THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1708221

Court of Appeals Case No. 2019-000556

Isaac Brailey, Claimant.....Appellant,

v.

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

RESPONDENTS' FINAL BRIEF

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2. Whether substantial evidence supports the Full Commission finding that pursuant to Section 42-1-160 of the South Carolina Code Ann. (2015), Appellant failed to meet his burden of proof where there is no evidence Appellant suffered a compensable injury by accident arising out and in the course of his employment with Michelin on June 24, 2017.

3. Whether substantial evidence supports the Full Commission finding this case is barred pursuant to *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), where the evidence demonstrates Appellant knew he could injure his back performing his job at Michelin.

4. Whether substantial evidence supports the Full Commission finding Section 42-9-60 of the South Carolina Code Ann. (2015) barred this claim as a matter of law where in 1997 a doctor restricted Appellant from performing heavy lifting until he was evaluated by an orthopedic surgeon, but Appellant never visited an orthopedic surgeon and instead continued to work jobs which required a significant amount of heavy lifting and thereafter failed to alert or notify Michelin he was allegedly suffering from ten out of ten pain for at least four weeks prior to June 24, 2017, and sought medical treatment on his own without any knowledge of Michelin due to Appellant's failure to provide notice.

5. Whether the Full Commission's credibility finding was clear and unambiguous and substantial evidence supports finding Appellant's lack of credibility supported barring compensability under the South Carolina Workers' Compensation Act.

STATEMENT OF THE CASE

This is a workers' compensation appeal by Isaac Brailey (Appellant) from the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel (the Full Commission), filed on February 28, 2019, which unanimously upheld the Decision and Order of the Hearing Commissioner, Commissioner Avery B. Wilkerson, Jr. (Commissioner Wilkerson).

On October 4, 2017, Appellant filed a claim against Respondents Michelin North America, Inc. (US7) and Safety National Casualty Corp. (collectively, "Michelin"), alleging that on June 24, 2017, he sustained an injury by accident to his back, arising out of and in the course of his employment with Michelin. Michelin denied the claim as compensable. Commissioner Wilkerson found that pursuant to Section 42-1-130 of the South Carolina Code and *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), Appellant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits under the South Carolina Workers' Compensation Act (the Act). **(R. 23-24).** Commissioner Wilkerson also found pursuant to Section 42-1-160 of the South Carolina Code, Appellant did not sustain a compensable injury to his low back while under the employ of the Michelin on June 24, 2017, as Appellant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented and *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) barred this claim. **(R. 23-24).** Commissioner Wilkerson further found that pursuant to Section 42-9-60 of the South Carolina Code, even assuming Appellant actually sustained an injury by accident to his low back on June 24, 2017, Appellant intentionally and willfully did so by (1) failing to alert or notify Michelin that he was allegedly suffering from ten out of ten low back pain for at least four weeks prior to that date, and (2) seeking medical treatment on his own without any knowledge by Michelin due to Appellant's failure to provide notice. **(R. 24).** The Full Commission

considered the issues briefed, unanimously found Commissioner Wilkerson 's Decision and Order was supported by the greater weight of the evidence, and affirmed the Decision and Order in its entirety with minor amendments. **(R. 25-26).**

STATEMENT OF FACTS

A. Appellant's Employment Application and Prior History

Among other companies, Appellant worked for Jannock LTD D/B/A Richtex Brick and Westinghouse prior to his employment with Michelin. **(R. 166, 407).** His position at Richtex entailed lifting and loading heavy bricks onto a monorail. **(R. 407-08).** In December 1997, shortly after he began working for Richtex, Appellant filed a workers' compensation claim against Richtex for a low back injury and began treating with Thomas Norris, III, MD. **(R. 143, 158-59, 166-75, 408-09).** In the medical report for Appellant's first visit on December 4, 1997, Dr. Norris noted Appellant had been "*working for Richtex for three weeks and of note he has had back pain for three weeks*. This has been worsening over the past couple of days since a possible injury while lifting some bricks on Tuesday of this week." **(R. 158-59)** (emphasis added). Dr. Norris instructed Appellant not to complete any heavy lifting and to return to the clinic in one week. **(*Id.*).** The medical record from the visit further stated as follows:

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

(*Id.*).

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

> [Appellant] *had noted back pain and soreness for three weeks. Then he reported this vague episode of lifting some bricks and he felt that he may have injured himself* at that time although he denied any

> significant change at the time of this incident. *Of note, three days after he saw me, he was at Doctors Care wanting a second opinion, although he was not following my instructions.*

(*Id.*) (emphases added). Further, Dr. Norris stated as follows:

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

(*Id.*).

Finally, Dr. Norris stated the following:

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

(*Id.*). (emphases added). Thereafter, Appellant settled the workers' compensation claim against Richtex, *did not* get evaluated by a back specialist as ordered, and never returned to work at Richtex following the claim. **(R. 410-11).**

Instead of getting evaluated by an orthopedic specialist as ordered by Dr. Norris, Appellant began working at Westinghouse in a position he alleged required lifting pellet containers and pushing carts of pipe wrenches and steel rods weighing up to 800 pounds. **(R. 411, 413).** During the hiring process for Westinghouse, Appellant completed the company's "Medical History and Examination Form (Post-Offer/Pre-Placement)." **(R. 177-81).** When shown the form at the hearing before the Single Commissioner, Appellant denied ever seeing the document prior to the

hearing, but admitted his name, address, and signature were handwritten on the form. **(R. 412).** Appellant also admitted he checked the box for "No" on the Westinghouse form when asked if he had any recurrent low back pain. ***(Id.)*.** On the Westinghouse form, despite the recent workers' compensation claim at Richtex, Appellant denied ever having had a work-related injury or having been restricted medically from doing any part of his job. **(R. 179).**

As with the false statements Appellant made on Westinghouse's medical history form, Appellant admitted that he also falsely denied any prior workers' compensation claims on Westinghouse's "HealthWorks Questionnaire and Physical" form. **(R. 180-81, 415-16, 606-10, 613-24).** Specifically, Appellant checked the boxes for "Never" when asked "Any pain, numbness, limited motion, injury or surgery of the back" and "Have you ever had a work injury, Workers' Compensation claim, been given an impairment rating or disability rating, applied for or received any type of disability or pension (including military VA), received an award or settlement for any injury, accident, or disease or other disorder?" ***(Id.)*.** He denied any permanent restrictions or limitations. ***(Id.)*.** He also denied having had a previous job with similar physical demands. ***(Id.)*.** Appellant knowingly made these false statements. Appellant claimed he quickly completely the form; however, he admitted that he took the time to include hypertension/high blood pressure; pain, numbness, limit of motion, injury or surgery of the hip, knee, leg, ankle, foot; and "knee pain with weather." ***(Id.)*.**

Following Westinghouse, Appellant began working for Respondent Michelin. **(R. 417).** The medical records indicate Appellant was "on disability" following his job at Westinghouse and before beginning employment with Michelin. **(R. 58).** His position at Michelin involved making "big" tires, which Appellant testified could cause sharp pain in a person's back when stretching the rubber in the tires. **(R. 423, 427).** During the hiring process at Michelin, he completed training,

a physical exam, and the "Michelin Confidential Health Questionnaire for Post-Offer Examination" (the Michelin Questionnaire). **(R. 176, 419-21).** On the Michelin Questionnaire, as with the Westinghouse forms, despite his prior workers' compensation claim and restriction from a doctor of no heavy lifting until he was evaluated by an orthopedic surgeon, Appellant again falsely denied any prior back injury, backache, back pain or having ever experienced a medical problem that affected his ability to perform work. ***(Id.; see also* R. 461, 601-05).** Specifically, the Michelin Questionnaire asked, "Do you have problems with, *or have you ever had medical attention for any of the following*: . . . 13. *Back injury, backache or pain* . . . 21. *Have you experienced a medical problem that affected your ability to perform your work* . . .", to which Appellant checked the box for "NO." ***(Id.).*** (emphases added). Likewise, Appellant never told his trainer at Michelin, Jermaine Lemon, that Appellant previously had to leave a job because of his back issues or that the doctor told Appellant to meet with an orthopedic surgeon before he could perform any heavy lifting. **(R. 666).** Appellant executed the Declaration and Authorization portion of the form which states "I understand and agree that any false, misleading or incomplete information will make me subject to disqualification from employment or subject to dismissal at any time." **(R. 176, 419-21, 830).**

