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.

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

RULES OF COURT

STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in finding that Isaac Brailey failed to meet his burden of proof that he suffered an compensable injury by accident arising out of his employer.

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

3. Whether the Appellate Panel erred in finding this claim was barred by Capers v. Flautt when no factual findings were made to support such a defense and when the defense does not apply to this case in that there was no evidence that Claimant knew or could have known with certainty that he would injure his back at Michelin.

4. Whether the Appellate Panel erred in finding as a matter of law that this claim was barred by Section 42-9-60 when no factual findings were made to support such a defense and there is no evidence that Brailey intentionally and willfully caused injury to himself by continuing to work full duty when no doctor put him under work restrictions until his accident on June 24, 2017.

5. Whether the Appellate Panel erred in finding Brailey was not a credible witness as such finding is not supported by substantial evidence; and even if it where, such a finding is insufficient to support a denial of the claim.

STATEMENT OF THE CASE

This appeal from the Workers' Compensation Commission arises out of job-related injuries suffered by the Appellant, Isaac Brailey, on June 24, 2017. Brailey's Employer, Michelin, denied his claim on July 13, 2017. [R.P. 135].

Brailey filed a Form 50 (Notice of Hearing) on October 4, 2017, alleging he suffered an injury by accident arising out of and in the course of his employment with Michelin on June 24, 2017. Brailey sought medical treatment and temporary total disability compensation. [R.P. 47].

Michelin and its insurance carrier, Safety National Casualty Corporation, timely filed a Form 51 (Employer's Answer to Request for Hearing), on November 3, 2017. Michelin asserted a general denial of all allegations asserting "Claim under investigation." Michelin also pled all affirmative defenses available under Title 42 and common law. [R.P. 49]..

The case was set for a hearing on September 26, 2017. Respondents moved for multiple continuances, resulting in the hearing being reset for December 14, 2017; January 31, 2018; February 5, 2018; and February 28, 2018. The case was tried before on March 23, 2018.

Commissioner Avery Wilkerson issued a Decision and Order denying the claim on November 8, 2017. In his Order, he held:

> IT IS THEREFORE ORDERED that claimant failed to prove he sustained a compensable injury to his back of [sic] left leg on June 24, 2017. Moreover, even if he had met his burden of proof, his claim would be barred by ***Capers v. Flautt,*** §42-9-60, and the fraud in the application for employment defense. [R.P. 24].

Appellant timely filed his Form 30 (Notice of Appeal) to the Full Commission. Oral arguments were heard on October 22, 2018. The Appellate Panel issued a Decision and Order affirming with amendments on February 28, 2019. [R.P. 25-46]. This appeal followed.

STATEMENT OF THE FACTS

This is an appeal from a Form 50 hearing in a denied case. Isaac Brailey, the employee in this workers compensation case, is 51 years old. Brailey was employed as a production worker at Michelin. Brailey sustained a work related injury to his back on June 24, 2017. The Commission denied his claim for the reasons set forth in the Argument section of this brief.

Approximately twenty years earlier, Brailey had worked for Richtex Brick for about three weeks. On approximately December 4, 1997, Brailey felt pain in "the middle of the back . . . just below the ribs." [R.P. 408, line 25-p. 409, line 11]. Brailey no longer has pain in this area of the back. He currently has pain "on my left side . . . above my hip or right at my hip" resulting from his June 24, 2017 work accident at Michelin. [R.P. 409, line 12-p. 410, line 4].

In 1997, Brailey went to two doctor's visits with the Richtex company doctor, Dr. Thomas Norris. Brailey's employer was "very cooperative. I went to physical therapy, you know, they said it might have a – a muscle strain; I don't know but they – I went to physical therapy and non-restriction on certain things." [R.P. 410, lines 5-12].

Brailey saw Dr. Norris on December 4th and 11th, 1997. X-rays were "essentially normal . . ." He was improving with therapy. Consistent with his hearing testimony, Dr. Norris confirmed "He reports the pain is in the middle of his back . . ." He noted no symptoms of weakness or tingling in either extremity. Dr. Norris diagnosed Brailey with lumbar and thoracic strain. Dr. Norris – plainly believing that Brailey had suffered no serious injury referred him to Dr. Bethea (an orthopaedic surgeon) who "would certainly put this to rest most expediently . . ." He stated "I will place him on no heavy lifting until he sees the surgeon." [Supp. R.P. 1-2].

Brailey never saw Dr. Bethea. He settled his claim on a clincher (full and final release) for

a nominal sum ($2,500.00) in June 1998. [R.P. 149].

For the next twenty years, Brailey had no problems with his back and no workers' compensation claims. Brailey worked as a quality control technician for Westinghouse for 16 years, until he was laid off in a reduction in force in March 2016. During his time at Westinghouse, Brailey had to lift pellets and containers, work with pipe wrenches, and push carts weighing 6-700 pounds. He had no back injuries at Westinghouse and was able to pass a physical examination every year he was there. [R.P. 413, line 1-p. 414, line 17].

Brailey worked briefly as a correctional office for the Department of Juvenile Justice before joining Michelin in April 2017. He had long hoped to join Michelin and stay there until retirement.

As part of the hiring process, Michelin required employees to undergo a physical examination by a company doctor before beginning work. When Brailey filled out his health questionnaire for Michelin on March 2, 1997, he admittedly did not disclose his previous back strain from 20 years before.[1] [R.P. 176; p. 420, line 17–p. 422, line 21]. Brailey was given a complete physical exam by Dr. Tomarchio and cleared for work with Michelin. Brailey testified the physical examination was thorough, including examining his ability to turn, bend, lift and squat. He experienced no pain during the examination. [R.P. 624, line 15-p. 625, line 1; p. 831].

Other Michelin employees who had undergone the post-offer physical confirmed the examination was thorough. Jermaine Lemon, Brailey's trainer, confirmed that even though he had no previous problem with his back, the company doctor still examined his back to make sure he

---

[1]Brailey also left off his address, phone number, emergency contacts and family doctor. This would be consistent with his testimony that they hurried him through the process and he "just filled it out as quickly as possible." [R.P. 176; p. 420, lines 6-12].

"could twist, turn, bend, stoop, lift without any problems."[2] [R.P. 683, line 23-p. 684, line 20].

Mark Gross, Michelin's Safety Manager testified that once Dr. Tomarchio cleared Brailey for full unrestricted duty, Michelin had what they needed to know and Brailey was good to go. [R.P. 778, lines 14-22].

