brailey omitted a minor back injury from twenty years prior for which he received some physical therapy, two doctor visits, and a nominal settlement of $2,500.00. Unlike

---

> procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

S.C. Code Ann. § 41-1-110 (2004).

Brayboy, Brailey had no permanent impairment, received no ongoing compensation, and had no problems with his back until his injury at Michelin. Moreover, as Brailey had been cleared to work, his omission was immaterial.

Respondents argue "Appellant's contentions imply that as time elapses, workers are free to lie on employment applications." [Respondents' Brief, page 18]. Appellant argues no such thing and is improper for Respondents to make such inflammatory statements. The fact is we are dealing with momentous issues here. While in the overall scheme of law this is merely one case out of many, for Isaac Brailey, the issues in this case of whether he receives back surgery and compensation for his injuries determine whether he can keep his home and provide for his family. Trivializing his plight should not be countenanced.

There is no evidence Brailey intentionally misled Michelin into hiring him by hiding some sort of major preexisting disabling condition. When he filled out the medical questionnaire, no one told him it would be later used against him. His testimony that he rushed through it is borne out by the fact he never filled in his address and emergency contacts. [APA page 16]. Surely if the questionnaire was so critical to Michelin they would have required it to be completed in full and instructed the employee to its purpose. And, if it was truly important to get detailed responses, then the questions would be narrowly tailored to the important information Michelin needed to know.[3]

The only reason Michelin even knows of the previous workers' compensation claim is because Brailey voluntarily disclosed his previous employment with Richtex and the details of his 1997 work injury, treatment and settlement in his deposition taken September 25, 2017. [Brailey

---

[3]The single question relevant to hiring and placement is "Are you presently being treated for any condition that may inhibit your ability to work?" [APA page 16]. Brailey truthfully answered *NO* to this question.

dep. Tr. Page 24, line 25-page 28, line 22]. At this point in time, neither Brailey nor his attorney had any idea that the Cooper defense was a reason for denial. And in fact, based on the prehearing brief filed by Respondents on January 25, 2018, it was not Respondents reason for denying the claim. [1/25/18 58].

Michelin argues "the record as a whole supported the Full Commission finding that Appellant knew he was concealing the truth from the employers when he completed the questionnaires." [Respondents' Brief, page 19]. This allegation is unsupportable. Brailey omitted mentioning back strain from twenty years earlier. He had no reason to believe he would not be hired had he mentioned it, nor did he have any reason to believe it would bar a future workers' compensation claim. Michelin wants to set this up as if Brailey had a major ongoing disability which he knew would disqualify him from the job; which he knew would result in injury; yet proceeded with the lie to set up a workers' compensation claim.[4] All of which is based on *stale evidence* of a minor back injury from two decades ago which Brailey barely remembered. The suggestion beggars belief.[5] .

The Commission's finding that Brailey "knowingly and willfully made a false misrepresentation as to his previous back condition" should be reversed.

---

[4]Brailey's trainer, Jermaine Lemon, testified Brailey seemed like a hard worker, always showed up on time, and had no difficulty doing the job. He testified he would have expected Brailey "with being new at the job to have some pain." [Tr. Page 295, line 1, page 296, line 3].

[5]Our appellate courts have repeatedly observed that medical evidence grows stale over time as a person's physical condition improves or worsens, even going so far as to order a new trial when two year old medical evidence was deemed to be stale. See, Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)(reversing and remanding for taking of additional evidence when "[m]uch of the medical evidence upon which the single commissioner relied was more than two years old at the time of the hearing.")(emphasis added). Cf. Johnson v. Renta-A-Center, Inc., 730 S.E.2d 857, 398 S.C. 595 (2012)(noting Commission found medical release more than a year old was "stale.").

B. The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.

Michelin argues that the testimony of its witnesses (Lemon, Gross and Sirois) is sufficient to meet its burden of showing that Michelin "relied upon the false representation and this reliance must have been a substantial factor in the hiring." See Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009). This argument is misplaced for several reasons.

None of these witnesses hired Brailey, nor are they even involved in the hiring process.

Jermaine Lemon was not a supervisor or manager. Nonetheless, he was allowed to testify – over objection and in response to leading questions – that he agreed "whether or not Michelin relies upon the answers that people give on those questionnaire as to whether or not they can perform the job." [Tr. Page 299, line 12-page 301, line 2]. Lemon may have been able to relate his personal experience in being hired, but he could not bind Michelin and could not testify to Michelin;s hiring process.