B. <u>Alleged Injury and Reporting</u>

Similarly to his claim at Richtex, shortly after beginning employment at Michelin, on June 11, 2017, Appellant went to a doctor complaining of "back pain after lifting at work." **(R. 67).** He complained the low back pain had persisted for the past several days and that he was doing heavy lifting at work prior to the onset of the pain. ***(Id.).*** The doctor prescribed cyclobenzaprine and tramadol. **(R. 68).** Appellant did not report this doctor's visit and back pain allegedly due to heavy lifting at work to any person at Michelin.

A few days later, on June 13, 2017, Appellant returned to a doctor complaining of lower back pains for the past two weeks after heavy lifting at work. **(R. 61).** Under history of present illness, the medical record from the visit states,

> *having left lower back pains for the past 2 weeks*
> *has had new job at Michelin, moving heavy stuff-there now for about 2 weeks*
> pain is *10/10* w/certain movements
> says feels sharp
> no radiation into legs . . .
> never had pain there in the past
> no recent injury or trauma . . .
> o/w[1] still due initial screening c-scope. referred at last appt. did not make appt - says cousin unexpectedly passed away
> and he had to help support family.

(Id.) (emphases added). Back pains for the two weeks prior to June 13, would have meant he had pains since the end of May 2017. He was taking cyclobenzaprine, hydrochlorothiazide, and tramadol, among other medications. ***(Id.)***. Appellant's treating physician, Dr. Scott Boyd,[2] testified that "[p]roper application of that scale, [ten out of ten] should be the worst pain you could experience." **(R. 322).** Appellant again did not report this medical visit or ten out of ten back pain allegedly due to heavy lifting at work to any person at Michelin.

On June 24, 2017, at 9:07 a.m., Appellant went to Lexington Medical Center Emergency Room (Lexington ER), complaining of lower back pain "since he was working last night, states does a lot of lifting/pulling and started hurting then." **(R. 70).** In consultation with the hospital social worker, Appellant had questions about a possible workers' compensation claim. **(R. 71,**

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[1] In the context of the medical report, it appears "o/w" means "out of work."

[2] Prior to the hearing before the Single Commissioner, Michelin moved to reconvene the deposition of Dr. Scott Boyd. **(R. 154-55).** Appellant *opposed* the motion. **(R. 182-87).** During the hearing, Michelin withdrew its motion to reconvene the deposition. **(R. 675, 803).** After Michelin withdrew its motion, Appellant then moved to reconvene the deposition even though he initially requested the Single Commissioner to deny Michelin's motion. **(R. 676-83, 803).** Following the hearing, the Single Commissioner denied Appellant's motion. **(R. 803-04).**

76). Appellant reported to the doctor that the pain "[d]oes not radiate" and there was no numbness in the extremities. **(R. 72).** The physician opined the neuro exam was normal, and Appellant was negative for gait problems and had a normal range of motion. **(R. 73-74).**

By all accounts, including Appellant's own testimony, no person at Michelin was aware that Appellant visited Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, claiming he was injured at work, and Appellant's alleged pain was not reported before June 24, 2017. **(R. 335-36, 414-15, 463-65, 469-71, 474, 490-92, 618, 638, 706-07, 720, 738, 743, 767-68).** When Appellant finally spoke with plant nurse for Michelin, Nurse Christie Sirois, on June 24, 2017, she scheduled him an appointment with Michelin's plant doctor, Dr. Stephen Izard, for the following business day, June 26, 2017. **(R. 737).**

Immediately prior to the visit with Dr. Izard, Appellant completed Michelin's "HealthWorks Post-Injury Questionnaire," claiming he injured his lower back on June 24, 2017, while he was stretching rubber and moving bobbins. **(R. 80-82).** When asked under the history of *present illness* section, "Have you ever injured this part of your body before," Appellant checked the box for "No." ***(Id.).*** As with his prior medical visits, Appellant alleged his back pain was ten on a scale of one to ten. ***(Id.).*** Under the *previous illnesses* section, when asked "Do you now have *or have you ever had*: (if so, list the date it occurred or you were diagnosed) . . . Back injuries or problems" Appellant checked the box for "now" and wrote the date as "6/24/17 Lexington Emergency." ***(Id.).*** (emphasis added). Following an evaluation, Dr. Izard opined Appellant presented a significant degree of symptom amplification and magnification. **(R. 84).** Dr. Izard ordered Appellant to follow-up with him two days later, on June 28, 2017. **(R. 85).**

Instead of revisiting Dr. Izard as specifically instructed, on the following day, June 27, 2017, Appellant returned to Lexington ER complaining of back pain and urinary retention. **(R.**

87-89). The report from the visit stated "here on Saturday for the same. Did not recognize numbness until he was reading discharge instructions." **(R. 87).** The doctor noted he had a normal gait. **(R. 89).** An X-ray of the lumbar spine showed no fracture subluxation. **(R. 91).** Thereafter, Appellant still did not return to Dr. Izard on June 28, 2017, as ordered. **(R. 738).** In fact, Appellant *never* returned to Michelin to follow-up with Dr. Izard or complete the investigation or accident report. **(R. 719-20, 771-72).** Safety manager, Mark Gross, offered to provide Appellant with transportation when Appellant told Gross he could not return for the appointment with Dr. Izard or complete the accident report or investigation because he did not have transportation. **(R. 772-73).** According to Gross, Appellant responded, "you need to talk to my lawyer" and hung up the phone. **(R. 773).** Appellant admitted that he was offered transportation to the appointment with Dr. Izard, and that he refused the offer. **(R. 577).**

Instead of ever returning to Michelin's medical providers, on June 30, 2017, Appellant went to Doctors Care, complaining of lower back pain. **(R. 99, 102, 537).** He did not answer the questions on the intake form addressing whether the injury was a workers' compensation claim. **(R. 98).** The doctor told Appellant he "really didn't have much to offer" Appellant as Appellant was already taking NSAIDs, muscle relaxers, and pain medications. **(R. 99).** The doctor referred him to an orthopedic specialist.