Brailey started working for Michelin on April 17, 2017. The work was strenuous and, as expected, caused body aches – eventually including back pain. Brailey was told aches and pains were a normal part of getting used to the job. [R.P. 429, line 23-p. 430, line 5]. His trainer, Jermaine Lemon, confirmed he would have expected Brailey to have some pain with being new on the job. [R.P. 664, lines 1-2]. Troy Lowman, Michelin's Training Manager, also testified the job "requires lifting, pulling and stretching" and that pain for new employees is "a normal, expected, thing." [R.P. 708, 1-11]. Gross testified he would expect new employees to have "soreness" because "it's hard work and they're not used to it." His concern was ensuring it was pain from working a new job rather than an injury. [R.P. 778, line 25-p. 781, line 1].

After working on the job for almost two months, Brailey decided he needed to be checked out by a doctor for back pain that had been going on for about a week. On June 11, 2017, Brailey went to Urgent Care. He reported "low back pain particularly in the left lumbar paraspinal region for the past several days. Patient was doing some heavy lifting at work prior to the onset of pain. He

---

[2]Michelin's other three witnesses knew nothing about the examination. Plant nurse Christy Sirois "assumed it was thorough," but had no first hand knowledge." [R.P.746, lines 3-5]. Even though he is a Training Manager who presumably would have undergone a similar physical exam when he was hired, Troy Lowman testified he was "not familiar at all with the physical examinations and the questionnaires . . ." [R.P. 707, lines 13-18]. Mark Gross, the Safety Manager, agreed Michelin wanted to be sure the doctors do a thorough exam, but testified "Personally, I'm not aware of exactly what the physical exam is, so, I can't tell you how thorough it is." [R.P. 777, lines 7-17].

denied any history of prior back rales. [sic] No direct trauma. No incontinence or radiation." [R.P. 67-69]. Brailey was given a muscle relaxer and pain medication. He was not placed under any work restrictions.

Two days later, on June 13, 2017, Brailey went to Dr. Marom, his family doctor, reporting "left lower back pains for the past 2 weeks.[3] Has had new job at Michelin, moving heavy stuff – there now for about past 2 weeks. Pain is 10/10 with certain movements. . . . no radiation into legs." [R.P. 61]. Dr. Marom diagnoses "acute low back . . . no radicular signs/symptoms . . . discussed likely strained muscles due to heavier work load at new job." [R.P. 65].

Brailey continued to work for Michelin with no additional issues for the next 11 days. On Saturday June 24, 2017, he was working in the early morning "stretching the rubber on tires" when he felt a sudden sharp pain in his back. He reported the issue to Jermaine who told him "yeah, I know that hurt you." [R.P. 439, line 3-p. 440, line 5]. At the end of the shift, Brailey went to the nurses station. He discovered it was not open during third shift weekends, so he went to the emergency room at Lexington Medical Center, arriving shortly after 9:00 am. [R.P. 440, lines 6-16].

At the emergency room, brailey reported "lower back pain to left side since he was working last night, states does a lot of lifting/pulling and started hurting then." [R.P. 72]. Brailey was given medication and – unlike his previous two doctor visits – taken out of work for three days.[4] He was

---

[3]This was the first time Brailey ever reported back pain to Dr. Marom. Previous records dating from before he started working at Michelin show no history of back pain. [R.P. 55-59].

[4]The fact no doctors put Brailey under work restrictions until after the June 24, 2017 work accident is a critical fact in this case. Troy Lowman testified "If the pain is affecting their life *and they can't work* – they can't function properly; yes I'd want them to report an accident." [R.P. 708, lines 12-18 (emphasis added)]. Consistent with Lowman's testimony, Brailey reported his accident the same day it happened – which was also the first time any doctor wrote him out work.

also referred to a neurosurgeon at Lexington Brain and Spine. [APA page 25].

Brailey called his training supervisor, Troy Lowman, from the emergency room. He told Lowman "he thought he hurt [his back] at work." [R.P. 701, line 14-p. 702, line 4]. Lowman testified he explained to Brailey how he should have reported the accident to the Health Center and Plant Nurse. When Brailey told him he done so and both were closed, he told Brailey he should have reported to Security. He and Brailey then discussed how to file a workers' compensation claim. [R.P. 702, line 24–p. 703, line 10].

After speaking with Brailey, Lowman contacted the plant nurse, Christie Sirois. Sirois called Brailey. He told her "he was seen in the ER for lower left back pain that started on 6/24/17 while stretching and pulling rubber." Sirois told Brailey not to take the medication prescribed by the emergency room and set him up to see the company doctor, Dr. Izard, on Monday morning. [R.P. 142].

On Monday morning, June 26, 2017, Brailey reported to Dr. Izard. On intake, he filled out a pain diagram showing left sided back pain with numbness radiating down his left buttock to just below his knee. [R.P. 82]. Dr. Izard documented "pain located in the Upper Leg, left side of back, left leg numbness . . ." [R.P. 83]. Dr. Izard recorded:

> There seems to be a significant degree of symptom amplification and magnification by the employee. I explained to the employee that at the worst he has a back strain which should require only treatment with NSAIDs and a muscle relaxant. I also explained to him that *he may very well have a urinary tract infection* since he was having difficulty urinating and having pain in the CVA area on the left side. He was advised to discontinue taking Percocet because of the high risk for addiction and the high risk for hyperalgesia related to the Percocet. The employee was also *advised not to follow-up with the neurosurgeon* that he will follow-up with me at Michelin medical department on Wednesday, 06/28/2017. [R.P. 84(emphasis added)].

Dr. Izard gave "no work restrictions at this time." [R.P. 86].

Concerned with the contradictory advice and the misdiagnosis of a urninary tract infection, Brailey went back to the emergency room the next day, on June 27, 2017. He stated "he has numbness in his right leg and also states when he coughs it hurts his back."[5] He was diagnosed with left sided sciatica, given an injection, oral steroids and Percocet, referred to Lexington Brain and Spine, and taken out of work for another three days. [R.P. 87-96].

The next morning, Brailey called Christie Sirois. He told her he could not see Dr. Izard that day because he did not have a ride. She asked if he is "treating this personally and he stated no that it was work related." [R.P. 142].

