THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1708221

Court of Appeals Case No. 2019-000556

Isaac Brailey, Claimant.....Appellant,

v.

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

REPLY IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

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ARGUMENT

I. Introduction

Appellant's Return to Respondents' Petition for Rehearing highlights the need for this Court to grant Respondents' Petition. Indeed, Appellant attempts to raise additional facts he believes the Court overlooked and law he believes this Court misapprehended. Accordingly, this Court must withdraw the original Opinion, and substitute a new Opinion affirming the Full Commission's Order. Alternatively, this Court should grant Respondents' Petition for Rehearing, withdraw its Opinion, and issue a substituted Opinion remanding to the Full Commission to make its 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.

II. Fraud in the Application

Simply put, as outlined in detail in Respondents' Petition for Rehearing, this Court overlooked or misapprehended numerous pertinent facts and applicable law and erred in its application of the substantial evidence standard of review and must therefore withdraw the original Opinion and substitute a new Opinion affirming the Full Commission's Order.

As an initial matter, this Court should not consider Appellant's arguments on points which Appellant claims the Court overlooked or misapprehended. Appellant did not file a Petition for Rehearing pursuant to Rule 221, SCACR, and therefore this Court cannot consider Appellant's argument asking this Court to change its ruling under the first two elements of the fraud in the application defense. **(Ret. pp. 2-7).** *See* Rule 221, SCACR (requiring the party disputing the opinion to file no later than fifteen days after the filing of the opinion a Petition for Rehearing stating with particularity the points supposed to have been overlooked or misapprehended by the

Court). Nor can this Court consider Appellant's arguments regarding application of a different standard of review.[1] *Id.*

Even if this Court were to determine a different standard of review must be applied, the Court must still withdraw the original Opinion and substitute a new Opinion affirming the Full Commission's Order. First, even under the broad preponderance of the evidence standard, the final determination of witness credibility is reserved to the Full Commission. *See Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 243-44, 647 S.E.2d 691, 695 (Ct. App. 2007) (providing that even when analyzing a workers' compensation issue under the preponderance of evidence standard, "the final determination of witness credibility is usually reserved to the Appellate Panel"); *Paschal v. Price*, 392 S.C. 128, 133, 708 S.E.2d 771, 773 (2011) (stating "[a]lthough we may take our own view of the preponderance of the evidence . . . this broader scope of review does not require this Court to ignore the findings of the Commission, which was in a superior position to evaluate witness credibility"); *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) ("The final determination of witness credibility and the weight assigned to the evidence

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[1] In any event, as recently as 2013, citing *Brayboy* and noting that appellate courts have applied the preponderance of the evidence standard, this Court has applied the substantial evidence standard of review to cases involving the fraud in the application defense under *Cooper*. *See e.g.*, *Osmanski v. Watkins & Shepard Trucking, Inc.*, No. 2013-UP-127 (S.C. Ct. App. filed March 27, 2013) ("As to Osmanski's argument that the Appellate Panel erred in barring Osmanski's claim due to fraud in the application, we find no error. *Substantial evidence* supported the Appellate Panel's finding that (1) Osmanski made a material misrepresentation regarding a prior injury to his left arm when applying for employment with WST; (2) WST relied upon this misrepresentation when hiring Osmanski; and (3) Osmanski's injury to his left arm giving rise to his claim for benefits was causally related to his misrepresentation. *See* S.C. Code Ann. § 1-23-380 (Supp. 2012) (providing that an appellate court "may not substitute its judgment for the judgment of the [Appellate Panel] as to the weight of the evidence on questions of fact" and *must affirm the decision of the Appellate Panel if it is supported by substantial evidence*). Specifically, *we find substantial evidence indicated* that . . . . Accordingly, the Appellate Panel did not err in applying the fraud in the application defense to bar Osmanski's claim. *See Brayboy,* 383 S.C. at 467, 681 S.E.2d at 569 . . . ; *see also Cooper v. McDevitt, & St. Co.*, 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973) . . . . (emphases added)).

is reserved to the appellate panel."). Respectfully, this Court erroneously relied a great deal on Appellant's credibility to reach its conclusions reversing the Full Commission despite the Full Commission's credibility finding and the overwhelming evidence in the record that Appellant lacks credibility.