On July 24, 2017, Appellant met with Dr. Scott Boyd's physician assistant, Luis Valdes, PA,[3] at Lexington Brain and Spine Institute. Appellant claim the pain was "now radiating down LEFT leg." **(R. 106).** Valdes ordered an MRI and physical therapy.[4] **(R. 109).** During the

[3] Valdes saw Appellant and would in turn report to Dr. Boyd. Dr. Boyd supervised Valdes and determined the medical treatment. **(R. 304).**

[4] Appellant again did not answer the question on the physical therapy intake form asking whether the injury was related to a work accident. **(R. 127).**

September 14, 2017 appointment, Appellant claimed the pain radiated "from his back down his RIGHT leg." **(R. 117).** The MRI showed a herniated disc; however, Dr. Boyd confirmed there was no way to tell from looking at the MRI how long the issue had been present. **(R. 308, 326-27).** Appellant reported to Dr. Boyd's office that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment," which was false. **(R. 112).** Dr. Boyd testified that his impression when his office first saw Appellant "was that he had an injury on June 24th and no problems before then." **(R. 54).** After being shown medical documents from Appellant's June 11, 2017 and June 13, 2017 medical visits, Dr. Boyd opined he could not "be certain" as to whether Appellant's lower back problem was caused by an accident on June 24, 2017. **(R. 328).**

Michelin denied the claim in its entirety. Appellant filed a Form 50 Request for Hearing, claiming he sustained an injury by accident to his back out of and in the course of his employment with Michelin on June 24, 2017. Michelin argued Appellant's back condition was unrelated to any work accident; rather, the wealth of evidence failed to support the existence of a work-related accident. Moreover, Michelin contended the medical evidence supported finding Appellant was complaining of problems prior to June 24, 2017, and he had a longstanding history of pre-existing back problems including evidence that he was previously restricted from doing the type of work he claimed caused his injury until he was seen by a surgeon and withheld that information from Michelin. Michelin asserted the defenses of Notice and Fraud in the Application for Employment. The Single Commissioner denied the claim and the Full Commission affirmed the denial. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) governs judicial review of

decisions by the Commission." *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 622, 785 S.E.2d 194, 197 (2016). "An appellate court's review is limited to the determination of whether or not the Commission's decision is supported by substantial evidence or is controlled by an error of law." *Id.* "In workers' compensation cases, the Commission is the ultimate fact finder." *Id.*

"Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner." *Muir v. CR Bard, Inc.*, 336 S.C. 266, 282, 519 S.E.2d 583 (Ct. App. 1999). "The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence." *Id.* Appellate courts must affirm the Commission's factual findings if they are supported by the evidence. *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011).

"A court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Muir*, 336 S.C. at 282, 519 S.E.2d at 591. "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* "[T]he substantial evidence test 'need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment'; and a judgment upon which reasonable men might differ will not be set aside." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (quoting *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel Cty.*, 273 Md. 245, 256, 329 A.2d 18, 25 (1974)).

Where a party asserts the concealment of information vitiated the employment relationship,

an appellate court reviews the Full Commission's findings on the relationship's existence according to its own view of the preponderance of the evidence. *See Fredrick v. Wellman, Inc.*, 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009) (noting our Supreme Court in *Brayboy v. WorkForce*, 383 S.C. 463, 681 S.E.2d 567 (2009) applied the preponderance of the evidence standard of review to an employer's assertion that the employment relationship had been vitiated by the employee's fraud in his employment application). "However, even under this broad standard of review, the final determination of witness credibility is usually reserved to the Appellate Panel." *Fredrick*, 385 S.C. at 16, 682 S.E.2d at 520.

ARGUMENT

I. The preponderance of the evidence supports the Full Commission finding Appellant vitiated the employer-employee relationship pursuant to Section 42-1-130 of the South Carolina Code Ann. (2015) and *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), where Appellant repeatedly made informed, willful, and material misrepresentations on his employment documents for Michelin and prior employers; Michelin relied upon his responses on the documents; and the evidence demonstrates a causal connection between the misrepresentations and the alleged injury.

The relationship of employment is a jurisdictional issue for purposes of workers' compensation benefits. *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). This Court's review of the issue is governed by the preponderance of the evidence. *Givens v. Steel Structures, Inc.*, 279 S.C. 12, 13, 301 S.E.2d 545, 546 (1983). The burden rests on Appellant to show that the Full Commission's decision is against the preponderance of the evidence. *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649.

In order for provisions of the Act to be applicable, Appellant must have been an employee of Michelin as defined in Section 42-1-130 and an employer-employee relationship must have existed. In *Cooper*, our Supreme Court held a false statement in an employment application will vitiate the employer-employee relationship and bar workers' compensation benefits when (1) the

employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and the reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. 260 S.C. at 468, 196 S.E.2d at 835. The preponderance of the evidence shows Michelin proved each element of the Fraud in the Application defense outlined in *Cooper* and supports the Full Commission's findings.

The facts of this case are similar to the facts outlined in *Brayboy*, 383 S.C. at 464, 681 S.E.2d at 567. The claimant in *Brayboy* sustained a back injury in 2003. *Id.* Brayboy's employment application included disclaimers similar to those outlined in Appellant's post-hire questionnaire. *Id.* at 464-65, 681 S.E.2d at 567-68. As in the instant case, "[n]otably, Brayboy signed his name under these cautionary statements. Despite these warnings, Brayboy responded in the negative to all questions inquiring if Brayboy had prior back injuries, physical defects, medical conditions, or previous workers' compensation claims." *Id.* at 465, 681 S.E.2d at 568. "Brayboy testified he did not report any of his prior injuries to WorkForce as he did not feel the injuries were relevant to a construction job. Also, Brayboy stated he did not include the cave-in injury as it had 'cleared up very quickly.'" *Id.* at 466, 681 S.E.2d at 568. Similarly, here, although Appellant executed the declaration and authorization portion of the form, he claims he quickly completed the forms and suggests that because he believed the prior workers' compensation claim was minor and occurred some years prior, Michelin did not need to know that information. Like Brayboy, Appellant failed to report his back problems and admitted he provided false information on Michelin's application as well as Westinghouse's employment documents. *Id.* at 467, 681 S.E.2d at 569. Just as our Supreme Court in *Brayboy*, this Court should be "firmly convinced" Michelin established all three factors of *Cooper*. *Id.*

A. The preponderance of the evidence supports finding Appellant knowingly and willfully repeatedly made false misrepresentations.

Appellant concedes in his brief that his responses on the Michelin Questionnaire were "untrue," but dismisses the false statements because some years have passed and according to him, the prior injury was minor. **(App. Br. 19-20).** Appellant's contentions imply that as time elapses, workers are free to lie on employment applications regarding their physical condition. Yet, despite Appellant's contention otherwise, no matter how much time has elapsed, his failure to disclose his medical history rises to the level of knowing and willful because his medical history demonstrates he repeatedly failed to disclose prior back issues, treatment for his back, and prior workers' compensation claims. Not only did Appellant fail to report the prior workers' compensation claim with Richtex, he did not even list Richtex as a prior employer on his employment application for Michelin. **(R. 504-06).**

The Full Commission's determination that Appellant knowingly and willfully made false representations is consistent with *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009), wherein this Court affirmed a determination of the Full Commission that a claimant was not entitled to benefits because she concealed her history of back problems when seeking employment with the respondent employer. Here, like *Fredrick*, 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. The Michelin Questionnaire asked, "Do you have problems with, or have you ever had medical attention for any of the following: . . . 13. Back injury, backache or pain . . . 21. Have you experienced a medical problem that affected your ability to perform your work . . .", to which Appellant responded "NO" to both questions. **(R. 420-21, 830).** *See id.* at 21, 682 S.E.2d at 522 (noting that the fact that the claimant "responded 'NO' to

the question 'HAVE YOU HAD BACK TROUBLE OF ANY KIND?'" supported finding the claimant knowingly and willfully made a false representation as to her physical condition).

Further, Appellant noted on the Michelin Questionnaire that he took medication for high blood pressure; however, like in *Fredrick*, this was not sufficient to place Michelin on notice as to the prior back issues. *See id.* ("[N]one of the past injuries or illnesses that she, in fact, listed on the form could have reasonably alerted a prospective employer to any impact on her spine."). Finally, here, as in *Fredrick*, there was no credible evidence in the record indicating Appellant had significant memory problems when he completed the questionnaires or that otherwise explained the appearance of deception on Appellant's part. *Id.*

B. The preponderance of the evidence supports finding Michelin relied upon Appellant's false statements and the reliance was a substantial factor in the hiring.