On Friday, June 30, 2017, Brailey went to Doctor's Care. He reported "he was hurt at Michelin. He says the Michelin doc told him to put ice on it and he had no work restrictions. He has muscle spasm, loss of balance. He has been seen twice in the ER for this problem." Given that he was already on medication from the ER, the doctor had nothing more to offer and "I told he and his wife he needed to see the ortho." [R.P. 99].

Brailey never returned to work at Michelin. Michelin terminated his employment "for not being a good fit during your probationary period" on July 6, 2017. [R.P. 137]. Michelin's carrier formally denied the claim on July 13, 2017. [R.P. 135].

On July 24, 2017, Brailey started treatment with a neurosurgeon, Dr. Scott Boyd. He reported the June 24, 2017 injury at Michelin. His "pain has been increasing and is now radiating down his LEFT leg towards the thigh with numbness in the LEFT calf." An MRI and physical

---

[5]The reference to *numbness in his right leg* 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." [R.P. 341, lines 15-18].

therapy were ordered. [R.P. 106-109]. Brailey also reported to Dr. Boyd that "he hadn't had previous back problems, except maybe 25 years ago he had an episode that resolved without any treatment." [R.P. 112; p. 309, line 17-p. 310, line 6].

The MRI showed a "Left paracental disc extrusion at L4-5 with a large superiorly migrated extruded disc fragment measuring 13 x 12 x 14 mm, which results in complete effacement of the left lateral recess, with contact and likely compression of the transiting nerve roots." [R.P. 110].

Dr. Boyd opined Brailey "needs surgery" and kept him out of work. Brailey wanted to avoid surgery, so physical therapy was provided. [R.P. 123].

On November 19, 2017, Dr. Boyd completed a questionnaire in which he provided causation to the work accident to a reasonable degree of medical certainty. [R.P. 125].

Dr. Boyd was deposed on January 15, 2018. After reviewing all medical records, he testified:

> It sounds like he began having back problems with pain because of increased physical exertion with his new job at Michelin starting in April, 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. [R.P. 344, lines 8-19].

Dr. Boyd added the pain running down his left leg in a radicular pattern "would be consistent with a disk herniation" which is what he found on the MRI. [R.P. 344, line 20-p. 345, line 1]. Dr. Boyd opined to a reasonable degree of medical certainty "I believe that, more likely than not, he injured his lumbar spine at his employment, including some episode on June 24th." [R.P. 345, line 15-p. 346, line 4]. Dr. Boyd maintained his opinion on causation throughout the deposition. There is no

conflicting medical evidence.[6]

As of the hearing, Brailey remained out of work waiting on surgery.

The case was tried before Commissioner Wilkerson on March 23, 2018. By Decision and Order dated July 10, 2018, Commissioner Wilkerson denied the claim. He made various findings, the most important being:

> 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. I find the claimant was unable to return to work after June 24, 2017 due to a separate incident. I find the June 24, 2017, incident is not compensable based upon the greater weight of the evidence and the other reasons stated within this finding. [R.P. 23, Finding of Fact 10].

The Commissioner primarily denied the claim based on finding Respondents proved the affirmative defenses set out in Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973), Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct.App.1991) and S.C. Code Ann. § 42-9-60 (2007)("No compensation shall be payable if the injury . . . was occasioned by the . . .wilful intention of the employee to injure . . . himself . . .").

The Appellate Panel affirmed with minor modifications.

---

[6]Respondents moved shortly before the hearing to reconvene the deposition of Dr. Boyd to cross-examine him on the 1997 medical records from Dr. Norris. The motion was denied although Commissioner Wilkerson reserved to hold a final decision until after hearing testimony.. At one point in the hearing Appellant withdrew his previous objection to reconvening the deposition – at which time Respondents announced they were withdrawing the motion. Commissioner Wilkerson accepted the withdrawal and closed the record. [R.P. 23, Finding of Fact 11].

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (2007).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). 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. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

The Cooper defense (also known as the "fraud in the application" defense) is a common law doctrine whereby the employment relationship can be voided by the employer under certain conditions. The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964).

ARGUMENT

1. Brailey met his burden of proof by showing by medical evidence that he suffered a compensable injury by accident.

The Single Commissioner found as a fact that "I find the claimant was unable to return to work after June 24, 2017 due to a *separate* incident." [R.P. 23, Finding of Fact 10 (emphasis added)]. The Appellate Panel *sua sponte* modified this finding – without explanation – to state "We find the claimant was unable to return to work after June 24, 2017 due to a *previous* incident." [R.P. 45, Finding of Fact 10 (emphasis added)]. It is not clear what the Appellate Panel meant by this change, as the Appellate Panel nonetheless acknowledges in the same finding that there was a "June 24, 2017, incident."

It appears likely that the Appellate Panel was referring to the previous doctor visits for work-related back pain in the weeks prior to the June 24, 2017 "incident."[7] If those episodes are the beginning of Brailey's back injury – with the June 24, 2017 accident culminating in the herniated disc – then the Commission would be bound to find a compensable injury. Those doctors uniformly opined the back pain was the result of heavy lifting on a new job, albeit not yet rising to the level of a compensable injury. Conversely, if as anticipated to be argued by Respondents, the current low back herniated disc relates back to the mid back strain from 20 years ago, then the Appellate Panel's decision is not supported by substantial evidence. It would be rank speculation to assume or conclude that this injury was merely a continuation of the back strain from 20 years ago. Brailey had

---

[7]On June 11, 2017, Brailey went to Urgent Care where he reported "doing some heavy lifting at work prior to the onset of pain." [Claimant's APA pages 13-15]. On June 13, 2017, Brailey went to his family doctor who noted he had a new job at Michelin moving heavy stuff and diagnosed him with "likely strained muscles due to heavier work load at new job." [Claimant's APA page 11].

no back problems and had received no treatment for back pain for *twenty years*. He worked a physical job at Westinghouse for 16 years with no problems. He only developed back pain when he had been working at Michelin for a number of weeks – and even then he had never suffered from radiculopathy (consistent with a herniated disc) until June 24, 2017. Furthermore, not one doctor who saw him from his time at Michelin until June 24th took him out of work or place restrictions on his work activities. In short, the amendment to the Single Commissioner's finding is of no significance.

While the Appellate Panel found " the June 24, 2017, incident is not compensable," the finding confirms Brailey proved that he had injured his back while working at Michelin on June 24, 2017. He has therefore met his burden of proof on showing he suffered an injury by accident arising out of and in the course of his employment. S.C. Code Ann. § 42-1-160 (2007).