Nurse Sirois is not involved in the hiring process in any respect. She cannot testify to reliance on Michelin's part. Nurse Sirois testified she did not do the physical exams and medical questionnaires that the new employees fill out. [Tr. Page 369, lines 8-11]. She had no personal knowledge of how thorough the exams actually were. [Tr. Page 395, lines 7-20] She only knew the company doctor would examine the new employee and clear him or her to work at Michelin. [Tr. Page 377, line 11-page 278, line 5].

Respondents cite Fredrick for the proposition that "the reliance prong in *Cooper* was satisfied where a staff nurse for the mployer testified that if the claimant had revealed her history of treatment for lower back problems, the employer would not have cleared the employee to work the particular

job without further investigation." [Respondents' Brief, page 21]. Fredrick is distinguishable for two important reasons. Firstly, the Court noted that the questionnaire itself stated: "The results of this medical examination will not be used to exclude an employee from his or her particular position **unless the results reveal the employee does not satisfy the employment criteria for the position,** and Wellman, Inc. can only provide a reasonable accommodation which will allow the employee to perform the essential functions of the job." Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009)(emphasis added by court). This Court found this statement showed "Wellman's reliance on the medical history form was undoubtedly a substantial factor in hiring Fredrick for the specific position in which she was placed." Id. Michelin included no such disclaimer. [APA page 16].

Wellman also presented testimony from its Human Resources Representative as to what Wellman would have done for placement or accommodation had Fredrick revealed her back problems. The testimony of the staff nurse was cumulative to this testimony, stating that Wellman would not have cleared Fredrick to work without further investigation. Id. Conversely, Michelin presented no testimony from an HR representative. Nurse Sirois never testified to hiring or placement; she simply acknowledged that Dr. Tomarchio completed paperwork cleared Brailey to work after a physical examination.

Despite her complete lack of firsthand knowledge, Sirois was allowed to testify over Appellant's objection as to her *opinion* as a "medical person" on the reliability of a physical examination done by Dr. Tomarchio. Respondents argued at the hearing that "her answers were not as an expert witness" – which, if true, would mean she was not qualified and should not have been allowed to state her opinions. Despite Respondents' characterization, the Hearing Commissioner

plainly considered her tantamount to an expert witness, for after asking if she had a medical degree, he stated she was "[t]he only person in this room that can testify to a medical situation, I mean, she's got a degree in nursing; nobody else has that degree." [Tr. Page 389, line 25-page 393, line 19]. Her testimony was incompetent and should be rejected as evidence of reliance.

The third Michelin witness was Mark Gross, the Safety Manager. Gross testified that the purpose of the questionnaire is "To find out if there's any concerns, health-wise, physical – any physical concerns." He agreed he would "rely on the answers that your employees give you on those documents." [Tr. Page 406, line 22-page 407 line 5]. At no point did Gross testify that this reliance had anything to do with the actual hiring process; only that they would investigate further. And if the information came back showing the employee could not do the PAP job, they would "probably not" look for other jobs the employee potentially could perform. [Tr. Page 408, lines 19-24].

Even if this nonspecific testimony could establish the reliance prong, Michelin's proof fails because Gross went on to testify that "if [Dr. Tomarchio] cleared him; [we] were good to go." [Tr. Page 410, lines 14-24; page 408, lines 19-24]. Gross went on to admit that "No doctor that [Brailey] saw after he came to work at Michelin had [put him under restrictions]." [Tr. Page 413, line 15-page 414, page 414, line 8]. Gross also testified he expected new employees to be sore, but wanted to make sure the soreness was not an injury. He was asked if Brailey had gotten the pain taken care of and was cleared to work by a doctor, whether he would know anything different if he had been given that information. He responded "Probably not, no." [Tr. page 410, line 25-page 413, line 1].

The fact is Michelin did not really rely on the questionnaire – they relied on Dr. Tomarchio do to a complete physical exam. By all accounts this is exactly what he did. And once Dr. Tomarchio cleared Brailey to work full unrestricted duty as a PAP Operator, Michelin had "what

[they] needed to know" to put Brailey to work. [Tr. Page 410, lines 14-24]. The further fact that Gross admitted all he needed to know was that Brailey was cleared to work even after going to see two doctors for back pain from his new job showed that there was no true reliance on the questionnaire. The reliance was on making sure the employee had medical clearance to safely work – which Brailey undoubtedly did. As such, the Court should find Michelin failed to prove the reliance prong.

C. There must have been a causal connection between the false representation and the injury.

The third prong of Cooper is "There must have been a causal connection between the false representation and the injury." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973). In this case, there is *no evidence* of a causal connection between the false representation and the injury.

