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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No.

Court of Appeals Case No. 2019-000556

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

v.

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

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Respondents submit this Petition for Rehearing to correct an apparent misunderstanding of the facts and misapplication of the law, and to prevent a gross miscarriage of justice resulting from the Court's Opinion dated April 27, 2022. For the reasons set forth below, the Court should grant Respondents' Petition, withdraw the original Opinion, and substitute a new Opinion affirming the Full Commission's Order concluding (1) Appellant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits; (2) Appellant failed to prove he sustained a compensable injury to his low back while under the employ of Michelin on June 24, 2017; and (3) assuming Appellant sustained an injury by accident on June 24, 2017, Appellant intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten back pain at least four weeks prior to that date. In addition to making its own credibility findings, the Court overlooked pertinent facts and misapprehended and misapplied the applicable law and standard of review in this case.

I. FRAUD IN THE APPLICATION DEFENSE UNDER *COOPER V. MCDEVITT & STREET CO.*, 260 S.C. 463, 196 S.E.2D 833 (1973).

The Court misapprehended the facts and failed to appropriately apply the substantial evidence standard of review in holding Michelin did not prove a causal connection between the false representation and the injury to satisfy the third element of *Cooper* because (1) "the record contains no evidence that the 1997 injury did not resolve, and the record does not indicate the 'extent' of the injury" to support the Commission's conclusion related to Dr. Scott Boyd, (2) the record does not contain medical evidence that Appellant's 1997 back injury contributed to the injury at Michelin or that Appellant was predisposed to back injury, and (3) "Indeed, Brailey worked at Westinghouse for sixteen years without a back injury." *Brailey v. Michelin North America, Inc*, Op. No. 5906 (S.C. Ct. App. filed April 27, 2022) (Howard Adv. Sh. No. 15 at 20).

A. The Court misapprehended and misapplied the standard of review.

As acknowledged by the Court, in South Carolina, a "decision of the Worker's Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record." *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). Respectfully, instead of looking for what in the Court's view should have been included in the record, the Court's sole duty under the applicable standard of review was to consider whether what is in the record supports the Commission's decision. The Court did not do that.

This Court further misapprehended the facts and misapplied the law that in workers' compensation cases, the Full Commission is the ultimate fact finder and makes the final determination of witness credibility and the weight to be accorded evidence. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986); *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of this Court to weigh the evidence as found by the Full Commission. *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981). Again, the Court acknowledged this standard of review, but failed to properly apply the standard. In direct contradiction to the standard, the Court improperly weighed the evidence in Appellant's favor despite the Full Commission's findings of fact as the ultimate fact finder.

For example, the Court relied on the fact that Appellant "passed a physical during Michelin's hiring process and was cleared for full duty" even though Michelin's nurse, Nurse Sirois, explained that if a job applicant wanted the job at Michelin bad enough, as Appellant claimed he did, then applicants could provide false information in order to pass the initial physical examination. **(R. 753-758)** As noted by this Court, substantial evidence supports the Commission's findings that Appellant "willfully and knowingly made false statements as to his

physical condition to Michelin." Thus, the fact that Appellant "passed a physical" does not mean he was physically able to do the job as implied by the Court's opinion. The record before the Court demonstrates Appellant lied to doctors when necessary to get what he wanted—i.e., to get a job.

Respondent takes exception to the Court applying Appellant's testimony to support its Opinion reversing the Full Commission. The Court's sua sponte findings as to Appellant's credibility are problematic because the Full Commission is the sole fact finder on issues of credibility. Furthermore, the Court's credibility findings bleed into its decision that the Full Commission's decision is not supported by substantial evidence.

Indeed, despite the Full Commission's credibility findings to the contrary, the Court appears to have accepted Appellant's testimony in reversing the Full Commission. The Court accepted, for example, Appellant claims that (1) he was never trained in correct procedures for filing workers' compensation claims or for reporting injuries at work even though Michelin employees testified otherwise, (2) called his supervisors during his visit to the ER on June 24, 2017, and the supervisor told him to go to the nurse which is inconsistent with the record, (3) "tried to see the Michelin nurse but the office was closed" despite the testimony from Michelin's training manager that the employees were trained that if the medical department was not open, they were to go directly to security because Michelin's security officers are trained EMTs and the employees were specifically instructed not to go to the family health center for work-related injuries; and (4) missed the follow up appointment with Dr. Izard "because he did not want to drive while taking pain medication" when in fact Appellant denied the transportation offered and lied to the Single Commissioner regarding his reasons for not attending the follow up appointment. More importantly, the Court appears to have accepted Appellant's claim that his current pain was in "a

different area of his back" than the prior injury in holding that there was no causal connection between the false representation to Michelin and the current injury. This was error.

