THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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S.C. Supreme Court

Appellate Case No. 2012-206586

Patricia D. Johnson, Employee, ... Petitioner,

v.

BMW Manufacturing Corporation, LLC, Employer,
Hartford Insurance Company of the Midwest and
Specialty Risk Services, Inc., Carrier, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DOES SUBSTANTIAL EVIDENCE SUPPORT THE CONCLUSION BY THE WORKERS' COMPENSATION COMMISSION AND THE COURT OF APPEALS THAT APPELLANT DID NOT SUSTAIN A COMPENSABLE ACCIDENTAL INJURY?

II. DID APPELLANT FAIL TO RAISE THE DOCTRINE OF JUDICIAL ESTOPPEL IN HER ARGUMENT BEFORE THE FULL COMMISSION; THEREBY RENDERING THAT ARGUMENT WAIVED AND NOT PRESERVED FOR APPELLATE REVIEW?

III. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION IN ACCEPTING THE REPORT OF DR. PHILLIP LATOURETTE AS EVIDENCE AND RELYING UPON SUCH IN FACTUALLY FINDING THAT APPELLANT HAD NOT SUFFERED A COMPENSABLE WORK RELATED INJURY?

IV. DOES LAY EVIDENCE SUPPORT A COMPENSABILITY FINDING OF APPELLANT'S ALLEGED LOW CLAIM?

STATEMENT OF THE CASE

Appellant Patricia D. Johnson ("Johnson") initiated these proceedings with the filing of her Form 50, Request for Hearing, on January 20, 2009, wherein she alleged work-related injury to her back and upper extremity, aggravation of a pre-existing condition, and, or in the alternative, repetitive trauma injury. (R. p. 12) Respondents BMW Manufacturing Corporation, LLC ("Employer") and Specialty Risk Services, Inc. ("Carrier") (collectively "Respondents") filed a timely Form 51, Employer's Answer, in which they denied the claim and noted a pending investigation into Johnson's allegations. (R. p. 18) Johnson filed a second Form 50, Request for Hearing, dated March 19, 2009. (R. p. 5) In that pleading, Johnson alleged entitlement to workers' compensation benefits for alleged injury to her right shoulder, right elbow, left shoulder, and left elbow resulting from repetitive trauma and, or in the alternative, aggravation of a pre-existing condition to the left shoulder and elbow caused by repetitive trauma. (*Id.*) Respondents filed a time Form 50, Employers Answer, on April 17, 2009, in which they admitted bilateral shoulder injury limited to March 24, 2008, and denied the elbow injury. (R. p. 8)

In his August 26, 2009 Decision and Order, the single commissioner concluded Johnson failed to prove she sustained a work-related injury by accident on August 23, 2008 or at any other time in 2008, that she failed to prove injury by repetitive trauma, and that she failed to prove aggravation of a pre-existing condition. (R. pp. 13-14, ¶ 1) Johnson appealed the single commissioner's Decision and Order, and the Appellate Panel of the Full Commission unanimously and fully affirmed the single commissioner in its Decision and Order dated April 27, 2010. (R. pp. 26-54)

Johnson appealed the Full Commission Decision and Order denying benefits and dismissing her claim to the South Carolina Court of Appeals. Following argument on October 5, 2011, the court affirmed in an unpublished, *per curiam* opinion filed October 21, 2011. *See Johnson v. BMW Manufacturing Corporation, LLC*, Op. No. 2011-UP-468 (S.C.Ct.App. filed Oct. 21, 2011)[1] Specifically, the court found "no error of law in the Commission's decision to deny Johnson's claim [and its] decision to be supported by substantial evidence of record. . . ." Thereafter, Johnson sought rehearing, which the court of appeals denied via order filed December 19, 2011. This Court granted *certiorari* via Order filed July 25, 2013.

[1] The unpublished order of the court of appeals is set forth in its entirety in the unnumbered Appendix filed by Johnson on or about September 24, 2013.

STATEMENT OF THE FACTS

As of the hearing before the single commissioner, Johnson is a fifty-eight year old high school graduate. (R. p. 63, line 21 - p. 64, line 10) Her work-life includes experience filling batteries, operating a commercial sewing machine, assembly line work, and manufacturing bathroom fixtures. (R. p. 65, line 5 - p. 66, line 6) She went to work for Employer in 2000 as an assembly line employee working on door liners. (R. p. 66, lines 6-12) Johnson injured her lumbar spine and low back at work as a consequence of retrieving mirror caps. (R. p. 69, lines 9-24) Johnson sought medical treatment for her injury but never reported the 2005 incident as a work related accident. (R. p. 70, line 21 - p. 71, line 13)

Following her 2005 back injury, Johnson began treating with Dr. Richard Bannon, who referred her to Dr. Cavert McCorkle. (R. p. 70, line 24 - p. 71, line 5) Dr. McCorkle performed surgery on Johnson's low back in May 2005. Johnson never reported the occurrence of back pain as a work related accident to BMW or to any of her medical providers. Instead, Johnson filed all medical charges associated with her 2005 back condition on her group health insurance. (R. pp. 71-72; p. 94, lines 21-25; pp. 95-96) Johnson was unable to work as a consequence of her back surgery for approximately six months. (R. p. 72, lines 15-22)