Respondents cite Givens for the proposition that "Expert medical testimony clearly indicated that claimant's condition was one of disc degeneration reflecting the cumulative effect of successive injuries." Givens v. Steel Structures, 279 S.C. 12, 301 S.E.2d 545 (1983). It is a curious choice, for Givens provides no support for Michelin's theory of the case. Givens "was awarded workmen's compensation benefits in a substantial amount for [an injury to his lower back] and the resulting permanent disability." Less than one month later, he applied for a new job, "knowingly and wilfully made false representations that he had no physical defects or prior injuries," and suffered a new injury to the same part of his back six months later.

Givens is no help to Respondents because while Brailey did have a workers' compensation claim twenty years prior, it was a minor injury to a *different* part of the back which settled for a

nominal amount. Most importantly, Brailey's injury was not one of disc degeneration from the cumulative effect of successive injuries. Dr. Boyd opined specifically that the work accident of June 24, 2017 caused a herniated disc. [Boyd dep. Tr. Page 43, line 8-page 45, line 4; APA page 71].

There is no medical evidence to support the causal connection prong. The Appellate Panel based this finding on its own lay medical opinion. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider must be reversed as unsupported by substantial evidence). Michelin's proof fails and the Appellate Panel should be reversed.

3. Respondents cannot prove the elements of *Capers v. Flautt.*

In the Conclusions of Law, the Commission made the conclusory statement that "Moreover the claim would be barred by *Capers v. Flautt.* [FC Order, page 22, Conclusion of Law 4]. Respondents argue that this nonspecific finding is supported by other findings of fact. This argument fails.

Respondents first note the Appellate Panel found "Moreover, claimant never notified anyone at Michelin he had ten out of ten pain in his back which he felt was caused by his work, but instead he returned to the same work he felt was causing his problems unbeknownst to Michelin." [order, Finding of Fact 4]. This finding has nothing to do with the elements set forth in Capers. Brailey had been cleared to work by those doctors on June 11th and 13th. Neither doctor thought he had an actual injury, merely pain from getting used to a new job. "[P]ain is not in and of itself a compensable injury." Jackson v. Fayetteville Area System of Transp., 337 S.E.2d 110, 78 N.C.App. 412 (N.C. App. 1985).

The second finding relied on by Respondents is merely a catch all conclusory finding which also has nothing to do with Capers. That finding is unsupported by substantial evidence because, as previously argued, all doctors opined Brailey injured his back at Michelin, with Dr. Boyd opining to a reasonable degree of medical certainty that Brailey suffered a herniated disc working at Michelin on June 24, 2017.

At no point does the Commission make a finding *based on medical evidence* that Brailey "expected or designed" with substantial certainty that stretching rubber on June 24, 2017 would result in a herniated disc in his back. To the contrary, Brailey exercised due diligence to avoid injury by going to two doctors to ensure the pain he was feeling from his new job was neither an actual injury nor exposed him to increased risk of an actual injury. It would turn the Act on its head if he were to be punished for his diligence, particularly when those doctors (as did Michelin's doctors) cleared him for work. Given that he had been medically cleared, the accident was "an unlooked for and an untoward event which is not expected or designed by" Brailey. Yates v. Life Ins. Co. of Georgia, 291 S.C. 301, 353 S.E.2d 297 (Ct.App.1987). See, also Linnen v. Beaufort County Sheriff's Dept., 408 S.E.2d 248, 305 S.C. 341 (Ct. App. 1991)("Furthermore, an accident is an event not within one's foresight and expectation and may be due to purely accidental causes or may be due to oversight and negligence, carelessness, fatigue, or miscalculation of the effects of voluntary action.").

Capers has specific elements which must be proven. Capers was a dishwasher. He had previously made a claim for workers compensation benefits based on contact dermatitis from exposure to dishwashing detergent. In the first claim, his doctor "considered Capers totally disabled from work which involved exposure to soap, detergents, and/or water." Two years later Capers took

a dishwashing job with a different employer. He again developed contact dermatitis for which he filed a second workers' compensation claim. His second claim was denied. This Court affirmed the denial, reasoning "the outbreak of dermatitis was not an unlooked for event which Capers did not expect. It was, in fact, an event which Capers could anticipate given his past experience." Capers v. Flautt, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991).