Respectfully, the Court did not properly apply the standard of review and improperly weighed the evidence in its Opinion, and these errors controlled the analysis which led to finding in favor of Appellant. The lens through which this Court viewed the facts to reach its conclusion to reverse the Commission erroneously relied on Appellant's testimony even though the Commission, as the ultimate finder of fact, determined Appellant lacked credibility.

B. The Court overlooked and misapplied *Jones v. Georgia-Pacific Corp.* 355 S.C. 413, 586 S.E.2d 111 (2003).

This Court overlooked *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003). In *Jones*, when determining whether an employer proved the third element of *Cooper*, 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." That is exactly the case here. Appellant had documented back problems prior to employment with Michelin and claims he injured his back while working for Michelin. The inquiry stops there. Respectfully, instead of properly applying *Jones*, the Court went further and continuously overstepped the bounds of the substantial evidence standard of review.

1. The Court overlooked the fact that Appellant's prior injury and the current Injury are the same claims.

The Court overlooked the fact that Appellant's claims in the instant action are the exact same claims which led to a workers' compensation injury and settlement in 1997. Indeed, the prior medical 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).

The Court further overlooked the fact that exactly like the prior injury, within three weeks after starting the physical aspect of his job,[1] Appellant reported low back pain and did not follow the instructions of the treating physician, and instead sought care by Doctors Care. The treating physician at Richtex Bricks, Dr. Norris, directly informed Appellant that he was "unable to perform the job" and that because he had been having pain the entire time he worked for the job, he should consider finding different employment. The treating physician instructed him to see a specialist for his "low back injury." Dr. Norris' medical records provide that Appellant "mention[ed to Dr. Norris] that he knows something is wrong with his back and he wants to go to a back specialist." Finally, the Court failed to note Dr. Norris' last medical instruction to Appellant that, "I will place him on no heavy lifting until he sees the surgeon." Appellant **never** visited a specialist.

[1] The first two weeks of Appellant's job at Michelin was classroom training.

Accordingly, the Court overlooked the fact that the claims are the same and Michelin proved a causal connection under *Jones*.

2. **The Court overlooked and misapprehended that evidence that the prior injury contributed to the current injury or that Appellant had a predisposition to back injury is not required under the law to find a causal connection and even it was, the record includes the evidence.**

First, the Court erred in applying the standard of review by suggesting that some medical evidence of predisposition to back injury or that the prior injury contributed to the current injury was necessary. *Jones* informs us that that is not necessary for finding the causal connection is supported by substantial evidence. But even if it was necessary, Dr. Norris' notes provide the medical evidence. Dr. Norris opined that if Appellant does a job he is "unable to perform," he can injure his back. Jermaine Lemon, who trained Appellant, testified Appellant had difficulty doing his job at Michelin. Training manager, Troy Lowman, testified Appellant never successfully completed validation and could not do the job safely. Furthermore, Michelin employees explained that Appellant, who was previously told by a doctor that he could not perform heavy lifting, could not perform Appellant's job at Michelin. **(R. 666-667)**

3. **The Court misapprehended the facts related to Dr. Scott Boyd.**

This Court misapprehended the facts supporting the Commission's conclusion related to Dr. Boyd's testimony when it held "The Commission found Dr. Boyd was not aware of 'the extent' of Brailey's 1997 back injury. However, the record contains no evidence that the 1997 injury did not resolve, and the record does not indicate the 'extent' of the injury." The Court overlooked the fact that Appellant admitted he did not tell Dr. Boyd about previously being placed under restrictions because of his back or his prior back injury. **(R. 599)**. Instead, Appellant told Dr. Boyd 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 because Appellant reported 10/10 back pain

only weeks prior to the appointment with Dr. Boyd. In fact, Dr. Boyd testified that, "[p]roper application of the scale, [ten out of ten], should be the worst pain you could experience." **(R. 322)** Further, the Court overlooked the fact that Appellant did not tell Dr. Boyd that Appellant told Dr. Norris that Appellant "knows something is wrong with his back and he wants to go to a back specialist" and that he never visited a specialist. Furthermore, as explained by the Safety Manager, Mark Gross, Michelin and its doctor were not able to investigate the full extent of the prior injury because Appellant did not inform the company of prior back issues and the prior workers' compensation claim. Finally, even if the Court was correct that there was no evidence that the 1997 injury did not resolve, the opposite of the Court's reasoning on the resolution of injury is also true—there is no evidence Appellant's injury did "resolve." In any event, the evidence is not necessary for a finding that the Full Commission's decision is supported by substantial evidence.