Moreover, the facts of this case are similar to the facts outlined in *Brayboy v. WorkForce*, 383 S.C. 463, 681 S.E.2d 567 (2009)—a case which Appellant urges this Court to follow. The claimant in *Brayboy* sustained a back injury in 2003. *Id.* at 464, 681 S.E.2d at 567. Brayboy's employment application included disclaimers similar to those outlined in Appellant's post-hire questionnaire. *Id.* at 464-65, 681 S.E.2d at 567-68. As in the instant case, "[n]otably, Brayboy signed his name under these cautionary statements. Despite these warnings, Brayboy responded in the negative to all questions inquiring if Brayboy had prior back injuries, physical defects, medical conditions, or previous workers' compensation claims." *Id.* at 465, 681 S.E.2d at 568. "Brayboy testified he did not report any of his prior injuries to WorkForce as he did not feel the injuries were relevant to a construction job. Also, Brayboy stated he did not include the cave-in injury as it had 'cleared up very quickly.'" *Id.* at 466, 681 S.E.2d at 568. Similarly, here, although Appellant executed the declaration and authorization portion of the form, he claims he quickly completed the forms and suggests that because he believed the prior workers' compensation claim was minor and occurred some years prior, Michelin did not need to know that information. Like Brayboy, Appellant failed to report his back problems and admitted he provided false information on Michelin's application as well as Westinghouse's employment documents. *Id.* at 467, 681 S.E.2d at 569.

As in *Brayboy*, Michelin presented credible evidence that it relied upon Appellant's false statements, and there was irrefutable evidence of a causal connection between the false information

and the current injury because the injury is "primarily in the same area" as the prior back injury. *Id.* at 467-68. Just as our Supreme Court in *Brayboy*, this Court should be "firmly convinced" Michelin established all three factors of *Cooper*. *Id.* at 569.

Finally, regardless of the standard of review,[2] Respondents respectfully submit that this Court overlooked and misapprehended *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003). *Jones* is still good law and has not been overruled by our Supreme Court. *See Landry v. Carolinas Healthcare Sys.*, 396 S.C. 149, 156, 719 S.E.2d 288, 292 (Ct. App. 2011) (rejecting claimant's argument that cases should not have been relied upon, finding those cases were applicable and relying upon them because they "have not been overruled"). The fact of the matter is, here as in *Jones*, "there is a causal connection between Claimant's injuries and the false representation as [he] had documented back problems prior to employment and claims that [he] injured [his] back while working for Respondent." *Jones*, 355 S.C. at 419, 586 S.E.2d at 114.

III. Remaining Issues

The substantial evidence standard of review applies to the other issues ruled upon in this Court's decision and as noted above and at length in the Petition for Rehearing, this Court misapplied the standard. The substantial evidence standard of review still controls for example,

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[2] After *Brayboy*, in *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 682 S.E.2d 516 (2009), this Court stated "In *Brayboy*, our Supreme Court applied the preponderance of the evidence standard of review to an employer's assertion that the employment relationship had been vitiated by the employee's fraud in his employment application" but went on to note that

> In a previous case, *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 416-19, 586 S.E.2d 111, 113-14 (2003), the Supreme Court applied the substantial evidence standard of review to the issue of whether an employee's claim was barred due to her fraud in completing an employment application. We note that in the instant case, the evidence allows us to affirm the Appellate Panel's findings under either the preponderance of the evidence standard or the substantial evidence standard.

this Court's ruling on whether Appellant met his burden of proof under section 42-1-160 to show he suffered a compensable injury by accident arising out of and in the course of his employment with Michelin on June 24, 2017,[3] this Court's ruling regarding *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991),[4] and this Court's other rulings. Further, as outlined in Respondents' Petition for Rehearing, this Court misapprehended the Commission's credibility finding, misapprehended *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020), and overlooked *Rummage v. BGF Industries*, 434 S.C. 441, 865 S.E.2d 380 (2021).