In the other two cases cited by Respondents, the employees did not suffer accidents. Each had longstanding problems (varicose veins in Havird; bunions in Landry) which they knew *from their doctors* would continue to worsen as they continued prolonged standing over time. See Havird v. Columbia YMCA, 418 S.E.2d 329, 308 S.C. 397 Ct. App. 1992)("Aggravation of [varicose veins] is the natural and expected result of standing in a limited area without much movement."); Landry v. Carolinas HealthCare Sys., 396 S.C. 149, 719 S.E.2d 288 (Ct. App. 2011)("doctor... warned her that her [preexisting bunion\ condition would worsen if she continued to stand on her feet for long periods of time.");

None of these cases remotely compare to Brailey's situation. Brailey had a brief episode of back pain twenty years earlier. He had a new onset of back pain with his new job at Michelin. He was cleared to work by Michelin's physician before he started working and cleared by two other physicians before the June 24, 2017 accident. Unlike the claimants in Capers, Havird, and Landry, Brailey's doctors told him he could work without certain injury. Therefore, the Commission's finding that Respondents proved Brailey sustained no accident under Capers should be reversed.

4. Brailey did not intentionally and willfully cause injury to himself [In Reply to Respondents' Argument at pages 35-39].

The Commission concluded as a matter of law that "the claimant intentionally and willfully

[sustained an injury by accident] by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same." [Order, page 22, Conclusion of Law 5]. The essence of Michelin's argument on this issue is that, because Brailey did not inform Michelin that he had gone to the doctor for back pain on June 11th and June 13th, he must have intentionally and willfully injured himself.

Michelin gives itself too much credit. Michelin seeks to accuse a new employee of failing to follow its reporting procedures, as if Michelin would have prevented the June 24, 2017 accident if they had the same information Brailey obtained from the two doctors. Michelin would have done no such thing and they know it. The Safety Manager, Mark Gross, was asked this very question; he responded "Probably not, no." [Tr. page 410, line 25-page 413, line 1]. He admitted that the key information was knowing that Brailey had been medically cleared for work.

We already know Brailey told his coworkers and trainers that his back was hurting. When he was told this was normal and expected for new employees (as confirmed by Gross), he sought an evaluation on his own – not to file or set up a workers' compensation claim, but to make sure he had nothing to worry about.

What would have changed if Brailey had told Michelin about the two mid-June doctor visits.? First, Michelin would have obtained those records – which would confirm back due to a new job; no actual injury; and no work restrictions. Second, Michelin would have obtained their own evaluation from Dr. Izard. Because Michelin sent Brailey to Dr. Izard *after* the June 24, 2017 work accident (with a newly herniated disc) and Dr. Izard specifically stated "no work restrictions", we can safely say that Dr. Izard would have also cleared him to work before he herniated the disc.

Nothing would have changed; nothing would have been different. Brailey would have been returned to work and suffered the exact same injury by accident on June 24th.

The circumstances in which an injury can have been intentionally inflicted are very specific. For there to be a deliberate or formed intention to injure or kill oneself, there really must be a situation as obvious as engaging in a shootout with a fellow police officer. Ziegler v. S. C. Law Enforcement Division, 250 S.C. 326, 157 S.E.2d 598 (1967)(injury in voluntary shootout with fellow officer manifested intent to injury or kill). It is not something that can be bootstrapped out of an alleged violation of a reporting requirement. The Appellate Panel must be reversed

5. The Commission's vague credibility findings do not bar this claim from being compensable under the Act [In Reply to Respondents' Arguments at pages 39-42].

Respondents argue the credibility issue is not preserved. Appellant disagrees, as the issue was raised and ruled upon by the Appellate Panel. In the Order, the listing of grounds of appeal includes: "Whether the Single Commissioner erred as a matter of fact and law in finding Claimant's testimony was not credible." [order, page 3]. The Appellate Panel went on to make its *own* finding of fact that "We find the claimant is not credible." Confirming that this was an independent finding, the Appellant Panel added that the finding was based on "The Hearing Commissioner's observations of the claimant at the hearing." [Order, Finding of Fact 2, pages 19-20]. As the issue was raised and ruled upon, it has been preserved for appellate review.

Respondents miss the mark as to Appellant's argument. There are two points. The first is that the Appellate Panel's findings are so vague and tenuous that there really is no discernable basis for them. More specifically, the Commission never states which specific testimony on which specific issue they found not believable. Instead, they simply find he is not credible and deny his

claim accordingly. This then is not a credibility finding. It is a *character* finding being used as a proxy for a *credibility* finding.