The fact Brailey had back pain from his new job prior to the accident does not change this analysis (although it does mean that if the injury began on or about June 11, 2017, then he has proven an injury on that date and the Commission should be reversed). When Brailey went to Urgent Care and his family doctor, he had back pain but *no radicular signs or symptoms.* It was not until the June 24, 2017 work accident that he developed radiculopathy.

This is dramatically demonstrated by the pain diagram he filled out for Dr. Izard on June 26, 2017. [R.P. 82]. Every medical report from that time on consistently shows left sided radiculopathy – a symptom notably absent from the June 11th and 13th examination (and absent from the 1997 medical records).

Clear *objective proof* of the new injury is shown by the July 29, 2017 MRI. The MRI showed a large extruded disc fragment measuring 13 x 12 x 14 millimeters (about ½ an inch) compressing

the L4-5 nerve roots. [R.P. 110]. Dr. Boyd opined this was proof of causation.

There is no medical evidence showing a different incident nor is there medical evidence that the radiculopathy and herniated disc existed before the June 24, 2017 work accident. Despite this, the Appellate Panel found that "the claimant has failed to carry his burden of an accident being sustained on June 24, 2017, due to his lack of credibility,[8] due to the lack of sufficient medical evidence to support the allegations, and moreover, due to medical evidence to the contrary." [R.P. 45, Finding of Fact 10]. This is patently wrong. There is *no* contrary medical evidence – other than perhaps the misdiagnosis of a urinary tract infection by Dr. Izard. See McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Furthermore, Brailey reported the June 24, 2017 work accident the same day it happened, as documented by Troy Lowman and Nurse Sirois. As medical was closed early Saturday morning, he went to the emergency room for immediate treatment where the doctors recorded the history of his work accident.

Brailey most specifically proved his injury by accident by the reports and testimony of Dr. Scott Boyd. Dr. Boyd opined specifically that the work accident of June 24, 2017 caused the herniated disc.[9] [R.P. 125, 344, line 8-p. 346, line 4].

---

[8]Credibility is addressed later in this brief at Issue 5, page 31-36.

[9]Dr. Boyd testified to a reasonable degree of medical certainty that:

> 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.P. 345, line 15-p. 346, line 4].

The Commission "found causation is not provided in the medical records because Dr. Boyd had no knowledge of the extent of claimant's prior back issues." [R.P. 44, Finding of Fact 5]. This is belied by the deposition testimony. Dr. Boyd was examined in detail on Brailey's previous records from Urgent Care, the emergency room, and Dr. Izard. Brailey had told Dr. Boyd's PA about the previous doctor visits when he first presented to Dr. Boyd's office. After reviewing those records and Brailey's deposition testimony, Dr. Boyd testified "It sounds like he was getting a sore back from the work he was doing at Michelin since according to his testimony, it began after he started doing the physical work at Michelin." Dr. Boyd confirmed that at this point (prior to June 24, 2017), there was nothing that would warrant a referral to a neurosurgeon. [R.P. 337, lines 3-10].

If this finding is supposed to imply that Dr. Boyd's opinion can be rejected because he was not shown medical records from twenty years ago, this would be error as it is entirely speculation on the part of the Commission. Those stale medical records have no probative value. Not only that, but the twenty year old records describe pain to an entirely different part of the back, explicitly rule out radiculopathy, and show no evidence of a herniated disc. [Supp. R.P. 1-2]. Dr. Boyd specifically based his causation opinion on "the first evidence of radicular symptoms down the left leg" on the June 26, 2017 doctor visit with Dr. Izard two days after the work accident. [R.P. 345, line 15-p. 346, line 4].

It is rank speculation for the Commission to presume that twenty year old records which rule out radicular symptoms would have changed Dr. Boyd's opinion. 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). If 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.

Furthermore, Dr. Boyd had knowledge that Brailey had an episode of back pain roughly twenty-five years prior. [R.P. 309, line 24-p. 310, line 2; Claimant's Apa page 58].Respondents had every opportunity to question him about this history. Morever, they had the opportunity to reconvene Dr. Boyd's deposition, but – presciently – withdrew their motion at the hearing when they (as did Respondent's counsel) perceived correctly from Commissioner Wilkerson's demeanor and aggressive challenging of Brailey that Michelin was likely to prevail without reopening the deposition.

Whether the accident is not compensable because Michelin proved one or more of its affirmative defenses is a separate issue. The Commission's finding of an "incident" at Michelin on June 24th that took Brailey out of work is confirmation that he actually proved his prima facie case. Proof is amply supplied by Dr. Boyd's expert medical testimony. There is no substantial evidence to support a finding that he did not injure his back in an accident arising out of and in the course of his employment at Michelin on June 24, 2017 or one of the earlier dates when he sought medical treatment for non-radicular back pain. Therefore, the Court should reverse and find that Brailey met his burden of proof.

2. Respondents cannot prove the elements of the *fraud in the application* defense.

At the hearing, the Commission held Respondents proved the so-called "fraud in the application defense" adopted in Cooper v. McDevitt & St. Co., 260 S.C. 463, 196 S.E.2d 833 (1973). [If an employer proves the Cooper defense, it can then void the employment relationship. If there

is no employment relationship, the Commission has no subject matter jurisdiction over the claim to award benefits.[10]

As an affirmative defense, three elements must be proven by an employer to bar a workers' compensation claimant from receiving benefits when he makes false statements in an employment application: "(1) The employee must have knowingly and wilfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and (3) 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). All three factors must be present for the employer to avoid paying benefits to the employee. Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993). The record shows there is insufficient evidence for Respondents to have proven all elements of the *fraud in the application* defense.

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

The Appellate Panel found:

> We find based on the greater weight of the evidence, there is clearly fraud in the application. . . . The claimant with knowledge falsely stated he never had prior back issues. [FC Order, Finding of Fact 7, page 20].

Respondents introduced a *Confidential Health Questionnaire for Post-Offer Examination* completed by Brailey on March 2, 2017. In the questionnaire, was asked "Do you have problems with, or have you ever had medical attention for any of the following?" Brailey checked "no" to the

---

[10]The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009).

questions about "Back injury, headache or pain" and "Have you ever experienced a medical problem that affected your ability to work?" [R.P. 176].