4. The Court misapprehended and misapplied Appellant's work at Westinghouse.

The Court also improperly weighed the evidence by placing great weight on the fact that Appellant worked at Westinghouse in the time between his employment with Richtex and Michelin. The Court overlooked the fact that Appellant lied on his Medical History and Examination Form for his position at Westinghouse. When Appellant applied to Westinghouse, he falsely denied ever having had a work-related injury or illness; ever being restricted medically from doing any part of his job; ever having any pain, numbness, limited motion, or injury of the back; ever having a work injury, workers' compensation claim, or receiving a settlement for any injury; or having had a previous job with similar physical demands. **(R. 177-79).** In other words, Appellant lied to Westinghouse about his medical history. Thus, this Court inappropriately relied on Appellant's testimony that he allegedly worked without issue at Westinghouse to conclude there was no causal connection between Appellant's false representation and the alleged injury.

First, even if Appellant's testimony was true, this Court does not know if Appellant was able to safely "perform the job" at Westinghouse without issue whereas the record is clear that Appellant could not perform his job at Richtex or Michelin. Second, and more importantly, this Court does not know if Appellant ever complained to Westinghouse about back issues or whether Westinghouse ever sent Appellant for any medical treatment in house or elsewhere. Furthermore, during the hearing before the Single Commissioner, Appellant alleged his position at Westinghouse required he lift pallet containers and push carts of wrenches and rods weighing up to 800 pounds. **(R. 411, 413)** However, in his deposition testimony, Appellant testified regarding his job at Westinghouse that, "It was not too much physical demand on that job. It was just basic. It was really light." **(R. 247)** The record does not include testimony from any Westinghouse representative and the Commission correctly found Appellant's testimony lacked credibility.

Accordingly, the Court misapprehended the facts related to Westinghouse and misapplied the standard of review in weighing the evidence to conclude that fact supported finding there was no causal connection. *See Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003) ("Our standard of review does not permit us to weigh the evidence and make our own determination."); S.C. Code Ann. § 1-23-610 (Supp. 2020) (noting that the reviewing Court shall not substitute its judgment for that of the agency "as to the weight of evidence on questions of fact").

II. APPELLANT'S ALLEGED BACK INJURY ON JUNE 24, 2017

A. The Court misapprehended and misapplied the facts and the applicable workers compensation law.

The Court acknowledges Appellant went to the doctor on June 11, 2017, and June 13, 2017, but again improperly weighed the evidence by minimizing the impact of these visits and Appellant's inconsistent testimony regarding the visits on the Full Commission's decision.

The Full Commission found as fact

> 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. We find the claimant was unable to return to work after June 24, 2017, due to a previous incident. We 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.

The Full Commission then concluded "[u]nder §42-1-160, the claimant did not sustain compensable injury to his low back while under the employ of [Michelin] on June 24, 2017, as alleged. Claimant failed to meet his burden of proof that he injured his low back on June 24, 2017, under the evidence presented."

This Court misapprehended and overlooked the fact that Appellant only claimed an injury by accident on June 24, 2017. He did not claim a repetitive trauma injury or an injury occurring on June 11, 2017, or June 13, 2017. Although there is record of Appellant visiting a medical facility on June 24, 2017, there are equally probative records evidencing similar complaints from weeks prior. Moreover, Dr. Izard noted the cause of Appellant's condition was not known at the time. **(R. 84)** Appellant, thereafter, failed to return to Dr. Izard as instructed. Finally, Appellant admitted during his hearing testimony that his June 24, 2017, medical report shows he was in less pain then then he had been on June 13, 2017. **(R. 516)** Also, Appellant admitted that he had hard coughing issues going on during this time which hurt his back and agreed he was coughing hard enough to herniate a disk. **(R. 530-532)** As Appellant has only alleged injury for Jun 24, 2017, it was reasonable for the Full Commission to find Appellant failed to meet his burden of proving an injury by accident on the date he has alleged. *See Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999) (holding the possibility of drawing two inconsistent conclusions from the

evidence does not prevent an administrative agency's findings from being supported by substantial evidence); *Waters v. S.C. Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996) (noting substantial evidence is evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached).

