

RECEIVED

OCT 01 2013

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION
South Carolina Workers' Compensation Commission

Full Commission Review
Derrick Williams, Commissioner

APPELLATE CASE NO.: 2012-206586

Patricia D. Johnson.....Petitioner,

v.

BMW Manufacturing Corporation, LLC.....Employer,

And

Hartford Insurance Company of the Midwest
and Specialty Risk Services, Inc.....Carrier, Respondents.

PETITIONER'S BRIEF

Albert V. Smith
Attorney for Petitioner
P.O. Box 5866
Spartanburg, SC 29304
Phone: (864) 585-8174
Fax: (864) 573-6348

Other Counsel of Record:
Vernon F. Dunbar
Attorney for Respondents
P. O. Box 1509
Greenville, SC 29602
Phone: (864) 552-4601
Fax: (864) 552-4620

TABLE OF CONTENTS

Table of Contents.....2

Table of Authorities.....3, 4

Questions Presented.....2

Statement of the Case.....5

Arguments

1. **Did the Court of Appeals err in affirming the Full Appellate Panel Order by finding that the Petitioner did not suffer a compensable accidental injury arising out of and in the course of her employment on August 19, 2008 or August 23, 2008 based on the evidence contained in the Record?.....8**

2. **Did the Court of Appeals err by affirming the Order of the Full Workers' Compensation Panel when it affirmed the Panel's Order because there is overwhelming evidence in the Record to support the Petitioner's claim that she suffered a compensable accidental injury that aggravated a pre-existing condition, or, in the alternative, that she suffered a repetitive motion injury that aggravated a preexisting condition?.....12**

3. **Did the Court of Appeals Err in affirming the Workers' Compensation Commission Full Appellate Panel's Order by not finding the Respondents were judicially estopped from denying the Petitioner's claim when they had accepted a repetitive motion injury to both upper extremities arising out of and in the course of her employment while working in the same job position?.....16**

4. **Did the Court of Appeals err in affirming the Order of the Workers' Compensation Commission Full Appellate Panel Order in view of additional grounds to reverse as stated in the South Carolina Supreme Court Case of Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust, 2011 WL 58403416 (S.C. 2011) dealing with expert testimony required of Claimants and Defendants in repetitive trauma cases?.....19**

Conclusion.....21

TABLE OF AUTHORITIES

Case of Canavan, 432 Mass. 304, 733 N.E.2d 1042 (2000).....18

City of New York v. Black Garter, 179 Misc.2d 597, 685 N.Y.S.2d 606, 607-08 (N.Y.1999).....18

Cole v. State Highway Dept., 190 S.C. 142, 2 S.E.2d 490.....13, 15

Cromer v. Newberry Cotton Mills, 201 S.C. 349, 23 S.E.2d 19.....14, 16

Dickinson–Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25 (Md.1974).....10

Ducker v. Dunean Mills, 218 S.C. 465, 63 S.E.2d 314.....14, 16

Ferguson v. State Highway Dept., 197 S.C. 520, 15 S.E.2d 775.....13

Gordon v. E. I. Du Pont De Nemours & Co. 228 S.C. 67, 76, 88 S.E.2d 844 848 (S.C.1955).....14, 16

Green v. City of Bennettsville, 197 S.C. 313, 15 S.E.2d 334.....15

Hawkins v. Bruno Yacht Sales, Inc. 342 S.C. 352, 366, 536 S.E.2d 698, 705 (S.C.App.,2000).....17

Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).....17

Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009).....10

Lark v. Bi–Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).....10

McDaniels v. Gen. Ins. Co. of Am., 1 Cal.App.2d 454, 36 P.2d 829, 832 (1934).....17

Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust 2011 WL 5840316, 3 (S.C.) (S.C.,2011).....17, 20

Murphy v. Corning, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct.App.2011).....19