Strictly speaking, Brailey's responses to these two questions were untrue because, although Brailey had not had any back problems or pain in over twenty years, he previously had a back injury in 1997 for which he had medical attention and that affected his ability to work for 2 ½ weeks. He also checked "no" to the question "Are you presently being treated for any condition that may inhibit your ability to work?" His response to this question – which seems to be the most germane – was true and accurate. He had not been treated for back pain for over twenty years. Indeed, the required element is a "false statement about his physical condition;" not whether he *previously* had back pain, a back injury, or a workers' compensation claim. Cooper at 469, 196 S.E.2d at 835. Indeed, one might note that the questions are so broad as to be meaningless. Is there anyone alive who has *never* had a headache or pain?

Furthermore, there is no evidence that Brailey's failure to disclose a minor back injury from twenty years ago could rise to the level of a *knowing and wilful* false statement intended to deceive Michelin. The Commission has previously held that "stale" medical records have no probative value. Medical records from twenty years prior showing nothing more than lumbar strain are about as stale as can be. They cannot be considered probative of anything relevant to Brailey's current condition. See Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(noting Commission found two-year old medical record to be "stale" and not indicative of claimant's current work status).

The seminal case on the "fraud in the application" defense is instructive. The claimant in that case, Jimmy Cooper, had suffered a "serious injury to his back, a ruptured disc" in a previous

workers' compensation claim. He was out of work for thirteen months following that injury and "was given a fourteen per cent disability to the lumbar spine." Two years later, Cooper applied for a job as a welder with McDevitt & Street. The employer required him to fill out a pre-employment questionnaire wherein he was asked "Have you now or have you ever had . . . back trouble?" His answer was "no."

Cooper admitted he purposefully deceived the employer to get a job, knowing he would be fired off the job if the employer knew about it. Referencing Cooper's testimony, our supreme court stated "Admittedly, the foregoing answer of the appellant was false, intentional and a material misrepresentation." Cooper at 467, 196 S.E.2d at 835.

The difference here is that Cooper knew he would get fired if the employer knew about his recent "serious injury to his back," so he wilfully and intentionally lied to get the job. Brailey had no such knowledge and no intent to deceive. He was specifically asked "Do you think if Michelin had known that you had back pain twenty (20) years ago that they would have not hired you?" He responded "They would hire me." [R.P. 422, lines 10-13]. Brailey testified similarly on cross examination.

Although Safety Manager Mark Gross testified on direct that Michelin would probably not offer Brailey a different job within the plant had he not been cleared to be a PAP Operator after the physical examination – even if Michelin had known about the back pain from 1997 – he also testified that if the doctors cleared Brailey to work full unrestricted duty, Michelin had "what you needed to know" and they "were good to go." [R.P. 778, lines 14-24; p. 776, lines 19-24].

And this is the point. Unlike Jimmy Cooper, Brailey's omission of the 1997 workers' compensation claim was minor. The Cooper court required the statement to be "false, intentional

and a *material* misrepresentation." Cooper at 467, 196 S.E.2d at 835 (emphasis added). There was no reason for him to intentionally and wilfully hide it from Michelin because it would not have made a lick of difference. The existence of a 20-year old back strain is not a material fact in this litigation. Whether or not he got hired turned on whether he passed the physical exam – which of course he did. [R.P. 831]. In fact, not only did he pass the physical exam, he was cleared to work by two more doctors on June 11th and June 13th even after he developed back pain from getting used to his new job. And *Michelin's own doctor*, Doctor Izard, cleared him for work even *after he had been injured* on June 24th and been taken out of work by the emergency room doctor.

It is entirely too easy to paint people with a broad brush and assume that because someone rushes through a broadly worded questionnaire, that person must *ipso facto* be committing fraud.[11] Brailey was simply looking for a new career at a place he wanted to ultimately retire from. He already had a track record of being a long standing loyal employee at Westinghouse, and he gave up a good job at DJJ to work at Michelin. He is not a fraud. He did not try to put his initial onset of back pain on Michelin. He never even attempted to file a workers' compensation claim until he was written out of work and referred to a neurosurgeon.

There is simply no evidence of a wilful intent to materially mislead Michelin. On this question, the Court can take its own view of the evidence. The Court should find Michelin failed to prove that Brailey wilfully and intentionally made a false representation about a material fact to induce Michelin to hire him. Therefore, the Commission should be reversed on this issue.

---

[11]Brailey also left off his address, phone number, emergency contacts and family doctor. [R.P. 176].

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

The second part of the Cooper test requires that "employer must have 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). The Appellate Panel found "the defendant-employer relied on the claimant's misrepresentation on his post-hire medical questionnaire," thus finding Respondents proved the second element. [R.P. 44, Finding of Fact 7]. Ordinarily, reliance is the easiest element to prove as it should only require testimony of the person who hired the employee, along with proof that the hiring was based solely on the questionnaire when no physical examination was done. However, when a company doctor performs a physical examination and clears the employee for full duty work, the reliance issue becomes more complex.

For the reliance prong, Michelin presented testimony from Mark Gross, the Safety Manager, that Michelin relies on the questionnaire in hiring employees. Notably, the actual person who hired Brailey did not testify.

Gross testified that he "rel[ied] on the answers that [my] employees give [me] on those documents."[12] [R.P. 775, lines 3-5]. Superficially, this might be enough – except for the fact that

---

[12]One might presume Michelin would comply with the Americans with Disabilities Act wherein it would obtain *post-offer* medical clearance to make *placement* decisions; not *hiring* decisions. See Small v. Oneita Indus., 318 S.C. 553, 554-55, 459 S.E.2d 306, 306-07 (1995) (noting an agent of the employer testified Small's prior injury would affect job placement decisions, not hiring decisions, and affirming the denial of workers' compensation benefits due to a false representation on an employment application). See, also Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463 (2009)("Had Brayboy given truthful information, Workforce would have been able to give him suitable assignments, which would not have included heavy lifting."). Apparently the ADA is not a concern for Michelin. Gross testified had the doctor not given Brailey clearance to do the PAP Operator job on which he was injured, Michelin would "probably not" offer Brailey "other jobs potentially he could perform." [R.P. 776, lines 19-24].

Dr. Tomarchio did a thorough physical examination and cleared Brailey for work at Michelin.[13] When asked about the work clearance from Dr. Tomarchio, Gross testified Michelin had "what you needed to know" and they "were good to go." [R.P. 778, lines 14-24; p. 776, lines 19-24].