Although Appellant claimed there is no medical evidence showing a different incident or that the radiculopathy and herniated disc existed before the June 24, 2017, the Court overlooked the evidence of Appellant experiencing back pain in 1997, so much so that he filed a workers' compensation claim and told the treating doctor that he needed to see a specialist and the 10/10 back pain that sent Appellant to two different doctors earlier in June 2017. Importantly, Dr. Boyd testified he could not "be certain" as to whether Appellant's lower back problem could be caused by an accident on June 24, 2017. **(R. 328-339)** Dr. Boyd further testified the history given to him was different than the history given to Internal Medicine. **(R. 320-321)** Finally, Dr. Boyd testified he could not be certain about a date of accident and the questionnaire he executed for Appellant should now say he was uncertain about the date. (R. 328-329) *See Brunson v. American Koyo Bearings*, 395 S.C. 450, 718 S.E.2d 755 (2011) (affirming the finding that a claimant did not suffer a work-related injury where her claim that she had never suffered from respiratory issues prior to the claim was directly refuted by the medical records documenting her prior complaints, the evidence related to her claim was conflicting, and a doctor believed the claimant had ulterior motives for pursuing her claim); *Fair v. Fluor Daniel*, 309 S.C. 520, 424 S.E.2d 541 (Ct. App. 1992).

B. The Court misapplied *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020).

The Court overlooked or misapprehended that this case is distinguishable from *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020). In *Crane*, the claimant was

investigating the cause of a hissing noise when an air hose suddenly separated from its fitting and caused an explosion-like sound. *Id.* at 640, 842 S.E.2d at 350-51. Surveillance video from the time of the accident showed the claimant stepped away from the tire changer and covered his ears with his hands. *Id.* Shortly thereafter, the claimant's wife drove him to the hospital, where the claimant complained of difficulty hearing in both ears and assessed his ear pain as an eight out of ten. *Id.* There was no dispute in the record as to whether the accident occurred because the surveillance camera captured the entire accident. At a hearing, the single commissioner found the claimant lacked credibility in large part because he appeared to exaggerate his hearing loss at the hearing. *Id.* at 641, 842 S.E.2d at 351-53. Based primarily on the finding that the claimant's testimony was not credible, the commissioner denied the claimant's claims. *Id.* Our Supreme Court reversed the Commission's decision because the claimant's credibility was not "reasonably and meaningfully" related to whether the claimant actually suffered hearing loss at his employment on February 19, 2014. *Id.* at 641-48, 842 S.E.2d at 351-55.

The Court held:

> Credibility can be important in resolving factual disputes before the commission. When credibility is a reasonable and meaningful basis on which to make a factual determination, and when there is evidence of sufficient substance to afford a reasonable basis for the credibility finding, we will uphold the commission's factual determinations on the basis of credibility.

Id. at 648, 842 S.E.2d at 355.

After *Crane*, in May 2021, in *Rummage v. BGF Industries*, 434 S.C. 441, 865 S.E.2d 380 (2021), this Court reiterated that credibility can be an important factor in resolving disputes before the Commission and the Commission can give less weight to medical opinions if it is believed that the claimant was untruthful in self-reporting of symptoms to the medical providers.

In *Rummage*, the claimant fell backward and struck her head into a hand truck. The

claimant filed a workers' compensation claim and secured causation opinions from several doctors opining to a reasonable degree of medical certainty that the claimant suffered from psychological issues after her workplace injury, had not reached MMI, and required psychiatric treatment including therapy.

After a hearing, "the single commissioner denied Claimant's claim, by and large based on her assessment of Claimant's credibility." *Id.* at 452, 865 S.E.2d at 386. The single commissioner gave little weight to the medical opinions of the doctors who provided causation because "they had not been provided Claimant's accurate medical history and had based their opinions on Claimant's unreliable self-reporting." *Id.* at 453, 865 S.E.2d at 386. The Full Commission affirmed the single commissioner, and this Court affirmed the Full Commission.

This Court concluded that even when a claimant is required to produce medical evidence to prove a claim, "this does not require the fact finder to ignore medical evidence that is not expert opinion, other lay evidence, or the credibility of the Claimant." *Id.* at 458, 865 S.E.2d at 389. This Court recognized the holding in *Crane* and stated that "In this case, credibility was a substantial issue . . . Therefore, the Appellate Panel could have properly given less weight to Claimant's doctor's opinions if it believed Claimant was untruthful in her self-reporting of symptoms or her presentation." *Id.* at 459, 865 S.E.2d at 390.