<i>Pierre v. Seaside Farms, Inc.</i> , 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).....	10
<i>Quinn v. Sharon Corp.</i> , 540 S.E.2d 474 S.C.App., 2000.....	18

STATUTES

South Carolina Code 1976 § 42-1-160.....	19
South Carolina Code 1976 §1-23-330.....	19
South Carolilna Code 1976 § 42-1-172.....	19

OTHER AUTHORITIES

28 Am.Jur.2d Estoppel and Waiver § 74.....	17
<i>Black's Law Dictionary</i> 848 (6th ed.1990.....	17
58 <i>Am.Jur. Workmen's Compensation</i> , Section 278, p. 775.....	13
31 C.J.S. <i>Estoppel and Waiver</i> § 139 (1996).....	18

STATEMENT OF THE CASE

The Petitioner worked as a long-term employee at BMW in Spartanburg County. She worked at the plant since 2000. She worked as a line employee that required her to do repetitive bending, stooping, use tools with her hands and arms for up to ten hour per shifts. Her work environment description further explained her job duties.

The Petitioner suffered back problems that required two surgical procedures while working this same job in 2005. She did not claim the condition that brought about the need for the surgical procedures in 2005 as job related, but the history she gave, she could have.¹ She returned to work on the same job that required her to do the same type of repetitive motions.

In March of 2008, she started to complain of injures to both of her upper extremities. The Respondents accepted these injures as compensable under the Workers

¹ Q. Okay, I believe you had to go out of work in 2005, is that correct? .

A. Yes.

Q. What happened?

A. I was getting some mirror cap out of --it was a rack that the mirror cap out of-- it was a rack that the mirror caps came in. Is the Commissioner right here? Okay. Mirror caps came in at that time was very, very had to turn around.

And at first they would have the forklift people to turn them around for us when they come-- When they bring the parts out. Then they stopped doing that and had us to do it, the people -- the folks that was working on the job. And I was turning it around that day.

And most of the times they pretty much be hard to turn around. And I remember back that I did have some that was very hard to turn around. And one I had in particular that was real hard to turn around, and I didn't have anybody to turn it around. So I asked the forklift driver to turn it around. And they said we had to do it ourselves. So I had to turn it around. And it was real hard.

Well, that day-- that morning when I went home I started feeling pain in my back-- you know, lower back, and it started going down the back of my legs. I didn't know what it was. And it just got worse and worse. That is when I injured my back on the job. (R. p. 69, line 9-p.70. line 13).

Compensation Act. These injuries were the result of repetitive trauma.² At the same time, she complained of a specific back injury.³ She, also complained of back problems that resulted from her having to bend on a repetitive basis.

Even though the Petitioner gave a specific date of injury for the back, alternatively she continued to experience increased pain with work activity. In fact, her treating physician, Dr. Phillip LaTourette, was concerned early on about returning her to work. He noted his concerns again on October 12, 2005.⁴ The Petitioner began to complain about how the work requirements were affecting the back pain.⁵ She did note that her back pain improved when she did not work.⁶ Ultimately, Dr. LaTourette concluded the Petitioner was disabled.⁷ This is the first time that Dr. LaTourette

² Defendants are providing medical treatment to the claimant for her upper extremity injuries on the basis of an accidental injury date of March 14, 2008, which date is reflected on the Commission forms. (R.pp.23-24 Consent Order). The do, in fact, admit compensability of both upper extremities due to repetitive trauma...(R. p. 61, Line 9)

³ Patricia D. Johnson...department B4C...Date of injury: 8-19-08....Time of injury: 4th Quarter....Fully describe your injury: Back Pain....Did the incident occur from one specific incident? Bending to low...If yes, describe the incident: Putting screws in the bottom of the door. (R. p. 21-Incident Report).

⁴ The patient is motivated to return to work and understands she could reinjure herself, causing a significant increase in her back pain. However, I will allow her to work on a limited duty basis at this time....However, I think she will have significant difficulty with work because of her severe degenerative changes at L4 and L5, as well as scar tissue in that area from her previous surgery. (R. p. 266).