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. [R.P. 778, lines 14-24].

At trial, Michelin argued that Dr. Tomarchio's physical examination must have been unreliable due to the alleged misrepresentation on the post-offer questionnaire. Over objection from Appellant, Respondents' counsel elicited testimony from Nurse Sirois that if someone "wants a job bad enough, can they fake symptoms . . even when they're not physically capable or if they – they're not physically able to do that, can they pass the physical . . . If they do not tell the truth . . ." [R.P. 754, lines 2-25].

The exchange prompted multiple objections from Respondent as to speculation and as to Nurse Sirois giving an expert opinion when she was not qualified as an expert. [R.P. 775, line 1-p. 761, line 19]. During the exchange, the Hearing Commissioner stated:

> Those [two Michelin employees who testified to the thoroughness of the examination on the back] were lay-persons as you would be a lay-person to a doctor; I would be a lay-person. She is testifying as a medical person and as she is a medical person.

---

[13]The two employees (Brailey and Lemon) who had first hand knowledge of the post-employment physical exam both testified it was a thorough examination of the back, testing whether somebody can lift, bend, twist, stoop, squat and so forth. [R.P. 624, line 15-p, 626, line 1; p. 683, line 23-page 684, line 20]. Gross agreed with the description and conceded he could not dispute it. [R.P. 777, lines 20-24; page 778, lines 4-13]. Nurse Sirois was not present during Brailey's examination but she "would assume" Dr. Tomarchio does a very thorough physical exam. [R.P. 746, lines 2-5].

> Her testimony is that of a Nurse and what does dealing with doctors. *She would be in a better position to determine what medical is than anybody sitting in this room.*

[R.P. 390, line 21-p. 759, line 9].

The commissioner went on to state 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." [R.P. 760, lines 1-4].

The commissioner's description of Sirois's testimony as a "medical person" virtually mirrors the requirements in the evidentiary rules which must be satisfied to present expert testimony. Rule 702, SCRE states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Before admitting expert testimony, the judge or commissioner must make three inquiries: (1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter, and (3) whether the substance of the testimony is reliable. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

It was error of the commissioner to effectively qualify Sirois as an expert witness with no motion to so qualify her as such nor any foundation other than her testimony that she has a B.S. degree in Nursing. Indeed, Respondents even conceded "her answers were not as an expert witness — her answers were as a medical person." [R.P. 760, lines 5-10]. A mere *medical person* is not

automatically an expert and cannot give a medical opinion as to whether a doctor's physical examination would be reliable or unreliable. For her to do so when she admittedly was not present is complete complete and utter speculation. Furthermore, to presume Brailey misled the doctor in the examination room is equally speculative. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(a conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages."). Cf. 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).

To satisfy their burden, Respondents could have presented testimony from Dr. Tomarchio – who could have been qualified as a medical expert. Had Dr. Tomarchio testified that he would not have qualified Brailey for full unrestricted duty had he known about the back strain from 20 years ago, then Respondents would have made a prima facie case on the reliance issue.[14] Here, where the only evidence is that Dr. Tomarchio supplied Michelin with "what [they] needed to know," the only conclusion is that Brailey was "good to go."

---

[14]Another point is the fact that at the time of his accident, Brailey had not been given work restrictions by either Urgent Care or the emergency room – even though he was reporting back pain from the exertions of being new on the job at Michelin. Dr. Izard, Michelin's company doctor, returned Brailey to full duty *even after his work injury*. It therefore seems likely that Brailey's minor back injury from twenty years ago would not have resulted in any restrictions from Dr. Tomarchio. Without any evidence to the contrary from Dr. Tomarchio, his full duty clearance must stand.

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. At the time of the June 24, 2017, work accident, Brailey was under no work restrictions. In fact, he had been to two doctors for back pain related to getting used to his new job and was given no work restrictions. [R.P. 61-69]. Even after the accident, Dr. Izard still "assigned no work restrictions at this time." [R.P. 86]. If he was under no restrictions before the accident from doctors who knew he was having back pain from his new job, then there was nothing for the employer to change or accommodate about his job. And Michelin insisted he go back to work as a PAP Operator *after* seeing Dr. Izard for the work injury. Ergo, there is no causal connection.

A second factor showing the lack of causal connection is that the previous back strain occurred *twenty years* ago. In Givens, the claimant settled a workers compensation for a low back injury. Less than a month later, he applied for a new job where he knowingly and wilfully made false representations that he had no physical defects nor prior injuries. He filed a new claim for a back injury five months later – an injury determined to be one of disc degeneration reflecting the cumulative effect of successive injuries (unlike Brailey's injury which was a new injury by accident to a completely different part of the back). Givens v. Steel Structures, 279 S.C. 12, 301 S.E.2d 545 (1983). The supreme court held his case was properly denied under Cooper.

Conversely, in McLeod, the employee "lied about" a birth defect (spina bifida), two car accidents (one of which caused him to miss 6-8 weeks of work and settled in tort for $2,600.00) and

a work accident where he missed 5-6 days of work due to back pain. "McLeod completely recovered from all three accidents." This Court found there was no casual connection between the false representation and the injury. The Court reasoned:

> McLeod had worked for three years for Piggly Wiggly lifting many sixty pound boxes per day without any injury. Prior to that, McLeod had performed heavy labor for other employers over a ten year period with only one minor injury. He also completely recovered from back injuries sustained in two separate car accidents.

McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 40 (Ct. App. 1983)

The facts in McLeod are similar to this case. Brailey had a previous low back injury twenty years earlier from which he completely recovered. He worked in medium to heavy labor for Westinghouse for 15-16 years with no injuries, nor did he have any other accidents or episodes of back pain .. The only timeframe differences are that McLeod worked for Piggly Wiggly for three years before his accident, whereas for Brailey it was about two months. On the other hand, McLeod had injuries in 1969, 1973 and 1974 – the most recent only three years before his 1978 work injury at Piggly Wiggly.

Ultimately, the burden is on the employer to prove the causal connection. It is not enough to merely show that an employee made a misrepresentation about a previous back injury and then later injured his back on the new job. See Vines v. Champion Bldg. Products, 315 S.C. 13, 431 S.E.2d 585 (S.C., 1993)("There is no evidence [empoyee's] previous injury [requiring back surgery contributed to the occurrence of the accident . . . even though there was evidence indicating [employee] was predisposed to back injuries because of his previous injury and surgery . . . ").

