

May it please the Court. Stephen Samuels for the Petitioner, Danny Crane in this appeal from the workers' compensation commission.

Danny Crane is legally deaf. We know this because three Pure Tone Audiograms and multiple medical doctors confirm he has severe hearing loss in his left ear and profound hearing loss in his right ear.

Despite this overwhelmingly one sided evidence, the Commission found as a fact that Mr. Crane's

1. Hearing had returned to normal on March 31, 2014;
2. Not credible.

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Additional medical treatment – Audiogram and Cassone

“Sit and Squirm”

should be considered disabled (if not at MMI)

Running award of TTD

Henry v. Commissioner of Soc. Sec., 802 F.3d 1264 (11th Cir. 2015) (“The ALJ inappropriately assessed the credibility of [physician’s] opinion based on a negative inference from [claimant’s] failure to seek additional medical treatment and without regard for [claimant’s] ability to pay for such treatment.”).

“In ‘sit and squirm’ jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied.” Wilson v. Heckler, 734 F.2d 513 (11<sup>th</sup> Cir. 1984).

This approach “will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel.” Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant “over-exaggerated his complaint about sitting for extended periods” was “unreasonable under the law and this Court does not accept them.”).

A hearing officer “may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional.” Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). Cf., Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner’s own medical opinion is not substantial evidence and must be reversed).

### **How was sit and squirm applied here?**

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(5) **The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.** The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

## RECORD REFERENCES

### ORDER:

PAGE	FOF
22	Exclude Dr. Bettle – find Bettle report “wholly unnecessary” as “Dr. Rogers’ report is even less reliable than Dr. Bettle’s report . . .”
34	“The APA submissions in this case contrast sharply wiht Claimant’s testimony. . . . Nor was any diagnostic study or Claimant’s head ordered or recommended.” CT scan 97 & 125
35-36	Notwithstanding Claimant’s complaints, his hearing was documented as “normal.” I give this report great weight.  Demonstrates fallacy of relying on EMR. Boilerplate says “normal hearing.” Real exam says “unable to hear folliwng air line explosion . . . some dizziness . . . right side headache.” R. 126-127
37	ER discharge – 3/26/14 – Conductive Hearing loss – WCC finds “appears to be a reference to Claimant’s earlier visit at the hospital on the date of the accident.” <b>R 95 versus 104</b>
42-43	Post Trial – “This additional evidence does not change my conclusions, it also confirms them. This evidence actually hurts Claimant’s case more than it helps.

- 43 1 Claimant's "display" and evasiveness at the hearing (among other problematic issues) make me seriously question whether or not there was an actual injury. **One cannot help but question that if Claimant had legitimate, causally-related hearing loss, he would have felt no need to "perform" at the hearing.** However, because there was an incident (captured by video) and for which Claimant went to the Emergency Room, I find that Claimant sustained an injury to his ears on the date of the accident. *What display? What evasiveness?*
- 44 3 Claimant, who has the burden of proof, did not offer any testimony as to whether or not he has worn or wears hearing protection while serving as a firefighter. *Insinuating he lost hearing working as a volunteer firefighter when there is no such evidence?*
- 44 6 This is a hearing that begged to be videotaped/audiotaped from the moment I introduced myself to Claimant prior to opening the record. *Decided on gut first impression.* It was very poor acting, and I therefore necessarily must find that Claimant is not credible. I also find it unconvincing that if Claimant could not hear anything, as he claims he could not after the incident, he would then continue to work to repair the tire changer, including telling other people to get him things.
- 46 8 Two most compelling records are 3/26/14 ER and 3/31/14 Dr. Ky record for the rib injury. *ER record for rib outweighs Dr. Rogers???* Ky record – I find that any injury Claimant sustained in the accident in issue resolved by March 31, 2014.
- 49 14 Because the video indeed shows an incident/accident, **my first inclination might have been to order the more objective test that Claimant, for a reason now abundantly clear to me, has avoided.** However, Claimant's audiogram testing shows inconsistencies, and Claimant – not Defendants – has the burden of proof.

outright denial of pre-existing conditions he had just admitted to Dr. Rogers just one month prior. *He says he doesn't know the technical terms.*

TR 236:

you had depression and bipolar disorder before this accident.

"I don't know the technical term."

Barden: Well, what did you have?

Some depression but the medicine I take is for depression, but it's for the keep the temper down."

Admits depression; denies anxiety & bipolar.

Admits migraines.



Test we want the court to adopt:

1. Credibility findings are reviewable under the substantial evidence standard.
2. Arbitrary and capricious credibility findings should be reversible.
3. Credibility findings based on nonmaterial evidence or on a mistaken view of the evidence should be reversible.
4. A credibility finding should not be used as a proxy to disregard competent evidence, nor should it be used to deny an otherwise meritorious claim.
5. Court should adopt the federal standard and reject findings based on sit and squirm jurisprudence.

Faithful to the APA and the substantial evidence standard of review; does not require the court to weigh findings of fact; and it promotes justice consistent with the purpose of the workers' compensation act.

#### Inconsistent Testing:

Compare it to a blood pressure test. You have your blood pressure tested 3 times over 3 months. The numbers will not be the same – therefore, they will be inconsistent. Yet even though the numbers are inconsistent, if they are all over a threshold, then they consistently show you have hypertension.

Even though there are some inconsistencies in the pure tone audiograms, they consistently show severe left and profound right hearing loss. And the ENT's who rely on these tests both opined Crane was deaf, both opined he was disabled, and both opined he needed ABR testing for cochlear implants.

This illustrates the problem. This is sit and squirm jurisprudence. The trier of fact has a lay opinion about what traits a particular condition should present.

#### Rogers credibility:

February 15, 2014 evaluation [by Dr. Koukos] showed that Claimant had **normal hearing**, a record which either Dr. Rogers was not given or did not review." Sort of true. We did not have it, so we did not send it to him.

PAGE	DATE	EVENT
91-95	2/19/14	Accident ER
108 109	2/20/14	Dr. Ansley. 1 <sup>st</sup> pure tone audiogram
126-127	2/25/14	CT scan Dr. Koukos
111 112 113	3/6/14	Dr. Ansley. 2 <sup>nd</sup> pure tone audiogram ABR referral
	3/17/14	Second CT scan
	3/26/14	Rib accident ER
114-116	3/31/14	Dr. Ky
134-140	5/19/14	Dr. Rogers IME
	6/26/14	HEARING
182-185	8/19/14	Dr. Cassone 3 <sup>rd</sup> pure tone audiogram
183	9/5/14	Ronald Lunn letter