⁵ Pt. still working full time. She will be changing jobs within BMW. Pt. is not sure what she will have to do. She is afraid of having a job with bending since she reports bending aggravates her pain. (Tr.p.290). Pt reports bending at work aggravates pain. (R. p. 342).

⁶ Pt. reports pain that flared up in back is better now but she has not been working. (R. p. 346).

⁷ I also believe there is some depression due to her pain and disability. She presently is not allowed to work at BMW because she is on narcotics and I don't see any way of her being able to return to work.I think she is disabled at this time. (R. p. 353).

concluded that the Petitioner was disabled. This opinion was given by him on January 15, 2009. He knew the Petitioner was working at BMW since her surgeries. The Petitioner complained of increased pain in her back. She related the back pain to activities at work. She provided this information to the Employer's doctor on a number of occasions. Finally, on August 19 or 20, 2008, she reported a specific back injury to the Employer.

The Single Commissioner adopted into an Order a finding the upper extremities were compensable due to repetitive trauma. He then heard the allegations concerning the back and denied the claim of the Petitioner both as to a specific injury and an aggravation of a preexisting injury to the back.

The case was appealed to the Full Workers' Compensation Appellate Panel who upheld the Order of the Single Commissioner.

The matter was then appealed to the Court of Appeals for the State of South Carolina, and it affirmed in an unpublished opinion the Appellate Panel's Order.

A Rehearing Motion was filed by the Petitioner, and it was denied by Order of the Court of Appeals on December 19, 2011.

Petitioner was granted certiorari by the Supreme Court on July 25, 2013.

ARGUMENT

1. Did the Court of Appeals err in affirming the Full Appellate Panel Order by finding that the Petitioner did not suffer a compensable accidental injury arising out of and in the course of her employment on August 19, 2008 or August 23, 2008 based on the evidence contained in the Record?

There is substantial evidence in the Record to support the Petitioner's position that she suffered a compensable injury on August 19, 2008. She filled out an incident report on August 25, 2008 whereby she gave a detailed description of the injury.⁸ The Petitioner timely gave details of her injury to the proper officials at the Respondent Employer's plant. It is interesting to note that the Petitioner had a great work ethic that would compel her to return to a job that more likely than not would injure her back. Dr. Phillip LaTourette cautioned the Petitioner about her return to work.⁹ The single injury she described and the way she states she got hurt fits right in with her job description.¹⁰

⁸ Patricia D. Johnson...department B4C...Date of injury: 8-19-08....Time of injury: 4th Quarter....Fully describe your injury: Back Pain....Did the incident occur from one specific incident? Bending to low...If yes, describe the incident: Putting screws in the bottom of the door. (R. p. 21-Incident Report).

⁹ I had a long discussion withj the patient and her husband about work and disability and her significant degenerative changes at L4-5 and L5-S1.She does work on an assembly line and there is a question about whether or not she can tolerate the increase activity. (R. p. 262).

¹⁰ JOB DESCRIPTION: Assemble automobiles, at assigned work station on a moving assemble line, performing any combination of the following repetitive tasks according to specifications and using had tools, power tools, welding equipment, and production fixtures and components to form body subassemblies. Position and fastens together body subasssemblies, such as side frames, underbodies, doors, hoods, and trunk lids....

The Petitioner, testifying before the Single Commissioner, gave details of her work requirements.¹¹ The work requirements proscribed by the job description and the

PHYSICAL REQUIREMENTS: Highly repetitive, rapid, machine pace activity to manually assemble vehicles. There is little automation of the assembly process.(R. p. 387).

¹¹ Q. And when you first went there, what was your job description, what were your duties?

