THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AVERY B. WILKERSON, APPELLATE PANEL CHAIRMAN, COMMISSIONER

WCC File No. 0818219

Joe A. Osmanski, Employee, ... Appellant,

v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier ..... Respondents.

RESPONDENTS' RETURN TO PETITION FOR REHEARING

Pursuant to Rule 240(e), SCACR, Respondents Watkins & Shepard Trucking, Inc. ("Employer") and Zurich North American Insurance Company hereby respond in opposition to Petitioner Joe Osmanski's ("Petitioner") Petition for Rehearing ("Petition") of this Court's Opinion No. 2013-UP-127, Osmanski v. Watkins & Shepard Trucking, Inc., 2013 S.C. App. Unpub. LEXIS 166 (2013). Petitioner presents no valid reasons for rehearing and, therefore, his Petition should be denied.

I. This Court addressed and properly resolved Petitioner's argument regarding the proper evidentiary standard.

First, Petitioner argues that his Court "failed to address" his argument that the standard for proving fraud in the application should be clear and convincing. However, this Court clearly rejected Petitioner's arguments regarding the standard of proof for the defense of fraud in the

application. Osmanski, 2013 S.C. App. Unpub. LEXIS 166, **1-2. Thus, Petitioner's arguments on this point are merely refabrications of the position he urged on appeal and provide no grounds for this Court to grant rehearing of its Opinion.

Although Petitioner asserts that the issue of the proper standard of review was not raised on appeal in Brayboy v. WorkForce, 383 S.S. 463, 681 S.E.2d 567 (2009), Petitioner has failed to provide any support for his assertion. Even if he had established that neither party raised this issue in Brayboy, it is beyond question that, "[t]he existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review." Brayboy, 383 S.S. at 466, 681 S.E.2d at 568, and authorities cited therein; *see also* Frederick v. Wellman, Inc., .384 S.C. 8, 16, 682 S.E.2d 516, 519-520 (Ct. App. 2009) (determining whether employer proved fraud in the application under the preponderance of the evidence standard); *see also* Shuler v. Tri-County Elec. Co-op, Inc., 385 S.C. 470, 473, 684 S.E.2d 765, 767 (2009) (determining, under the preponderance of the evidence standard, that the claimant was not entitled to workers compensation benefits solely because he was not considered an employee at the time of the accident).

Petitioner argues that the standard of proof for fraud in the application should be higher than preponderance due to the harsh result of a finding of fraud in the application. Respondents note that the result in this case is no different from the result obtained where an employee is denied benefits because he is a gratuitous employee, such as in Shuler, or an independent contractor, such as in, Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009) (denying benefits under a preponderance of the evidence standard).

In the end, as Respondents noted in their Brief, (Resp. Br. pp. 11-15), the evidence in this case meets even the more exacting clear and convincing standard. First, Petitioner conceded the first and third prong of the test enunciated in Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973), by failing to argue that he did not knowingly make a false statement on his job application or that there was no causal connection between his misrepresentation and his injury. Thus, the only point he challenged on appeal was the second prong of Cooper. As explained in Respondents' Brief and below, the evidence in this case regarding the second prong of Cooper meets even the clear and convincing standard and the Commission's factual findings on this point should be upheld.

II. This Court properly upheld the Commission's finding that Employer was entitled to rely and did rely on Claimant's misrepresentation on his employment application.

As this Court found, the evidence in this case supports the Commission's conclusion that Employer relied on the misrepresentations made by Petitioner during the application process. This case does not warrant rehearing simply because this Court did not address every single argument Petitioner put forward regarding this issue – this Court's Opinion clearly resolved the issue of reliance by upholding the Commission, which sufficiently disposes of the issue. Rehearing petitions are routinely dismissed when they present "nothing but a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).