The Court pointed to numerous incidences demonstrating the claimant's lack of credibility, including the claimant denying prior issues when the medical records showed otherwise, indicating she could "not remember" on specific issues, and two incidences in which the claimant had been dishonest. Ultimately, the Court held the claimant's medical experts' opinions "were substantially weakened in light of the credibility findings of the Appellate Panel as the opinions rely, at least in part, on an exaggerated presentation of symptoms." *Id.* at 460, 865 S.E.2d at 391.

Here, this Court misapprehended that in this case, like in *Rummage*, credibility was a substantial issue that was "reasonably and meaningfully" related to whether Appellant actually suffered an injury at work on June 24, 2017, as alleged or as to the causation of his alleged injuries. This is a denied claim from a claimant who provided false statements to employers, medical professionals, and even the Single Commissioner at a hearing. As in *Rummage*, the Full Commission could give less weight to Dr. Boyd's opinions, and properly did so, because it is clear from the totality of the evidence that Appellant was untruthful in his self-reporting of symptoms, the dates he reported the symptoms, and the cause of the injury.

Furthermore, the Court misapplied the law in holding that the expert medical evidence in this case establishes causation. Dr. Boyd's testimony is not dispositive of the issue. The Full Commission has discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established and although medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented. *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). Indeed, "medical testimony should not be held conclusive irrespective of other evidence." *Id.* at 467, 40 S.E.2d at 682-83. Further, this Court overlooked and misapprehended Dr. Boyd's testimony that he had no way of knowing how long Appellant's herniated disc had been present. Dr. Boyd confirmed that his opinion was based 100% on the history Appellant gave him and on the records from Urgent Care he may have received. Therefore, a crucial component of Dr. Boyd's opinion was his ability to trust the history Appellant provided to him and as addressed throughout this brief, the Single Commissioner (who observed Appellant testify) and Full Commission (the ultimate finder of fact) found Appellant lacked credibility.

Moreover, the Court misapprehended the Commission's credibility finding. The Commission's credibility finding was based on more than Appellant's "vague" and "rambling" responses. Specifically, the Commission provided as follows:

> We find the claimant is not credible. This Finding is based upon the greater weight of the evidence in the record, the testimony of the claimant, the testimony of representatives from Michelin, as well as the Hearing Commissioner's observations of the claimant at the hearing. Specifically, the greater weight of the evidence shows that a couple of weeks after he began working for Richtex in 1997, the claimant had a very similar incident. In that claim, the claimant alleged back pain after he began physical work with the company. At Richtex, as in the current claim, instead of following the treating doctor's orders, the claimant sought treatment at Doctors Care.
>
> As further evidence of the claimant's lack of credibility, the claimant omitted information about a former employer—an employer for which he had a workers' compensation claim for a back injury from his employment application for Michelin. The claimant also denied any prior workers' compensation claims, which is untrue. Moreover, he repeatedly attempted to justify his answers during his testimony. We find that while testifying, the claimant gave confusing answers when asked direct questions by his attorney. As noted by the Hearing Commissioner throughout the proceeding, the claimant provided vague responses when questioned by defense counsel. He would not answer defense counsel's questions, rambling through responses. (H.T. 227).

Here, the record is replete with evidence demonstrating Appellant's testimony was completely unreliable and lacked any credibility whatsoever because of his inconsistent and untrue statements. Including, but not limited to, the facts that Appellant

- falsely stated to employers he never had a workers' compensation claim **(R. 415-16)**
- falsely completed the Michelin's Post-Hire Health Questionnaire when he applied to Michelin **(R. 461, 601-05).**
- falsely completed Westinghouse's medical history form when he began working for Westinghouse only three and a half years after his back injury at Richtex **(R. 606-10, 613-23)**
- falsely told his family doctor that he never had prior back pain **(R. 485-86)**
- falsely stated he had never had any prior back problems or prior knee surgery when he met with Michelin's doctor on June 26, 2017 **(R. 522-23)**

- falsely completed Michelin's Post-Injury Questionnaire after he claimed he had a work accident
- falsely stated to Dr. Boyd on July 24, 2017, that he "hasn't had previous back problems except maybe 25 years ago he had an episode that resolved without any treatment" even though he had reported 10/10 back pain only weeks prior, and was in fact treated for a prior workers' compensation claim to his back by Dr. Norris
- admitted that he lied at the hearing when he said he did not return to see Dr. Izard because he did not have transportation, when in fact, Mark Gross did offer to provide him with transportation

Indeed, this Court concluded Appellant willfully and knowingly made false statements. Appellant lied to his employers, he lied to doctors, and provided inconsistent testimony between his deposition and hearing testimony.