A. It was physical.

Q. Were you required to stand on your feet?

A. Yes.

Q. A full eight hour day?

A. Uh-huh.

Q. Did you work an eight hour day?

A. When I first went there, yes, I think it was eight hours.

Q. And did it require any lifting above your head?

A. Yes.

Q. Okay. What kind of items or materials would you lift above your head?

A. Well, we had to pull our racks from the —to get our parts out of that was above the head.

Q. Okay. You did that on a constant basis?

A. Yes.

Q. Okay. Did you have to do any bending?

A. Yes.

Q. What kind of bending would you do?

A. The same. Putting screws in the doors—yeah—under the doors and just—trying to think of jobs that was down low. We also had to pull racks out down low, too.

Q. Okay. Now, would you ever bend down on your knees to pull those racks out or would you be standing at all times?

A. Be standing.

Q. At all times?

A. Uh-huh.

Q. Would you have to bend below your knees at times?

A. Yes.

Q. As part of your job?

A. Yes.

Q. Would that be on a regular--?

A. Regular basis.

Q. Did you have to do any stooping?

A. Yes.

Q. And what would you have to stoop for?

A. Sometimes we would stoop to do that?

Q. Okay?

body movements required of the Petitioner proved the forecast by Dr. LaTourette to be true. The Petitioner reinjured her back in a single accident arising out of and in the course of her employment. There is substantial evidence in the Record to support the Petitioner's claim for workers' compensation benefits. In workers' compensation cases, the Commission is the ultimate fact finder. *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009). An appellate court must affirm the findings made by the Commission if they are supported by substantial evidence. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* The substantial evidence test "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency *309 judgment;" and a judgment upon which reasonable men might differ will not be set aside. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (quoting **753 *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25

A. Yeah.

Q. All right?

A. Just according to how fast the line was going or whatever, you know, we had time--

Q. Was it a job--excuse me. I'm sorry.

A. If you had time.

Q. Was it a job that required fast hand, eye, and body coordination?

A. Yes.

Q. Okay. Were you on a production limit? Did you have to do this for a certain number of vehicles a day?

A. Yes.

Q. And how many vehicles would you have to do beginning in 2000 a day or how many doors would you do?

A. I can't remember how many cars we were running at that time.

Q. And did you continue on that job?

A. Uh-huh.

Q. Were you on that job in 2008?

A. Yes. (R. p. 66. line 10-p. 69, line. 8).

(Md.1974)). *Holmes v. National Service Industries, Inc.* 395 S.C. 305, 308-309, 717 S.E.2d 751, 752 - 753 (S.C.,2011).

John Huss was a section leader in the area of the plant where the Petitioner was working at the time she alleges she hurt her back. Mr. Huss testified before the Single Commissioner, and he admitted that there was repetitive motions required in certain areas where the Petitioner worked.¹² The Respondents acknowledge through the testimony of Mr. Huss that the Petitioner was working on the main line. This is the line that definitely required the kind of body movement that would aggravate the Petitioner's back.¹³ The Record is void of any knowledge by Mr. Huss of the accident suffered by the Petitioner. In fact, Mr. Huss had not seen the accident report.¹⁴

¹² A. The main line is definitely going to be repetitive. The one thing we ask for at BMW is do the exact same process on every car. (R. p. 125, line-17-line.19)

¹³ Q. Okay. Now, I understand—it's my understanding she testified that she hurt her back on the main line, but in terms of installing doors on the main line, what equipment is there – what equipment is utilized or is involved in making sure that the door is constructed or put together?

A. Well, as far as putting a door panel on a car, you open a casket is what we call them. It's over. They are on a lever. You slide them out. You pick the panel up. Then you take the panel to the door itself. You make sure all of the connections are made. You – most of them have an impact glove which they use. And then basically they hit the panels and knock the clips in. And the clip them on the bottom. As far as doing any screws or anything on that process, that is not part of that process.