Appellant's contentions in this regard completely miss the mark on whether Michelin satisfied this element of the *Cooper* factors. Several Michelin employees testified regarding the company's reliance on an employee's accuracy and truthfulness in completing the Michelin Questionnaire and how that reliance impacted the hiring of Appellant.[5]

Appellant's trainer, Jermaine Lemon, was a long-time employee of Michelin. **(R. 657).** Lemon confirmed Michelin relied on the Michelin Questionnaire answers and that it was important

[5] Appellant's references to and implications regarding the Americans with Disability Act (the ADA) are unwarranted and, more importantly, unpreserved as Appellant never even mentioned the ADA to the Single Commissioner or Full Commission. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); *Bazen v. Badger R. Bazen Co.*, 388 S.C. 58, 65, 693 S.E.2d 436, 440 (Ct. App. 2010) (noting only issues raised to and ruled upon by the Full Commission are cognizable on appeal). Moreover, even if the contentions were preserved, they are inappropriate and untrue. *See* Michelin's Diversity and Inclusion Report, https://jobs.michelinman.com (discussing Michelin's policy regarding individuals with disabilities, stating "Michelin recognizes the value of—and works to fully leverage—the unique talents and skills of individuals of all abilities. Michelin is currently developing a Business Resource Group for employees to support people of all abilities").

to provide truthful responses because Michelin needed to know whether the employee could perform the job duties to prevent other employees from getting injured. **(R. 665-69).** Lemon explained that he wanted to know if a co-worker such as Appellant was physically capable of performing the job because if they were not, he could get injured as well. **(R. 666-67).**

Safety manager, Mark Gross, had been employed with Michelin for thirty-seven years. **(R. 765).** Gross described the safety training provided to all new employees and outlined the Michelin Questionnaire. **(R. 766-67, 774-75).** He also confirmed Michelin relied on the employees to be truthful in completing the questionnaire for the safety of all employees. **(R. 775, 786).** Further, he explained it was not possible for Michelin's plant doctors to conduct thorough investigations and examinations if an employee lies during the application process. **(R. 787, 790-91, 796-97).** Gross explained that if he had known about Appellant's prior issues, he would have been concerned. **(R. 775-76).**

Nurse Sirois,[6] explained Michelin provides high-paying jobs and if an applicant wanted a job at Michelin bad enough, they could provide false information and still pass the initial physical medical examination. **(R. 753-58).** Thus, because Appellant did not admit he had prior back issues and a prior workers' compensation claim on the questionnaire, Michelin and its doctors were not able to investigate the extent of the prior injury and determine a position for Appellant that would not subject him to further deterioration and would prevent injuries to him and his co-workers. **(R. 775).** *See Fredrick*, 385 S.C. 8, 682 S.E.2d 516 (finding the reliance prong in *Cooper* was satisfied

[6] Any alleged error of by the Single Commissioner in allegedly qualifying Nurse Sirois as an expert is not preserved for review as the issue was not presented to the Full Commission. *See Bazen*, 388 S.C. at 65, 693 S.E.2d at 440 (noting only issues raised to and ruled upon by the Full Commission are cognizable on appeal). Notwithstanding, even if the argument was preserved, whether the Single Commissioner admitted the nurse as an expert does not change the fact that substantial evidence supported finding Michelin relied upon Appellant's fraudulent answers on the Michelin Questionnaire as multiple members of management testified regarding the reliance.

where a staff nurse for the employer testified that if the claimant had revealed her history of treatment for lower back problems, the employer would not have cleared the employer to work the particular job without further investigation); *Jones v. Georgia-Pac. Corp.*, 355 S.C. 413, 418-19, 586 S.E.2d 111, 114 (2003) (holding the reliance prong in *Cooper* was satisfied where the employer presented evidence showing that had the employer known of the claimant's prior issues, the employer would have attempted to find a job for the claimant that would not subject a pre-existing physical impairment to further deterioration).

C. The preponderance of the evidence supports finding a causal connection existed between Appellant's injuries.

As an initial matter, Appellant's reliance upon *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1983) is misplaced. The instant case is distinguishable from *McLeod* because in *McLeod* the claimant injured his back *three years after* he began working for the employer. During those three years of employment, the claimant in *McLeod* had been lifting between sixty to 160 sixty-pound boxes, five days a week, eight hours a day without complaints of back problems and always met his production quota. *Id.* at 470, 313 S.E.2d 40. By contrast, Appellant allegedly injured his back within weeks of beginning his job with Respondent Michelin. He was "on disability" after he left Westinghouse and shortly before he started at Michelin. Moreover, Lowman testified that Appellant never successfully completed validation at Michelin, meaning Appellant never demonstrated the ability to safely perform the job alone, with good quality, and while developing speed. **(R. 697-98).** Other Michelin employees also testified that the area where Appellant worked was strenuous work and Appellant, in fact, had difficulty performing the job. **(R. 659-663).** Michelin employees explained that Appellant, who was told by a doctor that he could not perform heavy lifting, could not perform Appellant's job at Michelin. **(R. 666-67).** Thus, just as Dr. Norris explained Appellant could not perform the job at Richtex

because of his back issues, Appellant could not perform the job at Michelin because of his back issues. **(R. 158-59)**. If anything, Appellant's back condition worsened over the years as he aged. *See Havird v. Columbia YMCA*, 308 S.C. 397, 400, 418 S.E.2d 329, 331 (Ct. App. 1992) (noting that continuing to work in pain and fatigue "often worsens [a person's] health").

This case is in line with *Givens*, 279 S.C. at 13, 301 S.E.2d at 546 and *Jones*, 355 S.C. at 418-19, 586 S.E.2d at 114, in which our Supreme Court held the record supported finding a causal connection between the claimant's injuries. In *Givens*, the claimant filed a workers' compensation claim for his back six months after he began with the company and had previously injured his back at a different employer. 279 S.C. at 13, 301 S.E.2d at 546. The Court noted, "Expert medical testimony clearly indicated that claimant's condition was one of disc degeneration reflecting the cumulative effect of successive injuries." *Id.* at 14, 301 S.E.2d at 547. Likewise, in *Jones*, the claimant failed to disclose prior back trouble, leg pain, and bursitis to the respondent employer and during her employment she repeatedly returned to her doctor complaining of back and leg pain. 355 S.C. at 415, 586 S.E.2d at 112. Our Supreme Court held "there is a causal connection between Claimant's injuries and the false representation as she had documented back problems prior to employment and claims that she injured her back while working for Respondent." 355 S.C. at 419, 586 S.E.2d at 114.

Here, substantial evidence indicated Appellant previously injured his back in a work accident, resulting in Appellant leaving the job. Because of that injury and his back issues the entire time he had the job, Appellant's treating physician warned him not to perform any heavy lifting until after he met with an orthopedic surgeon. The record includes evidence showing Appellant failed to disclose that prior injury, workers' compensation claim, employer where the injury occurred, or physician's opinion to Michelin during the application process and that

Michelin relied upon this information when hiring him. It is undisputed that Appellant's current alleged injury was causally related to the impairments to his back resulting from his prior back issues. Accordingly, the Full Commission did not err in applying the Fraud in the Application doctrine to bar Appellant's claim.

II. Substantial evidence supports the Full Commission finding that pursuant to Section 42-1-160 of the South Carolina Code Ann. (2015), Appellant failed to meet his burden of proof where there is no evidence Appellant suffered a compensable injury by accident arising out and in the course of his employment with Michelin on June 24, 2017.

As an initial matter, Appellant disputes the Full Commission's change in the finding from "separate" to "previous," but then concedes "the amendment to the Single Commissioner's finding is of no significance." **(App. Br. 13-14).** Because whether it was a "separate" incident or "previous" incident does not change the conclusion that Appellant did not suffer a compensable, work-related injury by accident on June 24, 2017, this Court need not decide whether the Full Commission erred in changing this language as there is no reversible error. *See Miles v. Miles*, 303 S.C. 33, 36, 397 S.E.2d 790, 792 (Ct. App. 1990) (recognizing an overriding rule that "whatever doesn't make any difference, doesn't matter"); *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.").