Petitioner merely argues again that Employer "could not have relied on a statement their own doctor told them wasn't true." Petitioner insists that Dr. Osbahr "specifically told the Respondent that [Petitioner] had one-half of the normal range of motion in his arm and that he had impairment to his arm." (Pet. p. 3). This argument already has been presented in Petitioner's Brief and Reply Brief and has been rejected by this Court. However, in the event

this Court addresses this particular argument on rehearing, it should affirm its Opinion for the reasons set forth in Respondents Brief, (Resp. Br. pp. 11-15), and below.

First, Dr. Osbahr's note on the D.O.T. form simply noted "supination only 90 [left] arm." (R. 345). Matthew Grandy, Employer's Director of Driver Recruiting and Training, testified that he did not know what normal supination for an arm was. (R. p. 275, Grandy Dep. p. 31, lines 9-23) (R. p. 275, Grandy Depo p. 32, lines 11-17). Second, the Commission held that neither Dr. Osbahr nor the Employer knew or had the opportunity to explore the full extent of Petitioner's limitation. Dr. Osbahr evaluated Petitioner only for the D.O.T. physical and not for his other job responsibilities. (R. p. 318, Osbahr Dep. p. 21, lines 7-8).[1] Third, Dr. Osbahr testified that he was not certain whether he sent the "long" form, which would have had the notation regarding Claimant's arm impairment, or the "short" form to Employer. (R. p. 318, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (R. pp. 319-320, Osbahr Dep. p. 25, line 6 – p. 26, line 3 (Dr. Osbahr testifying that he cannot confirm whether Employer received the long or the short form)).[2] In short, ample evidence supports the Commission's conclusion that Employer was not informed of the extent of the impairment to Petitioner's left arm, that Employer relied on Petitioner's statements on the job application forms, and that that reliance was a substantial factor in Petitioner's hiring. (R. pp. 15-20).

In any event, courts have found reasonable reliance in common law fraud actions even where information was publicly available to the plaintiff. *See, e.g.*, Moseley v. All Things Possible, Inc., 395 S.C. 492, 719 S.E.2d 656 (2011) (affirming fraud judgment in favor of

[1] As noted previously, Dr. Osbahr was not provided with Claimant's job description, any information regarding the lift test, and did not evaluate him for any pushing, pulling or lifting requirements of his job (R. p. 316, Osbahr Dep. p.11, lines 13-16) (R. pp. 318-319, Osbahr Dep. p. 21, line 17 – p. 22, line 13) (R. p. 319-320, Osbahr Dep. p. 25, line 23 – p. 26, line 12).

[2] Dr. Osbahr examined Petitioner on October 30, 2006. (R. p. 315, Osbahr Depo. p. 6, lines 6-8). His statement almost three years later, (R p. 331), is countered by his admission at his deposition that he did not know which form he sent to Employer and, in any event, nothing on the form indicates what normal supination for an elbow is.

plaintiffs despite the fact that an easement was discoverable in public records); South v. Sherwood Chev., Inc., 277 S.C. 372, 287 S.E.2d 490 (1982) (finding plaintiff reasonably relied on representation that truck was a 1979 model even though the contract and an owner's manual in the glove box specified it was a 1978 model). By way of contrast, and in contrast to the instant case, the plaintiffs in the case relied on by Petitioner, O'Shields v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d 50 (1974), examined their mobile home upon delivery, specifically noted the deficiencies that were readily apparent,[3] but accepted the home anyway. 262 S.C. at 282, 204 S.E.2d at 52. Petitioner's impairment here was not readily obvious to either Dr. Osbahr or Employer.

Furthermore, although Petitioner appears to be asking this Court to find as a matter of law that Employer was not entitled to rely on Petitioner's misrepresentations, the parties raised numerous factual disputes relating to this issue, which were resolved by the Commission in Respondents' favor. For example, Petitioner argued that Dr. Osbahr reported Claimant's impairment and loss of function in his left arm directly to the Employer. (Final Brief of the Appellant, pp. 10-11). However, the Commission found that neither Dr. Osbahr nor Employer had the opportunity to discover the full extent of Claimant's impairment. (R. p. 16). Although Petitioner testified that he showed Dr. Osbahr his scars, (*see also* R. p. 126, line 16 – 128, line 18), there is no note on the D.O.T. form indicating scarring and Dr. Osbahr testified specifically that he did not notice any scarring. (R. p. 318, Osbahr Dep. p. 20, lines 5-21) (*see also* R. p. 16). Because the Commission's resolution of these factual disputes is supported by substantial evidence, this Court must uphold the Commission's findings of fact. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Petitioner's urging that common law