Q. Okay, And in terms of bending on the main line, is there bending involved? And, if so, how much.

A. There is bending involved and – but on those processes when we have the processes up we raise – we actually have the processes are to raise the carriers that the doors are actually on. At the low end it's about 20-inches when it's all the way down. At the high end it's about 44 inches with -- at the bottom of the door when it's all the way up. (R. p. 127, line 5-p.128, line7).

¹⁴ Q. Have you seen the incident report?

A. I have not seen an incident report. (R. p. 32, line.14-line 16)

Again, the Petitioner maintains there is substantial evidence in the Record to support the Petitioner's position that the Court of Appeals decision in this matter should be reversed. The Petitioner was never given the benefit of the workers' compensation statute that requires a liberal construction of the act in favor of coverage.

2. Did the Court of Appeals err by affirming the Order of the Full Workers' Compensation Panel when it affirmed the Panel's Order because there is overwhelming evidence in the Record to support the Petitioner's claim that she suffered a compensable accidental injury that aggravated a preexisting condition, or, in the alternative, that she suffered a repetitive motion injury that aggravated a preexisting condition?

The Petitioner complained of increased back pain with certain of her job requirements. The Petitioner started working for the employer in 2000. The Record contains statements from Dr. Cavert K. McCorkle¹⁵ and Dr. Richard B. Bannon¹⁶ who gave medical opinions with a reasonable degree of medical certainty that the back injury suffered by the Petitioner was caused by a specific injury, or, in the alternative, an aggravation of a preexisting condition by repetitive motions performed by the Petitioner

¹⁵ It is my opinion that repetitive pushing, pulling, bending, lifting, walking long distances and standing for a long period of time on the job would most probably with a reasonable degree of medical certainty aggravate any preexisting condition she would have had with her back, left leg and foot. That is to say that this type of activity would aggravate and/or make worse low back pain. (R. p. 194)

¹⁶ Ms. Johnson is a patient under my care. She has had back pain for a number of years and in 2005 she had surgery done by Dr. McCorkle for a disc problem. For the past year or two the patient has had increased pain in the low back area as well as in the neck and shoulder. She especially has pain in the left leg and foot. The pain has been exacerbated by the multiple body positions required to do her job. She has to stoop and bend and get into a number of awkward positions. I have reviewed her records including her CT and myelogram reports, and it is my opinion that even though she had problems in the past and had surgery on her back, her work activities would definitely aggravate these physical conditions. (R. p. 519).

on her job. This was based on a history given to these experts as they testified at their depositions.

The same history was given by the Petitioner to the plant physician, Dr. Ken Hommel.¹⁷ On September 5, 2008, Dr. Hommel's further reveals the Petitioner's attempts to get medical help for her back and have it accepted as a compensable work related injury.¹⁸ There is no such comprehensive history given to the doctors about the upper extremities and the injuries associated with them, but these injuries were accepted.

Therefore, the Petitioner argues that the back injury is compensable and the unpublished opinion of the Court of Appeals should be reversed. The rule relating to the compensability of preexisting conditions being aggravated by new injuries is well established that where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable. *Cole v. State Highway Dept.*, 190 S.C. 142, 2 S.E.2d 490; *Green v. City of Bennettsville*, 197 S.C. 313, 15 S.E.2d 334; *Ferguson v. State Highway Dept.*, 197 S.C. 520, 15 S.E.2d 775. The same principle is equally applicable where the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is

¹⁷ "...that she injured her low back for a second time approximately two weeks ago. She reports that she was bent forward installing screws on the door panel when she noticed the back pain. She reports the pain became worse and she went to her family doctor to evaluate her back. She reports that he did an MRI of her low back....She has also had epidural injections. She reports that she recently had onset of increased low back pain while working." This was from the doctor's note of August 25, 2008. (R. p. 535)

¹⁸ This associate works on the line assembly production job. She recently reported that her back started hurting more at work from bending forward to install bolts and filed a work comp claim. (R. p. 535).

proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier one. 58 *Am.Jur. Workmen's Compensation*, Section 278, p. 775; *Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 23 S.E.2d 19; *Ducker v. Dunean Mills*, 218 S.C. 465, 63 S.E.2d 314. *Gordon v. E. I. Du Pont De Nemours & Co.* 228 S.C. 67, 76, 88 S.E.2d 844, 848 (S.C.1955).