Furthermore, nothing in the Full Commission's Order "confirms [Appellant] proved that he had injured his back while working at Michelin on June 24, 2017," as Appellant would have this Court find. **(App. Br. 14).** To the contrary, the Order, which is supported by substantial evidence, confirms Appellant had issues with his back long before June 24, 2017, and yet never reported those issues to Michelin. The Commission correctly found that pursuant to Section 42-

1-160 of the South Carolina Code, Appellant did not sustain a compensable injury to his low back while under the employ of the Michelin on June 24, 2017, as Appellant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented.

Section 42-1-160 defines "injury" and "personal injury" as "only injury by accident arising out of and in the course of employment." Thus, "[a] compensable injury under the Workers' Compensation Act includes only an 'injury by accident arising out of and in the course of employment.'" *Yates v. Life Ins. Co. of Georgia*, 291 S.C. 301, 304, 353 S.E.2d 297, 299 (Ct. App. 1987) (quoting S.C. Code Ann. §42-1-160). "The word 'accident,' as used in workers' compensation, means an unlooked for and untoward event that the person who suffered the injury did not expect, design, or intentionally cause." *Id.*

By Appellant's own testimony and the record as a whole, any issue with his back on June 24, 2017, from heavy lifting was not an unlooked for or unexpected event. Appellant had back issues during the entire time that he worked for Richtex, and even filed a workers' compensation claim for his back, which he never reported to Michelin. Likewise, he then had back issues the entire time he worked for Michelin. Appellant visited Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, claiming he was injured at work and the pain had persisted for several weeks. He never reported those 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.

Appellant contends the record demonstrates he sustained a compensable injury on June 24, 2017, because he did not report any radicular signs or symptoms on June 11 or June 13, 2017, and "[i]t was not until the June 24, 2017 work accident that he developed radiculopathy." **(App. Br. 14).** However, Appellant's contention is a misstatement of the record. In fact, Appellant reported

to the doctor that the pain "[d]oes not radiate" and there was no numbness in the extremities at the June 24th visit. **(R. 72).** On his June 26, 2017 "HealthWorks Post-Injury Questionnaire" to Dr. Izard, he claimed the pain radiated down his left leg, but then at his June 27, 2017 medical visit to Lexington ER on the next day, he claimed the pain radiated to his right hip, right thigh, and right knee, and that he did not recognize numbness until after he read discharge instructions about numbness in the right leg. **(R. 82, 87).** On July 24, 2017, Appellant reported to Dr. Boyd's office that the pain radiated down his left leg, but then on September 14, 2017, he claimed the pain radiated from his back to his "RIGHT leg." **(R. 106, 117).** Therefore, the medical reports are directly contrary to Appellant's claim in his brief to this Court that "[e]very medical report from that time on consistently shows left sided radiculopathy." **(App. Br. 14).** Appellant's inconsistent statements regarding any alleged radiating pain support the Full Commission finding Appellant lacked credibility.

Appellant relies heavily on Dr. Boyd's testimony to prove causation; however, Appellant invests Dr. Boyd's testimony on causation with more significance than it merits. Dr. Boyd testified that his impression when his office first saw Appellant "was that he had an injury on June 24th and no problems before then." **(R. 355).** After being shown medical documents from Appellant's June 11, 2017 and June 13, 2017 medical visits, Dr. Boyd testified he could not "be certain" as to whether Appellant's lower back problem was caused by an accident on June 24, 2017. **(R. 328-39).** Dr. Boyd admitted the history of accident given to him was different than that given to Internal Medicine. **(R. 320-21).** Furthermore, when Appellant asked Dr. Boyd, "So is it reasonable, then, to say that something is different on June 24th as compared to June 11th and June 13th, in terms of what the treating doctor did at that time?" Dr. Boyd responded, "I think the symptoms are roughly similar to what he had reported before . . . ." **(R. 338).** Dr. Boyd confirmed the June 24,

2017 hospital report makes no mention of radiating pain. **(R. 325).** Dr. Boyd then testifies,

> It sounds like he began having back problems with pain because of increased physical exertion with his new job at Michelin starting in April [2017], got progressively worse to the point that he sought medical attention. And I think, at some point, somewhere around June 24th, something changed where he began having a slightly different set of symptoms with pain radiating down his left leg in a radicular pattern. . . . I will say reviewing these records and specifically the questionnaire he filled out on June 26, which I believe is the first evidence of radicular symptoms down the left leg, that he reports some event on June 24th. I believe that, more likely than not, he injured his lumbar spine at his employment including some episode on June 24th.

(R. 344-45).

To infer, as Appellant urges, that Dr. Boyd's testimony proves Appellant sustained an injury by accident on June 24, 2017, strains credulity. 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, as any issue with his back 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. First, Dr. Boyd again notes Appellant had back pain that he attributed to work as early as April 2017. Dr. Boyd also confirmed ten out of ten pain as reported by Appellant on June 13, 2017, was the worst pain a person could experience. Next, Dr. Boyd stated he specifically relied on the questionnaire completed by Appellant, which the record shows Appellant falsely completed and as discussed later in this brief, the Full Commission correctly determined Appellant lacked credibility.

Dr. Boyd's causation testimony outlined above is similar to testimony relied upon by the claimant in *Jones v. Georgia-Pacific Corp.* In *Jones*, the claimant failed to include a prior back injury on her employment application. 355 S.C. at 416, 586 S.E.2d at 112. While she worked for the employer, she repeatedly returned to her doctor complaining of back pain. *Id.* The claimant

then alleged that on August 7, 1997, she was picking up large pieces of cardboard and felt something "pop" in her back. *Id.* The doctors who treated the claimant after her alleged injury on August 7, 1997, noted that the claimant had prior back problems, but opined the claimant had a "major problem" as of August 8, 1997, and the injury she reported on August 7th was the "straw that broke the camel's back." *Id.* at 417, 586 S.E.2d 113. Our Supreme Court held that although the doctors' testimony was inconsistent as to whether the August 7, 1997 injury triggered the claimant's subsequent back problems, there was substantial evidence presented upon which the Commission could conclude that the claimant's injuries were not directly and causally related to the August 7, 1997 accident. *Id.*

Here, furthermore, Dr. Boyd had no knowledge of—and there was no testimony in Dr. Boyd's deposition regarding—Appellant's prior workers' compensation claim for a back injury or the recommendation that Appellant meet with a surgeon before performing heavy lifting. The only mention of a prior injury was Appellant's false statement to Dr. Boyd's office that he had an issue that resolved without treatment. Appellant cannot now suggest in good faith that "[i]f the Commission truly believed the old records had dispositive value, then the Single Commissioner or Appellate Panel should have ordered Dr. Boyd's deposition to be reconvened" **(App. Br. 17)** when Appellant, himself, originally opposed Michelin's motion to reconvene Dr. Boyd's deposition.

To further support his contention of an injury by accident on June 24, 2017, Appellant argues at great length as to how the pain on June 24, 2017, was different or worse than the pain he reported on June 11 and June 13, 2017. However, the argument is a distinction without a difference because it does not change the fact that his issues on the alleged date of accident—June 24, 2017, were not unlooked for or an untoward event. Appellant reported ten out of ten back pain that

persisted for several weeks prior on June 13, 2017, which his own treating physician stated was the "worse pain you could experience." Appellant also alleged his back pain on June 24, 2017, was ten on a scale of one to ten. **(R. 80-82).** Moreover, the only evidence that any of Appellant's alleged pain, including the pain he reported on June 11 and June 13 was work-related was his statements to the doctors.[7] As previously stated, and as addressed in more detail later in this brief, the Commission properly found Appellant lacked credibility. Appellant could have hurt his back in a variety of ways which were unrelated to work.