The cases finding a causal connection involve relatively recent injuries which required surgery or resulted in some degree of permanent impairment; not remote injuries from which there was a complete recovery. See, eg., Brayboy v. Workforce, 681 S.E. 2d 567, 383 S.C. 463

(2009)(employee failed to disclose 20-40% service related disability and 5% impairment to same part of back injured in later work accident with new employer); Small v. Oneita Industries, 459 S.E.2d 306, 318 S.C. 553 (1995)(25% impairment rating due to back injuries suffered in prior employment); Givens v. Steel Structures, Inc., 279 S.C. 12, 301 S.E.2d 545 (1983)(employee "awarded workmen's compensation benefits in a substantial amount for this injury and the resulting permanent partial disability" less than one month before misrepresentation to new employer); Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973)(out of work for thirteen months and 14% disability to the lumbar spine); Fredrick v. Wellman, Inc., 682 S.E.2d 516, 385 S.C. 8 (Ct. App. 2009)(expert medical testimony from surgeon that "preexisting disc herniation was the same disc herniation for which he treated her following her October 18, 2005 work accident."). Unlike the instant case, these cases involved serious previous injuries with new injuries occurring to the same area of the back as the preexisting condition.

The causal connection prong is the most difficult Cooper element to prove. Here, the proof fails. There is no causal connection shown by any qualified expert testimony that the 20-year old back strain played any role Brailey's injury with Michelin. He received no surgery and had no permanent impairment from the previous injury He made a full recovery from the previous injury. Brailey had no back problems or other injuries for the next twenty years. His previous back strain was to a different part of his back than the herniated disc suffered in the Michelin work injury.

Therefore, the conclusion that Respondents proved the Cooper defense should be reversed and the June 24, 2017 accident should be ruled to be a compensable injury.

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]. Such a brief conclusory statement without accompanying findings of fact is defective and must be reversed as a matter of law. See, e.g. Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct App. 1991)(Generalized, conclusory, or incomplete findings will not suffice as findings of fact.).

Equally important, Capers is inapplicable to this case. In Capers, the claimant was a dishwasher. He developed contact dermatitis from contact with the dishwashing detergent while working at Fort Jackson. Based on the opinion of his doctor, Capers claimed he was permanently and "totally disabled from work which involved exposure to soap, detergents, and /or water." Capers v. Flautt, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991). Two years later, Capers filed an *identical* claim for contact dermatitis from exposure to detergent and water from working as a dishwasher at Holiday Inn.

The Court of Appeals affirmed the Commission's finding that "Capers did not sustain an accidental injury as contemplated within S.C.Code Ann. Section 42-1-160 (1976)." Id. The Court reasoned "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." Id.

This is an entirely different circumstance than the instant case. Capers was allergic to detergent. He knew with certainty that he would develop contact dermatitis every time he was exposed to detergent. He also knew that the contact dermatitis would resolve when the exposure ended.

To say that Brailey knew with substantial certainty that he would herniate a disc in his back

from working at Michelin is neither reasonable nor plausible. At most, Brailey knew that he had once suffered back strain twenty years earlier working in a brick plant. The back strain resolved and he had no problems for the next twenty years – including 15 years working at Westinghouse.

While Brailey did suffer back pain (without radiculopathy) after working at Michelin for about 6 weeks, he reasonably believed that this was normal back pain to be expected for someone unaccustomed to that level of physical labor. His trainer had told him back pain was normal and expected for new employees. His family doctor even told him he needed to "exercise to lose weight and need for strengthening of core muscles and proper lifting techniques." [R.P. 65]. No doctor told him not to work at Michelin or put him under work restrictions even though he was reporting back pain from working at Michelin.

If no doctor believed he needed to be under work restrictions in 2018, then he can hardly have been expected to request light duty or lay out of work. He could not have known nor expected that he would herniate a disc at work on June 24, 2017. Therefore, the legal conclusion that Capers bars this claim should be reversed.

4. Brailey did not intentionally and willfully cause injury to himself.

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." [R.P. 46, Conclusion of Law 5]. As this finding is made with no corresponding finding of fact, it too is facially defective. See, e.g. Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct App. 1991)(Generalized, conclusory, or incomplete findings will not suffice as findings of fact.).

More importantly, it is just plain wrong. The applicable statute bars compensation for an injury "occasioned by the . . . wilful intention of the employee to injure or kill himself . . . S.C. 42-9-60 (2007). The courts define "willful intention" as a deliberate or formed intention to injure or kill oneself. Youmans v. Coastal Petroleum Co., 333 S.C. 195, 508 S.E.2d 43 (Ct. App. 1998). The clearest example of this involved a police officer who voluntarily engaged in a shoot-out with a fellow officer. Ziegler v. S. C. Law Enforcement Division , 250 S.C. 326, 157 S.E.2d 598 (1967).

Brailey was not playing the fool or engaging in dangerous conduct. He was simply doing his job. In fact, even when he started having back pain, he did not make a fuss or try to gin up a workers' compensation claim. He simply went to the doctor, got some medication and got cleared to return to work. If he has been medically cleared to work full duty after reporting back pain from the job, then there can be no willful intention to suffer injury. This Conclusion of Law should be reversed.

5. The Commission's vague credibility findings do not bar this claim from being compensable under the Act.

The Appellate Panel found Brailey was not a credible witness. [R.P. 43-44, Finding of Fact 2]. Appellant acknowledges that South Carolina traditionally holds a determination of credibility is solely for the appellate panel and could not be reversed by the appellate courts. However, even credibility findings must be supported by substantial evidence. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court." (emphasis added)). Cf. Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked

out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court."); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998)("Although the general proposition that the jury determines credibility issues is a correct one, there is no issue for the jury when the evidence as a whole admits of only one reasonable inference").

More importantly, a negative credibility finding is only one piece of the puzzle. When the evidence supports a finding of compensability notwithstanding a credibility finding, then the Court can disregard the credibility finding. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(declining to address credibility issue because Appellate Panel's factual findings were based on the single commissioner's own medical opinion unsupported by medical evidence in the record). This is particularly so when the credibility finding is tainted by other findings, by a witnesses manner of speaking, or by excessive participation in cross-examination by a trial judge or commissioner.