The distinction is an important one. Under current law, a credibility finding cannot be reversed by this Court (unless there is no substantial evidence to support it). 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)) Conversely, a character finding is inherently arbitrary and capricious – and must reversed. The Commission can weigh conflicting evidence based on the credibility of witnesses. It cannot simply ignore evidence and deny a claim merely because it dislikes a person. Cf. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168 (1988)("The contrast of appellant's character with that of other criminal defendants being prosecuted in Lancaster County is deleterious in that the solicitor offered his personal opinion--devoid of evidentiary basis--of appellant's character.")(Finney, A.J., dissenting).

The mode of questioning from the Hearing Commissioner appears to demonstrate a bias against Brailey. A trial judge "has the right, in his discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth." Williams v. S.C. Farm Bureau Mutual Ins. Co.,251 S.C. 464, 163 S.E.2d 212 (1968). "In exercising discretion to question a witness, the trial judge must do so in an impartial manner that does not indicate the trial judge's opinion as to any fact or 'have an unintended prejudicial effect.' Day v. Kilgore, 444 S.E.2d 515, 314 S.C. 365 (1994), *quoting* Fowler v. Laney Tank Lines, Inc., 211 S.E.2d 231, 263 S.C. 422 (1975). While it is true that in the absence of a jury, a commissioner may be given more latitude in questioning witness, there is nonetheless a prejudicial effect when questioning the witness "may lead [the trier of fact] out of their normal role of passive finders of fact and into the role of advocate." Id.

It appears that happened here, for the only way for the Appellate Panel – the ultimate trier of fact – to discern "The Hearing Commissioner's observations of the claimant at the hearing" would be to note the aggressive and sometimes hostile questioning of Brailey by the Hearing Commissioner. This mode of questioning appears to have injected an improper element of bias against Brailey into the proceeding, such that material evidence was disregarded in place of a simple dislike of the employee.

And this is the second point. Whether or not the Commission liked Brailey; whether they thought the omission of the twenty-year old episode of back pain was deliberate or innocent; whether or not they thought Brailey should have told Michelin he was going to the doctor in mid-June 2017 for back pain – regardless of all those things, the actual events of this case are not in serious dispute. And, once Brailey established that he had been cleared for work only to suffer a herniated disc in the June 24, 2017 accident, then the Commission was bound to find this a compensable claim. Because that is where the evidence takes you.

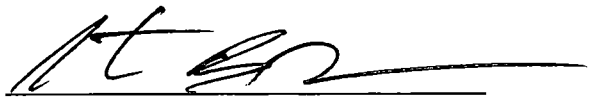
It is far too easy to paint Brailey with a broad brush and say he is of bad character for omitting a minor injury and minor workers' compensation claim from twenty years ago from the questionnaire. Is it really fair to punish people for innocent acts and technical violations when, in the final analysis, that omission made no difference whatsoever to the events of 2017? There is no evidence Brailey tried to set up a workers' compensation claim or even concealed a disability to get a job. It is only because Michelin was able to make Brailey appear to be a bad witness – aided by the Hearing Commissioner stepping into the role of inquisitor.

The credibility findings cannot outweigh the compelling evidence of a compensable injury by accident resulting in a herniated disc. The Decision and Order below should be reversed.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed. Brailey should be awarded medical treatment with Dr. Boyd and temporary total disability compensation from June 24, 2017 for his compensable back injury with radiculopathy.

Respectfully Submitted,



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

Attorney for Appellant

Columbia, South Carolina
December 12, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-000556

Isaac D. Brailey, Claimant, ... Appellant,

v.

Michelin North America, Inc., (US7), Employer,
and Safety National Casualty Corp., Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Wanda Powell, on behalf of the Samuels Law Firm, LLC, have served the **Reply Brief of Appellant** and **Supplemental Designation of Matter** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 12, 2019, addressed as follows:

Grady L. Beard, Esq.
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Jasmine D. Smith, Esq.
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

December 12, 2019

Wanda Powell
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000

SAMUELS
LAW FIRM

STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

December 12, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Isaac Brailey v. Michelin North America, Inc., *et. al.*
Appellate Case No.: 2019-000556

Dear Ms. Kitchings:

Enclosed for filing are the original and one (1) copy of the **Reply Brief of Appellant** and **Supplemental Designation of Matter** and **Proof of Service** in the above case.

Please have your staff file the **Reply Brief of Appellant** and **Supplemental Designation of Matter** and return the clocked copies to our courier.

With kindest regards, I am

Respectfully,

Stephen B. Samuels

SBS/wp

cc: Grady Beard, Esq.
Jasmine D. Smith, Esq.