Accordingly, the Court overlooked and misapprehended facts and misapplied the law in holding the Commission erred in finding Appellant did not injure his back in an accident arising out of his employment at Michelin.

III. *Capers v. Flautt*

If the Court does not affirm the Full Commission, the Court should withdraw its Opinion and substitute a new Opinion, remanding with instructions for the Commission to make its own findings of fact and conclusions of law regarding *Capers v. Flautt*. If it is the Court's opinion that the Commission's Order does not contain sufficient findings of fact and conclusions of law relating to *Capers*, then the Commission should have the opportunity to make those finding and conclusions before a determination can be made as to whether Appellant proved a compensable injury by accident. In fact, that is exactly what our Supreme Court did in *Cooper v. McDevitt & Street Company*, 260 S.C. 463, 196 S.E. 2d 823 (1973), when the Court remanded the case to the Commission for the taking of testimony on the third element of the fraud in the application defense and for the making of a finding of fact on that issue, 260 S.C. 469.

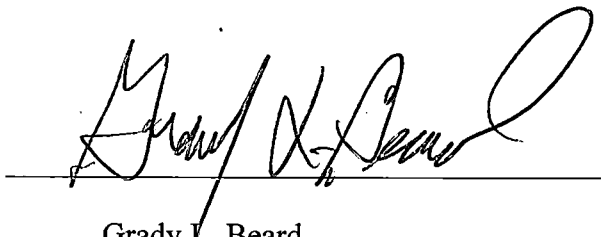
CONCLUSION

Based upon the forgoing, the Court should grant the present Petition for Rehearing, withdraw the April 27, 2022 Opinion, and issue a substituted Opinion affirming the Full Commission's Order concluding (1) Appellant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits; (2) Appellant failed to prove he sustained a compensable injury to his low back while under the employ of Michelin on June 24, 2017; and (3) assuming Appellant sustained an injury back accident on June 24, 2017, Appellant intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten back pain at least four weeks prior to that date. In fact, public policy dictates that an employee who alleges a job is causing them ten out of ten back pain, or any body part pain, for as long as four weeks requiring multiple medical visits, should have an affirmative duty to notify his employer of same before it becomes too late, both for the employee's and the employer's protection. Moreover, a failure to do so is an extremely serious act by the employee which could, and likely will, severely prejudice his employer evidencing a willful intent to disregard the employer and thereby likely to result in injury or more severe injury.

In the alternative, this Court should grant this Petition for Rehearing, withdraw its Opinion, and issue a substituted Opinion remanding to Full Commission to make it own findings of fact and conclusions of law related to *Capers v. Flautt* before a determination can be made as to whether Appellant proved a compensable injury by accident.

Signature page follows

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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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.

PROOF OF SERVICE

I certify that I have caused Respondents' Petition for Rehearing to be served on Appellant via email and by depositing a copy of it in the United States Mail, postage prepaid, addressed to Stephen Samuels, Esquire, 1320 Richland Street, Columbia, SC 29201; The Honorable Jenny Abbott Kitchings, Clerk of Court, 1220 Senate Street, Columbia SC 29201 via hand delivery; and Ms. Amy Bracy, Judicial Director, South Carolina Worker' Compensation Commission, 1333 Main Street, Columbia, SC 29201 (via U.S. mail and e-mail).

I further certify that all parties required by Rule to be served have been served.

Cindy Lamb

Columbia, South Carolina
May 12, 2022

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May 12, 2022

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
1220 Senate Street (29201)
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RE: Isaac Brailey v. Michelin North America, Inc. US7
WCC No.: 1708221
Court of Appeals Case No. 2019-000556
DOI: 06/24/2017
Claim No.: 002550-080240-wc-01
Our File No.: 6555/8068

Dear Ms. Abbott Kitchings:

Enclosed please find the original and one (1) copy of the Respondents' Petition for Rehearing and proof of service in support of our position on behalf of the employer/carrier in the above-referenced matter. A check in the amount of Fifty and no/100 ($50.00) is also enclosed for the filing fee. We are filing the original and retaining a clocked-in copy via our courier.

With a copy of this letter, we are hereby serving a copy of the Respondents' Petition for Rehearing on counsel for the claimant.

With kindest personal regards, I remain

Very truly yours,

Grady Beard, Esquire
Enclosures
cc: Stephen Samuels, Esquire
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