Again, there is substantial evidence in the Record to support this Court reversing the Court of Appeals decision in this matter. Did the Court of Appeals err by affirming the Order of the Full Workers' Compensation Panel when it affirmed the Panel's Order because there is overwhelming evidence in the Record to support the Petitioner's claim that she suffered a compensable accidental injury that aggravated a preexisting condition, or, in the alternative, that she suffered a repetitive motion injury that aggravated a preexisting condition?

The Petitioner provided to the Employer more history about her back hurting because of her job requirements than she gave of her arms. The Petitioner started working for the employer in 2000. The Record contains statements from Dr. Cavert K. McCorkle¹⁹ and Dr. Richard B. Bannon²⁰ who gave medical opinions with a reasonable

¹⁹ It is my opinion that repetitive pushing, pulling, bending, lifting, walking long distances and standing for a long period of time on the job would most probably with a reasonable degree of medical certainty aggravate any preexisting condition she would have had with her back, left leg and foot. That is to say that this type of activity would aggravate and/or make worse low back pain. (R. p. 194)

²⁰ Ms. Johnson is a patient under my care. She has had back pain for a number of years and in 2005 she had surgery done by Dr. McCorkle for a disc problem. For the past year or two the patient has had increased pain in the low back area as well as in the neck and shoulder. She especially has pain in the left leg and foot. The pain has been exacerbated by the multiple body positions required to do her job. She has to stoop and bend and get

degree of medical certainty that the back injury suffered by the Petitioner was caused by a specific injury, or, in the alternative, an aggravation of a preexisting condition by repetitive motions performed by the Petitioner on her job. This was based on a history given to these experts as they testified at their depositions.

The same history was given by the Petitioner to the plant physician, Dr. Ken Hommel.²¹ On September 5, 2008, Dr. Hommel's further reveals the Petitioner's attempts to get medical help for her back and have it accepted as a compensable work related injury.²² There is no such comprehensive history given to the doctors about the upper extremities and the injuries associated with them, but these injuries were accepted.

Therefore, the Petitioner argues that the back injury is compensable and the unpublished opinion of the Court of Appeals should be reversed. The rule relating to the compensability preexisting conditions being aggravated by new injuries is well established that where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is

into a number of awkward positions. I have reviewed her records including her CT and myelogram reports, and it is my opinion that even though she had problems in the past and had surgery on her back , her work actdivities would definitely aggravate these physical conditions. (R. p. 519).

²¹ "...that she injured her low back for a second time approximately two weeks ago. She reports that she was bent forward installing screws on the door panel when she noticed the back pain. She reports the pain became worse and she went to her family doctor to evaluate her back. She reports that he did an MRI of her low back....She has also had epidural injections. She reports that she recently had onset of increased low back pain while working." This was from the doctor's note of August 25, 2008. (R. p. 535)

²² This associate works on the line assembly production job. She recently reported that her back started hurting more at work from bending forward to install bolts and filed a work comp claim. (R. p. 535).

compensable. *Cole, id.*; *Green v. City of Bennettsville*, 197 S.C. 313, 15 S.E.2d 334; *Ferguson v. State Highway Dept.*, 197 S.C. 520, 15 S.E.2d 775. The same principle is equally applicable where the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier one. 58 *Am.Jur. Workmen's Compensation*, Section 278, p. 775; *Cromer, Id.*, 201 S.C. 349, 23 S.E.2d 19; *Ducker, id.*.*Gordon, id.*, 848.