Appellant seems to suggest that because he alleged the back pain in the June 11 and June 13 appointments was attributed to work at Michelin, then the Commission should have found the June 24 allegation compensable because those prior "episodes" culminated into the herniated disc on the MRI scan. **(App. Br. 13).** This reasoning is flawed for several reasons. First, Appellant only claimed an injury by accident on June 24, 2017. He did not claim a repetitive trauma injury, injuries on June 11, 2017, or June 13, 2017, or an aggravation of a preexisting injury. Moreover, even if he now argues a different date prior to June 24 or an aggravation of a preexisting injury, the assertions would not warrant reversal because the Commission's decision is supported by substantial evidence. *See Sharpe*, 336 S.C. at 161-62, 519 S.E.2d at 106 (affirming the Commission's decision that the claimant failed to prove an injury by accident on a specific date and rejecting the argument that even if the claimant was injured on a different date, the claimant's work accident aggravated the pre-existing injury); *id.* ("Again, although there was evidence from

[7] Of note, Appellant's allegation on June 24, 2017, was exactly the same as the reporting of his claim against Richtex. In that case, the doctor noted "had noted back pain and soreness for three weeks. Then he reported this vague episode of lifting some bricks and he felt that he may have injured himself at that time although he denied any significant change at the time of this incident." **(R. 158-59).** Here, he reported back pain and soreness for several weeks, then reported a vague episode of lifting on June 24, 2017, claiming he felt he may have injured himself at that time even though there was no significant change when the alleged incident occurred.

which the Commissioner could have found that an accident occurred on July 21st, and from which he could have held a prior injury was aggravated, there is ample evidence in the record from which reasonable minds could infer that Sharpe was actually injured on July 16th, that no accident occurred on July 21st, and that, in fact, Sharpe 'staged' the July 21st accident.").

Further, the treating physician on which Appellant based his arguments testified that there was no way to tell from looking at the MRI scan how long the herniated disc was present. It is plausible that the herniated disc could have been present long before Appellant even began working at Michelin. *See* **R. 58** (noting Appellant was "on disability" following his position with Westinghouse). Accordingly, the Commission did not err in concluding Appellant failed to meet his burden of proving an injury by accident on June 24, 2017.

III. Substantial evidence supports the Full Commission finding this case is barred pursuant to *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), where the evidence demonstrates Appellant knew he could injure his back performing his job at Michelin.

Not only was Appellant's alleged pain on June 24, 2017, not accidental because Appellant alleged significant back pain for several weeks prior to June 24, but also because Appellant had been aware of his back problems for several years and left a job due to the same problem prior to working at Michelin. In *Capers*, 305 S.C. at 256, 407 S.E.2d at 661, this Court addressed whether a claimant sustained an injury by accident arising out of and in the course of his employment pursuant to Section 42-1-160. The Court reiterated that the "word 'accident' has been applied by our courts in the workers' compensation context to mean an 'unlooked for or untoward event that the injured person did not expect, design or intentionally cause.'" *Id.* The Court held there was substantial evidence in the record to support the conclusion that Capers' injury was not accidental because he had been aware of the situation for several years and had previously left a job due to the same problem. *Id.* at 257, 407 S.E.2d at 661-62.

Here, in arguing the Commission erred, Appellant initially contends the Full Commission's finding as to *Capers* is conclusory; however, the conclusion is supported by Findings of Facts No. 4 and No. 10. In Finding of Fact No. 4, the Commission found,

> that on June 11, 2017, the claimant reported ten out of ten pain; however, he did not file a workers' compensation claim for any date but June 24, 2017. (H.T. 259-60). . . . 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.

Additionally, in Finding of Fact No. 10, the Commission found,

> This claim is denied in its entirety based on evidence of numerous issues relating back to 1997 through 2017. The claimant has failed to carry his burden of proof of an accident being sustained on June 24, 2017, due to his lack of credibility, the lack of sufficient medical evidence to support his allegations, and, moreover, due to medical evidence to the contrary.

In *Landry v. Carolinas Healthcare Sys.*, this Court relied upon *Capers* in holding substantial evidence supported the Full Commission finding a claimant did not suffer an injury by accident arising out of and in the course of her employment where the worsening of her bunion condition was not unexpected. 396 S.C. 149, 157, 719 S.E.2d 288, 292 (Ct. App. 2011). The Court noted the claimant continued to work in a job that required her to stand for long periods of time even though (1) she was aware of her physical condition and knew which activities would worsen her symptoms, (2) her doctor warned her that standing on her feet for prolonged periods of time would worsen her bunion conditions, and (3) she testified she was aware that the amount of standing in her occupation was hazardous to the condition of her feet. *Id.*

Similarly, in *Havird*, this Court concluded the claimant did not suffer an injury by accident within the meaning of the Act. 308 S.C. 397, 418 S.E.2d 329. The Court noted the claimant's vascular disease was not aggravated by unexpected or excessive exertion in the performance of his

duties or by unusual and extraordinary conditions in his employment. *Id.* at 400, 418 S.E.2d at 331. Instead, the worsening of his varicose veins was the natural and expected result of working in a job that was performed while standing. *Id.* This Court explained,

> It is well known that prolonged standing is bad for people with varicose veins. Aggravation of the condition is the natural and expected result of standing in a limited area without much movement. Havird himself knew standing would worsen his condition over time and did his best to reduce further injury to his legs by elevating them when he could. The injury to his legs was real, but it was not injury by accident.

Id.; *see also Richardson v. Wellman Combing Co.*, 233 S.C. 454, 459, 105 S.E.2d 602, 604 (1958) (holding there was no proof of an injury by accident).

In the instant case, Appellant, like the claimants in *Capers*, *Havird*, and *Landry*, knew of his back condition and knew which activities, such as heavy lifting or bending, would worsen his symptoms. Appellant contends he did not expect that he would hurt his back while performing manual labor at Michelin. However, in his prior jobs, Appellant required treatment for back pain after heaving lifting at work. Appellant knew his doctor had restricted him from heavy lifting until he was evaluated by a surgeon. He repeatedly chose to ignore the doctor's orders. He did not get evaluated by a specialist and instead went directly to work at Westinghouse which according to Appellant's own testimony required lifting containers and pushing carts weighing up to 800 pounds and thereafter, following being on disability after his work at Westinghouse, Appellant began making "big" tires for Michelin, which Appellant stated could cause sharp pain in a person's back when stretching the rubber in the tires. **(R. 58, 423, 427).** A doctor previously warned him that "having back pain for three weeks, the entire time he has been working for Ric[h]tex, if he does not respond very well and very fast to some conservative treatment it might be in his and Ric[h]tex's best interest for him to find new employment" and that he was "unable to perform the

job required at Richtex." **(R. 158-59).**

Despite the warnings, Appellant went to work for Michelin—a company where he knew he would be required to do the same type of manual labor after he provided Michelin false information regarding his medical history. Although Appellant had prior back problems and testified that he knew stretching the rubber could cause back problems **(R. 423, 427)**, he filed this claim alleging he suffered a back injury at Michelin from "[s]tretching rubber for a tire." **(R. 47).** Thus, Appellant knew the type of work he performed at Michelin could cause back problems and worsen his condition. *Havird*, 308 S.C. at 400, 418 S.E.2d at 331.