Finally, and as an alternative, if the Court continues to determine the Full Commission's findings of fact and conclusions of law were not sufficiently detailed, contrary to Appellant's assertion, South Carolina law requires this Court to remand to the Commission for sufficiently detailed findings and conclusions before it can rule on whether the Commission's decision regarding *Capers* was erroneous. *See Turner v. Campbell Soup Co.*, 252 S.C. 446, 450, 166 S.E.2d 817, 818 (1969) (finding remand is appropriate when the appellate court determines the Commission failed to make an essential finding of fact or when the appellate court concludes the Commission's findings are so indefinite or general as to afford no reasonable basis for the appellate court to determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to the findings); *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 129, 127 S.E.2d 288, 295 (1962) (holding an issue that impacts the "ultimate liability in the case" is "one upon which the Commission is required to make an express finding of fact" and "failure to do so requires that the case be remanded to the Commission for such finding" (superseded by

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[3] *See e.g.*, *Houston v. Deloach & Deloach*, 378 S.C. 543, 553, 663 S.E.2d 85, 90 (Ct. App. 2008) (applying substantial evidence standard of review to determination of whether claimant's injury arises out of and is in the course and scope of employment under Section 42-1-160).

[4] *Landry v. Carolinas Healthcare Sys.*, 396 S.C. 149, 156, 719 S.E.2d 288, 292 (Ct. App. 2011).

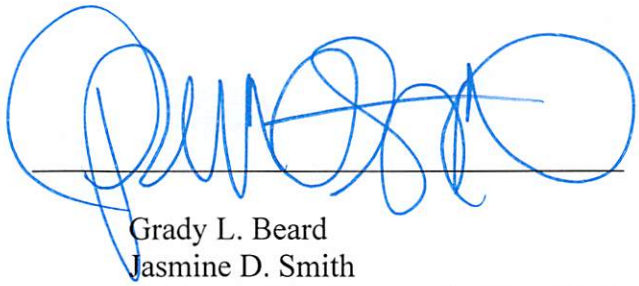
statute)); *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (remanding for the administrative body to make detailed factual findings before the appellate court could determine whether the decision was erroneous, stating "[i]t is impossible for an appellate court to review the order for error, since the reasons underlying the decision are left to speculation"); *Baldwin v. James River Corp.*, 304 S.C. 485, 487, 405 S.E.2d 421, 422-23 (Ct. App. 1991) (remanding the case to the Commission because it held the Commission made insufficient findings of fact so as to permit appellate review of the Commission's decision); *Pack v. State Dep't of Transp.*, 381 S.C. 526, 538, 673 S.E.2d 461, 468 (Ct. App. 2009) (remanding to the Commission to make further findings because it determined the Commission's findings were not clear and therefore the Court could not properly evaluate the decision of the Commission); *Canteen v. McLeod Reg'l Med. Ctr.*, 400 S.C. 551, 558, 735 S.E.2d 246, 250 (Ct. App. 2012) (holding circuit court improperly weighed the evidence and made its own factual determinations, remanding to the Commission for specific findings and conclusions).

CONCLUSION

For the reasons set forth above and in Respondents' Petition for Rehearing, Respondents' Petition for Rehearing should be granted, and the Court should withdraw the April 27, 2022, Opinion and issue a substituted Opinion affirming the Full Commission's Order. In the alternative, this Court should grant this Petition for Rehearing, withdraw its Opinion, and issue a substituted Opinion remanding to the Appellate Panel of the Full Commission to make its 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 to follow]

Respectfully submitted,



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June 3, 2022

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PROOF OF SERVICE

I certify that I have caused Respondents' Reply in Support of 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 e-mail; and Ms. Amy Bracy, Judicial Director, South Carolina Worker' Compensation Commission, 1333 Main Street, Columbia, SC 29201 (via U.S. mail).

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

Cyndi Nygord

Cyndi Nygord, Paralegal

Columbia, South Carolina
June 3, 2022

From:	Cynthia D. Nygord
To:	stephen@samuelsreynolds.com
Cc:	Grady Beard; Jasmine D. Smith; Emily S. Andrews; Cindy Lamb; Cynthia D. Nygord
Subject:	2019-000556 - Brailey v. Michelin, et al - Respondents" Reply in Support of Petition for Rehearing [IMAN-CLIENTS.FID40326]
Date:	Friday, June 3, 2022 10:22:56 AM
Attachments:	image001.png 2022-6-3 - Respondents" Reply in Support of Petition for Rehearing.pdf 2022-6-3 - Proof of Service - Respondents" Reply in Support of Petition for Rehearing.pdf

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Dear Mr. Samuels:

Attached herewith for service upon you, please find Respondents' Reply in Support of Respondents' Petition for Rehearing which is being filed this morning. Hard copy to follow via US Mail.

A copy of this email will be attached to Proof of Service being filed with the SC Court of Appeals.

With kindest regards,
Cyndi Nygord

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