In this case, the Commission explained its reasons for the credibility finding in Finding of Fact 2. The first example given is a purported similarity between the 1997 workers' compensation claim and the instant claim. The specific comparison is that "At Richtex, as in the current claim, instead of following the treating doctor's orders, the claimant sought treatment at Doctors Care." [R.P. 43-44, Finding of Fact 2]. As anyone with any experience in the workers' compensation arena knows, company doctors are often biased towards the employer. Even when doctors are neutral and fair, injured workers understandably fear bias and reasonably seek second opinions at their own expense.

In this case, Brailey appears to have ample reason for seeking a second opinion. The 1997

reports from Dr. Norris show the patient and doctor plainly distrust each other – as well as showing that Dr. Norris was beholden to Richtex. Under those circumstances, there was nothing nefarious from Brailey seeking a second opinion. Moreover, although not in the record, there is no evidence that the second opinion doctor diagnosed Brailey with anything more serious than Dr. Norris's diagnosis of back strain.

As to Dr. Izard, it is a bit much for the Commission to describe him as the "treating doctor." Dr. Izard not only offered no treatment; he misdiagnosed Brailey with a UTI; returned him to work with no restrictions despite a herniated disc (which Dr. Izard missed); and told him not to follow the orders of the emergency room doctor. Conversely, the emergency room doctor (Dr. Brenner) prescribed medications; took him out of work for three days and recommended no heavy lifting thereafter; and referred him to a neurosurgeon. And of course, Dr. Brenner was ultimately proven right when the neurosurgeon (Dr. Boyd) ordered an MRI which showed a herniated disc requiring back surgery. The fact is it would have been a huge mistake for Brailey to go back to work and risk further *much more serious* injury. And it was irresponsible of Dr. Izard and Nurse Sirois to order Brailey to go back to work, not to take prescribed medications, and not to go to the neurosurgeon. Under these circumstances, on this point, the Commission's credibility finding is not supported by substantial evidence. See, Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App.2013)("This credibility determination by the appellate panel, *if supported by substantial evidence*, is binding on the court." (emphasis added)).

The Commission's second reason for not finding Brailey credible is because he "omitted information about a prior employer – an employer for which he had a workers' compensation claim

for a back injury – from his employment application for Michelin."[15] [R.P. 43-44, Finding of Fact 2]. With all due respect to the Commission, sometimes we have to deal with reality. And while it would be ideal for all employees to list every single employer they have ever worked for on their employment applications, that expectation is just not realistic. Leaving off a single employer one worked for twenty years ago *for two weeks* is not a crime nor is it uncommon. This is not to say it cannot be a scintilla of evidence supporting a credibility finding; only that it cannot rise to the level of substantial evidence, particularly when the witness openly discussed the employment and his workers' compensation claim at Richtex under oath at the hearing and his deposition.[16]

The third rationale for finding Brailey not credible is concerning. The Commission found him not credible because his answers were "confusing . . . vague [and] rambling." [R.P. 43-44, Finding of Fact 2]. Throughout the hearing transcript, there are numerous examples of Brailey being interrupted and not being permitted to answer a question. Sometimes by counsel, but often by the hearing commissioner. And while a hearing commissioner has broad authority to ask a witness to clarify an answer, a commissioner exceeds that authority when the commissioner becomes an advocate for one side or the either and virtually engages in cross-examination. A commissioner can question a witness; a commissioner cannot challenge a witness. A commissioner must remain neutral.

The best example of this occurs in a long exchange beginning with questions about the length

---

[15]Although identified and reviewed by Brailey at the hearing, the employment application itself was not admitted into evidence nor, apparently, was it provided to Brailey's attorney in discovery.

[16]Brailey disclosed his previous employment with Richtex and the details of his 1997 work injury, treatment and settlement in his deposition taken September 25, 2017. [R.P. 249, line 25-p. 253, line 22].

of the probationary period at Michelin. It then devolves into Brailey attempting to explain why he filed a workers' compensation claim for June 24th and not June 11th.[17] Throughout this exchange, the hearing commissioner repeatedly interrupts and chastises Brailey. [R.P. 630-637]. The purpose here is not to impugn the commissioner. Only to illustrate how difficult it is for a witness to maintain his composure and coherently answer questions delivered rapid fire from a trial judge or commissioner. When evaluating a credibility finding, the mode of questions and the person asking them weigh into the equation.

At the end of the day, Appellant recognizes that the Court must be deferential to the Commission's credibility findings. As these findings are so vague and Brailey was not impeached on inconsistent statements under oath (Appellant recognizes the previously discussed issues over the questionnaire), the credibility findings here are not dispositive.

Brailey proved his case by the documentary evidence along with the totality of evidence. The underlying facts of this case are not in serious dispute; only the legal conclusions following those facts. No one disputes Brailey strained his back twenty years ago resulting in a workers' compensation claim he settled for the nominal amount of $2,500.00. Brailey had no further back problems for the next twenty years. Brailey did not disclose the 1997 injury on Michelin's post-

---

[17]From a legal standpoint, the claim was filed by counsel with a date of June 24, 2017 because that was the date the actual injury by accident occurred – as confirmed by Dr. Boyd. [R.P. 142]. The date coincides with the development of radiculopathy associated with the herniated disc from stretching rubber. In the alternative, Appellant requested a finding of June 11, 2017, but that date was not Appellant's primary position because there was minimal evidence of an actual injury; only nonspecific non-radiating pain from getting used to a new job. See Jackson v. Fayetteville Area System of Transp., 337 S.E.2d 110, 78 N.C.App. 412 (N.C. App. 1985) ("The Commission's finding that plaintiff experienced pain as a result of what occurred while she was performing her duties on 13 December 1982 is not sufficient as pain is not in and of itself a compensable injury.).

employment questionnaire, yet he was cleared to full duty by Dr. Tomarchio. Brailey developed back pain from his new job at Michelin; went to the doctor on his own on June 11th and 13th; was not placed on work restrictions; and did not report the doctor visits to Michelin. Brailey reported injuring himself on June 24, 2017 stretching rubber. According to Dr. Boyd's uncontradicted medical opinion, this injury resulted in a herniated disc requiring surgery and preventing him for working.

Even if the Commission (or Court) does not like the fact Brailey did not disclose his previous back strain when he was hired, he still proved his case by the totality of the evidence. A vague credibility finding does not change that essential point. Therefore, the Decision and Order of the Commission should reversed. Brailey should be awarded workers' compensation benefits.

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
January 30, 2020

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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
January 30, 2020