3. Did the Court of Appeals Err in affirming the Workers' Compensation Commission Full Appellate Panel's Order by not finding the Respondents were judicially estopped from denying the Petitioner's claim when they had accepted a repetitive motion injury to both upper extremities arising out of and in the course of her employment while working in the same job position?

The Court of Appeals and the Full Panel of the Workers' Compensation Commission did not address the issue of judicial estoppel. The Petitioner had what appeared to be two healthy upper extremities going into her work experience with the Employer subsequent to her surgeries in 2005. The Respondents, now admit that these two extremities were damaged through repetitive trauma. In the opinion of the Petitioner, it would be highly unlikely to injure two upper extremities by repetitive motion and not cause some injury to a back either through repetitive motion or a single on the job accidental injury. The "doctrine of judicial estoppel" precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. *Quinn v. Sharon Corp.*, 540 S.E.2d 474 S.C.App., 2000.

The testimony of Dr. McCorkle and Dr. Bannon, supra, whereby they give expert opinions that repetitive motion requirements on the Petitioner's job would, with a reasonable degree of medical certainty, cause injury to or aggravate a preexisting back

problem. The expert opinion offered by Dr. LaTourette is of no consequence in that he did not offer an opinion on causation. He states that he did not have an opinion on the issue, but would say that the Petitioner was now totally disabled.²³ Dr. LaTourette had never said the Petitioner was totally disabled before that note. Take this with his cautious conversation he had with the Petitioner when she expressed a desire to return to work.

The Respondents accepted as compensable bilateral injury to the upper extremities of the Petitioner due to repetitive trauma, but denied repetitive trauma injures to the back that aggravated a preexisting condition. Judicial estoppel operates to prohibit a party to a lawsuit “from adopting a position in conflict with one earlier taken in the same or related litigation.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). Its purpose is not to protect the parties from allegedly dishonest conduct by adversaries; rather, judicial estoppel acts to ensure the integrity of the judicial process. *Id.* (citing 31 C.J.S. Estoppel & Waiver § 139 (1996)). The doctrine, therefore, sustains the truth-seeking function of the courts. *Id.* at 252, 489 S.E.2d at 477. *Hawkins v. Bruno Yacht Sales, Inc.* 342 S.C. 352, 366, 536 S.E.2d 698, 705 (S.C.App.,2000). A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot “blow both hot and cold.” *McDaniels v. Gen. Ins. Co. of Am.*, 1 Cal.App.2d 454, 36 P.2d 829, 832 (1934). Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings. *Black's Law Dictionary* 848 (6th ed.1990) (citation omitted); *28 Am.Jur.2d Estoppel and Waiver* § 74 (“The fundamental

²³ I am prepared to declare that Ms. Johnson is fully disabled. I am not prepared to declare her pain and disability is due to a work related injury. (R. p. 363).

concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein.” (footnote omitted)); *see also City of New York v. Black Garter*, 179 Misc.2d 597, 685 N.Y.S.2d 606, 607-08 (N.Y.1999) (“Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding ... from assuming a contrary position in another action simply because his or her interests have changed.... The doctrine rests upon the principle that a litigant ‘should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same **477 fact should be found otherwise.’ ” (citations omitted)).

The purpose of judicial estoppel is to prevent the manipulation of the judicial system by the litigants. *Case of Canavan*, 432 Mass. 304, 733 N.E.2d 1042 (2000); *see also* 31 C.J.S. *Estoppel and Waiver* § 139 (1996) (“The ... function of judicial estoppel is to protect the integrity of the judicial process ... rather than to protect litigants from allegedly improper conduct by their adversaries.” (footnote omitted)). A court invokes judicial estoppel to prevent a party from changing its position over the course of judicial proceedings. 31 C.J.S. *Estoppel and Waiver* § 139 (1996) (footnote omitted). The doctrine estops a party from playing “fast-and-loose” with the courts or to trifle with the proceedings. *Id.* (footnotes omitted). *Quinn v. Sharon Corp.* 343 S.C. 411, 416, 540 S.E.2d 474, 476 - 477 (S.C.App.,2000)

The argument was preserved, and the Court of Appeals decision should, therefore, be reversed.