[3] The deficiencies consisted of: 1) ceilings that were seven feet instead of eight feet; 2) no exposed beams in the living room; 3) no "swag lights"; and 4) the hall was not carpeted. 262 S.C. at 280, 204 S.E.2d at 51.

fraud standards should apply does not help him here. In a common law fraud action, an appellate court will not disturb the findings of fact made by the judge "if there is **any** evidence which reasonably supports the judge's findings." Moseley, 395 S.C. at 495, 719 S.E.2d at 658 (emphasis added). Here, this Court properly held that substantial evidence supports the Commission's resolution of this factual dispute and should be upheld on appeal.

III. This Court properly held that Petitioner's injury was not unexpected from his point of view.

Petitioner's third argument for rehearing raises no point that this Court overlooked or misapprehended and, therefore, provides no reason for this Court to grant rehearing. The arguments in the Petition mirror the arguments made in Petitioner's Brief. (*See* Final Brief of the Appellant, pp. 12-13). As stated previously by Respondents, substantial evidence supports the Commission's factual and legal conclusions that Petitioner: 1) knew he was under permanent lifting restrictions; 2) had been warned by Dr. Chidgey his treating physician "that he should avoid situations where he might fall or excessively stress his left arm;" 3) knew he was impaired and had settled his prior workers' compensation claim for approximately $68,000; and 4) knew prior to accepting the job with Employer that the requirements of his job exceeded his lifting restrictions. In short, Petitioner took a risk that he might experience precisely the type of injury that he incurred to his elbow. (R. pp. 10-14) (R. p. 145, line 14 – p. 147, line17) (R. p. 154, line 3 – p. 155, line 20) (R. p. 442) (R. pp. 463-465) (R. p. 283, line 16 – p. 289, line 23) (R. p. 298, line 19 – p. 299, line 2) (R. p. 200, lines 2-25) (R. pp. 489-497). As Dr. Chidgey succinctly stated, if Petitioner wanted "to try and gain life out of the arthroplasty, you keep your weight to a lower level. If you increase that, you may get away with it." (R. p. 300, lines 8-18). Implicit in this statement is the recognition that you may *not* "get away with it" also. It was Petitioner's decision to take that risk and, "it would be patently unfair to require [Respondents] to bear the

burden for a risk that the Claimant knowingly and willfully chose to take ...," (Commission Decision, R. pp. 14-15), particularly where, as here, Employer did not know about Petitioner's existing impairment.[4]

CONCLUSION

For all the reasons stated herein, this Court should deny Petitioner's Petition and affirm Opinion No. 2013-UP-127.

Respectfully submitted,

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April 26, 2013

[4] Petitioner's assertion that his treating physician opined that "but for" the accident that occurred on November 1, 2008, Petitioner would have been able to continue to perform his job indefinitely, (Pet. pp. 3-4), is nothing more than pure speculation. It is axiomatic that workers' compensation awards may not be based on surmise, conjecture or speculation. Tiller v. National Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

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PROOF OF SERVICE

I certify that on the 26th day of April 2013, I served the **Respondents' Return to Petition for Rehearing** on Joe A. Osmanski by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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April 26, 2013

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
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RE: Joe A. Osmanski v. Watkins & Shepard Trucking, Inc. and Zurich North America
Date of Accident: November 1, 2008
WCC File No.: 0818219
Our File No.: 20675.09021
Claim No.: 2800063420-001
Appeal Tracking No. 2011-196087

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return to Petition for Rehearing and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return the clocked-in copies in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Kevin B. Smith, Esq. (w/encl.)
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