In fact, Appellant's prior case and the instant case are almost identical. At Richtex, Appellant filed a workers' compensation claim only weeks after he started the job. **(R. 158-59).** He claimed he had back problems the entire time he worked at the job, then reported a "vague" episode of lifting which caused an injury. ***(Id.)***. At Michelin, he complained of back pain for nearly the entire time he worked for the company, then was "vague" in describing the alleged injury to Nurse Sirois. **(R. 735, 741).** In the Richtex claim, he went to Doctors Care for a second opinion without following the treating physician's, Dr. Norris, orders. **(R. 158-59).** Similarly, here, he went to the emergency room and to Doctor's Care instead of following the treating physician's, Dr. Izard, orders to return Dr. Izard for a follow-up evaluation. **(R. 84, 88, 99).** At Richtex, Dr. Norris described Appellant as being in "a litigation thought process" shortly after beginning medical treatment, just as in the instant action against Michelin, Appellant told Gross to "talk to my lawyer" when Gross offered transportation to Appellant for him to continue with the company's investigation of the claim. **(R. 158-59; 772-73).**

Although Appellant attempts to distinguish the area of the back in the prior workers' compensation claim and the current claim, the prior records and reports demonstrate the alleged

issue involved the same part of Appellant's back—low and middle back that hurts when he bends. In the December 4, 1997 medical report, the note states "back exam shows tenderness to palpation of the *intervertebral space at L2-3* . . . . There is tenderness and muscle spasm in the *bilateral lumbar region* . . . ." **(R. 158)** (emphases added). Further, the Workers' Compensation Commission's database shows the location as "*low back* area" for the 1997 claim. **(R. 166)** (emphasis added). Appellant's Form 50 Request for a Hearing in the instant case alleges he sustained an injury to his "back," indicating an issue with any part of his back. In the instant action, Appellant completed Michelin's Post-Injury Questionnaire claiming the injury was to his "*lower left & middle back.*" **(R. 80)** (emphasis added). He claimed, "severe pain, ba[r]ly can move can't been (sic) down." Likewise, the medical record from the December 11, 1997 visit with Dr. Norris Appellant reported "the pain is in the *middle of his back*, hurts sometimes when . . . he bends." **(R. 159)** (emphasis added). When he saw Dr. Marom on June 13, 2017, weeks prior to reporting this workers' compensation claim, Dr. Marom diagnosed him with acute *low back pain.* **(R. 65).** Furthermore, in the forms in which Appellant repeatedly falsely denied any prior claims or back injuries, the questions ask about issues with any part of the back.

Accordingly, Appellant knew the lifting restriction was intended to prevent exactly the type of injury that occurred. Any alleged resultant back injury was a predictable consequence of Appellant's voluntary defiance of the lifting restriction. Just as in *Capers*, there is substantial evidence in the record to support the conclusion that any back issue experienced by Appellant on June 24, 2017, was not accidental. Appellant had been aware of the situation for several years and had previously left a job due to the same problem caused by heavy lifting. Therefore, the back problem "was not an unlooked for event which [Appellant] did not expect. It was, in fact, an event which [Appellant] could anticipate given his past experience." *Id.* at 256, 407 S.E.2d at 662.

Because Appellant knew the requirements of the position with Michelin and the restrictions placed upon him by his treating physician as a result of the prior injury to his back, Appellant's injury was not unexpected and thus, was not compensable. *Id.*

South Carolina law does not provide compensation benefits for injuries the employee voluntarily inflicted. Appellant's injury was the expected result of repeated activities which violated the doctor's specific restrictions and therefore does not constitute an injury by accident. Therefore, substantial evidence supports the Full Commission's finding *Capers* barred this claim and Appellant's back condition on June 24, 2017, was not a compensable injury by accident.

IV. Substantial evidence supports the Full Commission finding Section 42-9-60 of the South Carolina Code Ann. (2015) barred this claim as a matter of law where in 1997 a doctor restricted Appellant to no heavy lifting until he was evaluated by an orthopedic surgeon, but Appellant never visited an orthopedic surgeon and instead continued to work jobs which required a significant amount of heavy lifting and thereafter failed to alert or notify Michelin he was allegedly suffering from ten out of ten pain for at least four weeks prior to June 24, 2017, and sought medical treatment on his own without any knowledge of Michelin due to Appellant's failure to provide notice.

The Commission correctly determined that even if Appellant sustained an injury by accident on June 24, 2017, Appellant intentionally and willfully did so by failing to alert or notify Michelin he was allegedly suffering from ten out of ten low back pain for at least four weeks prior to June 24, 2017, and seeking medical treatment on his own without Michelin's knowledge of any issues. **(R. 45-46).**

"Generally, the fault of an employee in a workers' compensation claim has no bearing on the employee's right to recover." *Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008). However, Section 42-9-60 of the South Carolina Code makes an exception to this general rule, stating "No compensation shall be payable if the injury or death was occasioned by the . . . wilful intention of the employee to injure . . . himself or another."

"[T]he term 'wilful intention,' as used in the statute, means a deliberate or formed intention." *Zeigler v. S. C. Law Enf't Div.*, 250 S.C. 326, 329, 157 S.E.2d 598, 599 (1967). In *Zeigler*, a person was considered to have willfully intended an action when the act "was not impulsive or instinctive, but deliberate" and "[t]he circumstances were such that the parties were charged with the knowledge and reasonable expectation that the act would result in serious injury." *Id.* at 331, 157 S.E.2d at 600.

As previously outlined, Appellant fraudulently failed to notify Michelin of his prior back issue and workers' compensation claim for his back during the application process. Then, after beginning manual labor at Michelin, Appellant failed to inform any member of management at Michelin that he was experiencing significant back pain during almost his entire tenure with the company. No person at Michelin was aware that Appellant visited Lexington Medical Center on June 11, 2017, and his personal doctor on June 13, 2017, complaining of back pain for the prior several weeks and claiming he was injured at work. **(R. 335-36, 414-15, 463-65, 469-71, 474, 490-92, 618, 638, 706-07, 720, 738, 743, 767-68).** Appellant's alleged pain was not reported before June 24, 2017. ***(Id.).*** As safety manager, Mark Gross was supposed to be notified of any actual or potential workers' compensation claims and Gross confirmed no person in management at Michelin had any idea Appellant was claiming to have back problems since around the end of May 2017 that he attributed to working at Michelin. **(R.766-67).** Gross testified that he was first informed of Appellant's alleged injury late in the afternoon on June 24, 2017. **(R. 770).**

Training manager, Troy Lowman, first became aware Appellant was filing a workers' compensation claim on June 24, 2017, around lunchtime. **(R. 701).** Appellant called Lowman and told him he was at a hospital for a work injury and Lowman believed Appellant had already been seen by a doctor when Appellant called him. **(R. 701-02, 714).** Lowman asked Appellant to

report the accident to Michelin security, which in turn would have generated an accident report and investigation. **(R. 717).** Appellant never returned Lowman's repeated phone calls after that initial call in the hospital. **(R. 720, 724).** Similarly to Lowman and Gross, Nurse Sirois testified that she first learned of Appellant's alleged issue on June 24, 2017, when she received a call from the shop manager asking her if she knew anything about Appellant's alleged injury and she did not. **(R. 732-33).** She contacted Appellant and asked him about the alleged incident and told him he did not follow the proper protocol in seeking medical treatment. **(R. 733-35).**

Michelin trained Appellant to follow specific protocol for reporting injuries, which he did not follow. This is elucidated in the testimony of Lowman, who was a thirty-six-year employee responsible for on-boarding new employees and insuring training occurred and was properly conducted. **(R. 697).** Lowman and other managers confirmed training at Michelin included a discussion on workers' compensation and reporting claims. **(R. 699, 768-71).** The training provided to all new employees—including Appellant—provided that the proper protocol for reporting any work injury was for Appellant to notify the shift manager and safety spoke and complete an accident investigation form. **(R. 700, 768-71).** Appellant's trainer, Jermaine Lemon, trained Appellant to go to the medical department at Michelin and, if the medical department was closed, go directly to Michelin security because Michelin's security officers are trained Emergency Medical Technicians. ***(Id.).*** Lemon trained Appellant *not* to go to Michelin's family health center for work-related injuries. ***(Id.).*** Yet, Appellant never reported the June 11, 2017 and June 13, 2017 visits and claimed that before he went to the emergency room on June 24, 2017, he went to Michelin's nurse's station and family health center, but could not find assistance so he went to Lexington ER. **(R. 440-48).**