4. Did the Court of Appeals err in affirming the Order of the Workers’ Compensation Commission Full Appellate Panel Order in view of additional grounds to reverse as stated in the South Carolina Supreme Court Case of Michau v. Georgetown County ex rel. South Carolina Counties Workers

Compensation Trust, 2011 WL 58403416 (S.C. 2011) dealing with expert testimony required of Claimants and Defendants in repetitive trauma cases?

The only opinions stated with a reasonable degree of medical certainty were those of Dr. Bannon and Dr. McCorkle. The medical notes of Dr. Phillip LaTourette were stated and entered into the record without a reasonable degree of medical certainty. In spite of that, the Court of Appeals, by adopting the Full Panel Order, relied heavily upon the testimony of Dr. LaTourette in reaching its decision. Dr. LaTourette's testimony is misplaced as a matter of fact and law. "(E) In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. For purposes of this subsection, "medically complex cases" means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic techniques." South Carolina Code 1976 § 42-1-160.

The Court of Appeals and the Full Panel positions regarding the kind of evidence needed to deny a repetitive trauma case is misplaced in view of a most recent South Carolina Supreme Court Decision, to wit: "In our view, section 1-23-330 establishes a minimum standard that applies generally, but not exclusively. On the other hand, section 42-1-172(C) expressly creates an additional heightened standard for repetitive trauma injury cases. Specifically, it requires "medical evidence," in the form of "expert opinion or testimony [to be] stated to a reasonable degree of medical certainty." S.C.Code Ann. § 42-1-172(C). Indeed, section 42-1-172(C) commands that the "[c]ompensability of a repetitive trauma injury must be determined *only* under the provisions of this statute." *Id.* (emphasis added); *see also* *Murphy v. Corning*, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct.App.2011) ("[T]he compensability of a repetitive trauma injury must be determined

by the Commission under the provisions of [section] 42-1-172 [and] the Commission erred by failing to address [section] 42-1-172. *Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust* 2011 WL 5840316, 3 (S.C.) (S.C.,2011). The Court of Appeals' ruling in this case is in direct conflict with this and other rulings of the South Carolina Supreme Court.

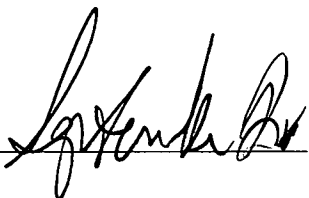
The South Carolina Supreme Court has found single accident and repetitive trauma cases compensable. This Court has now found that the defendants now have to use expert medical evidence to a reasonable degree of medical certainty to deny a repetitive motion claim if the claimant has offered expert testimony to the contrary. Our Supreme Court has said that judicial estoppel is the law in this state that controls when the same party takes opposing positions on like issues in a closely related case.

For these reasons, the Court of Appeals affirmation should be reversed in this instance.

CONCLUSION

For the reasons stated above, the Petitioner duly requests that this Court grant her the relief that she is requesting. The Petitioner had a previous injury to her back. She came back to work at the Respondent Employer place of business doing the same job that she was doing prior to her surgery in 2005. The Petitioner complained of pain to her back when she did the job, and, as a result of doing the job, she developed bilateral problems with her upper extremities which the Respondents accepted as compensable. However, they refused to accept an aggravation of a prior injury or a specific injury to her back when the medical evidence clearly shows her job was the cause of all of her problems.

Therefore, the Petitioner strongly urges this Court to find her injury to her back compensable based on the Record as a whole.

Dated: , 2013

Signed: 

This is to certify that this brief complies with South Carolina Appellate Court Rule 211(b).

Signed: 
Albert V. Smith