As demonstrated by hearing testimony, the proper procedure would have been for

Appellant to report the June 11, 2017 and June 13, 2017 appointments to a manager or safety spoke. **(R. 704-05, 768).** Moreover, Appellant should have reported *any* back pain that hindered his ability to do his job, but he did not. **(R. 710-11).** Furthermore, Nurse Sirois confirmed that if, as here, a Michelin employee goes to any doctor or hospital or anywhere else and claims to be having ten out of ten back pain and relates the pain to the job at Michelin, that is something that should have been reported immediately to Michelin. **(R. 737).** In fact, Appellant admitted ten out of ten level pain is not minor and is in fact the worst pain a person could have. **(R. 623, 640).** As the Michelin employees testified, Appellant had ample opportunity to notify Michelin of any alleged work injury but failed to do so. **(R. 705-06).**

Michelin needed to know of Appellant's back pain because of its impact on the safety of Appellant, Michelin, Appellant's co-workers, and other members of Appellant's team. **(R. 705-06, 720-22, 782).** Nurse Sirois opined it was not safe for Appellant to continue his job if he had ten out of ten pain in his back as Appellant alleged. **(R. 736-37).** Michelin management explained that if Appellant had reported the prior back pain, the nurse would have brought him in for an assessment and immediately referred him to the plant doctor for treatment and further evaluation to determine whether he could continue to safely perform his job. **(R. 721-22, 737).** *See Mintz v. Fiske-Carter Const. Co.*, 218 S.C. 409, 63 S.E.2d 50, 52 (1951) (explaining that notice to the employer of an accident affords the employer an opportunity to furnish medical care to the employee and minimize the disability and resulting liability).

Despite not reporting the ten out of ten pain, Appellant continued to work in the same position which he alleges caused the pain. The June 13, 2017 report demonstrates Appellant forced himself to work knowing he had issues and should not have been working according to his own doctor. *See Havird*, 308 S.C. at 400, 418 S.E.2d at 331 (noting that continuing to work in pain

and fatigue "often worsens [a person's] health"). Accordingly, the Full Commission properly denied the claim as Appellant's alleged injury on June 24, 2017, was not unexpected and was instead willful as his failure to notify Michelin of the prior history and medical visits in which he reported ten out of ten pain demonstrated circumstances such that Appellant is charged with the knowledge and reasonable expectation that the act would result in serious injury. *Zeigler*, 250 S.C. at 331, 157 S.E.2d at 600.

V. The Full Commission's credibility finding was clear and unambiguous and substantial evidence supports finding Appellant's lack of credibility supported barring compensability under the Act.

As an initial matter, this issue is not preserved. Appellant never raised the issue, briefed it, nor argued regarding credibility to the Full Commission. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [Full Commission] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Under our preservation rules, a "losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id.*

Even if the issue was preserved, substantial evidence supports affirming the decision. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." *Sharpe*, 336 S.C. at 160, 519 S.E.2d at 105. Despite Appellant's contention otherwise, this Court cannot disregard the credibility findings of the Commission when those findings were used to

support the finding that the claimant did not suffer a work-related injury. *See id.* at 159-160, 519 S.E.2d at 105 (holding the findings of the workers' compensation commission that a claimant did not suffer a work-related injury was supported by the evidence where the Commission based its decision on the lack of credibility of the claimant and on the credibility of the employer's witnesses).

The Full Commission found Appellant failed to carry his burden of proof of sustaining an injury by accident on June 24, 2017, due in part to his lack of credibility. **(R. 45).** *Id.* When considered as a whole, the record is replete with evidence of Appellant's lack of credibility. First, as noted in the Full Commission's findings of fact, Appellant repeatedly provided false information to employers. At the hearing, he denied ever seeing Westinghouse's medical history form, but then admitted his name, address, and signature were hand-written written on the form. **(R. 412-13).** On the Westinghouse forms, despite the prior workers' compensation claim at Richtex, Appellant denied ever having had a work-related injury or having been restricted medically from doing any part of his job. **(R. 177-81).** He falsely stated he never had any pain, numbness, limited motion, or injury of the back. **(R. 414-15, 180-81).** He also falsely denied any prior work injury, prior workers' compensation claims, or receiving a settlement for any work injury. **(R. 180-81, 414-16, 606-10, 613-24).** He denied any permanent restrictions or limitations. **(R. 180-81, 414-15).** He also denied having had a previous job with similar physical demands. **(*Id.*).**

Moreover, on the Michelin Questionnaire, as with the Westinghouse forms, despite his prior workers' compensation claim and restriction from a doctor of no heavy lifting until he was evaluated by an orthopedic surgeon, Appellant again falsely denied any prior back injury, backache, back pain or having ever experienced a medical problem that affected his ability to

perform work. ***(Id.*; R. 420-21, 461, 601-05).** Appellant reported to Valdes that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment," which was false. **(R. 112).**

Appellant completed a "HealthWorks Post-Injury Questionnaire," and when asked under the history of present illness section, "Have you ever injured this part of your body before," Appellant checked the box for "No." **(R. 80-81).** Further, under the previous illnesses section, when asked "Do you now have or have you ever had: (if so, list the date it occurred or you were diagnosed) . . . Back injuries or problems" Appellant checked the box for "now" and wrote the date as "6/24/17 Lexington Emergency" without any indication of the prior medical visits for his back issues. ***(Id.)*.**

Furthermore, Dr. Izard opined Appellant presented a significant degree of symptom amplification and magnification. **(R. 84).** *See Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009) (holding the Commission's finding that a claimant lacked credibility was supported by the evidence where "she exaggerated her symptoms and made inconsistent statements at the hearing and to her treating physicians"). Both Gross and Lemon testified they did not believe any of Appellant's allegations in this claim. **(R. 663, 669, 785).** Appellant admitted that he falsely told his family doctor that he had never had prior back pain and he falsely told Dr. Izard that he had never had any prior back problems or prior knee surgery. **(R. 486, 522-23).** Accordingly, Appellant's recurrent false statements to employers and medical professionals sufficiently supported the Commission's findings regarding his credibility. *See Porter v. Labor Depot*, 372 S.C. 560, 574, 643 S.E.2d 96, 103 (Ct. App. 2007) (finding the record supported finding the claimant lacked credibility where the claimant's testimony conflicted with medical evidence provided in EMS reports, emergency room records, and prior medical histories).

CONCLUSION

This Court should affirm the Full Commission's order denying Appellant's claim in its entirety. Appellant vitiated the employer-employee relationship when he fraudulently denied any prior back issues and Michelin relied upon the denial. Appellant failed to meet his burden of proof under Section 42-1-160 to show he sustained an injury by accident on June 24, 2017, and the claim fails under Section 42-9-60 and *Capers v. Flautt*, where the record demonstrated any back issues on June 24, 2017, were not unexpected or an untoward event and instead were expected and willful given his prior work history and his medical visits that he did not report to Michelin in the weeks prior to June 24, 2017. Finally, Appellant's lack of credibility overlays every issue decided by the Full Commission and makes any medical report Appellant submitted insufficient to support his claim. For these reasons, Michelin respectfully submits that the decision of the Full Commission should be affirmed.

Respectfully,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1708221

Court of Appeals Case No. 2019-000556

Isaac Brailey, Claimant ..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

Counsel certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

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