Johnson continued to experience pain following her back surgery, and Dr. McCorkle referred her to Dr. Phillip C. Latourette of The Carolina Center for Advanced Management of Pain. (R. p. 74; lines 6-25; pp. 96-97; p. 274) Dr. Latourette has continuously treated Johnson from 2005 to the present. (R. p. 75; pp. 257-374) Dr. Latourette initially treated Johnson's chronic pain condition with medications such as

Avinza and Lortab. (R. p. 96, lines 20-25; p. 97; p. 274) When those medications failed to alleviate Johnson's chronic pain condition, Dr. Latourette prescribed Percocet, a stronger medication. (R. p. 97, lines 11-20; p. 278) Despite experiencing continuous chronic and radicular pain from 2005 until August 23, 2008, Johnson was able to work four days a week, ten hours a day on a regular basis. (R. p. 76, lines 10-25; p. 77, lines 1-4)

Johnson testified she re-injured her back on August 23, 2008, while she was working in the re-work[2] area. (R. p. 77, line 8 - p. 78, line 8) Johnson's alleged injury occurred as she was bending to install screws in the bottom of a door. (*Id.*) She did not notify her supervisor of the occurrence as a work related accident. (R. p. 79, lines 5-9) Johnson also testified the pain she was experiencing in August 2008 was different from pain she had previously experienced as a result of her back injury in 2005. (R. p. 80, lines 21-25)

Johnson reported to BMW's Industrial Health Services for medical treatment complaining of back pain. (R. p. 81, lines 1-23) While receiving medical treatment at Industrial Health Services ("IHS"), Johnson disclosed she was taking various narcotic pain medications for chronic back pain, including Lortab, Oxycodone, and Avensa. (R. p. 83, lines 1-3; p. 85, lines 4-8; p. 535) Johnson was not permitted to work on the assembly line while consuming potent narcotic medications because of the hazard such posed to Appellant's safety and the safety of her co-workers. (R. p. 85, lines 3-8)

[2] John Huss, section leader on the door line at the Cost Center 1820, explained that the re-work position consists of inspecting doors to make sure seals are properly aligned and making small adjustments as necessary. (R. p. 121, line 25 - p. 122, line 8; p. 123, lines 1-18)

Johnson contends that subsequent to her surgery in 2005, officials at BMW were aware she was consuming narcotic medications for her chronic back condition and that they never restricted her ability to report for work. (R. p. 83, lines 9-14) However, Johnson also admitted that at the time of her alleged 2008 injury, she was taking stronger narcotic medications for her chronic back condition, namely Morphine and Oxycodone. (R. p. 97, line 11 - p. 98, line 3)

Although Johnson testified the alleged August 23, 2008 work related accident resulted in different and increased symptoms of back and leg pain, the medical records contradict her account. For example, Johnson continuously treated with Dr. Phillip Latourette from August 10, 2005 through February 5, 2009, for the same complaints of continuous chronic low back pain, with pain radiating into the legs and feet. She treats with Dr. Latourette approximately one time per month, during which Dr. Latourette routinely inquires about her pain and the location of the pain. (R. p. 98-100) Johnson and her husband discussed the degenerative disc disease condition and permanent disability, as well as applying for Social Security disability benefits, with Dr. LaTourette on September 14, 2005. (R. p. 102, lines 14-25; p. 103, lines 1-17; p. 262)

Johnson testified that both non-occupational and occupational related activities exacerbated her back pain during the years prior to her alleged incident in August 2008. (R. p. 118, lines 3-19; p. 119, lines 2-16) She admitted that even when she was not engaged in any occupational activities, she experienced severe chronic back pain. (R. p. 104, lines 8-25, pp. 105-106; pp. 262, 346, 350, 405) Even when consuming narcotic pain medications, Johnson reported that sitting and walking exacerbated her back and leg pain. (R. p. 101, line 21 - p. 102, line 10; p. 258) Nevertheless, after the alleged accident

of August 23, 2008, Johnson reported to physicians at IHS on September 4, 2008, that she was fine and was able to return to work. (R. p. 111, lines 2-21; pp. 502, 535)

John Huss ("Huss"), section leader on the door line and Johnson's supervisor, testified he is familiar with the assembly line where Johnson worked and the re-work department. Huss acknowledged that at the time of Johnson's alleged injury, she was working in the re-work department. (R. pp. 122-123) According to Huss, the re-work position consists primarily of inspection duties. In the re-work department, an employee is required to physically examine the doors to make certain the seals are lined up and to make small adjustments. (R. pp. 123-124). Huss testified that the re-work job is a preferred job because it is not as physical as working on the assembly line. (R. p. 124, lines 13-21; pp. 125-128)

Addressing Johnson's allegations that she injured her back while installing screws at the bottom of a door, Huss testified it was uncommon for an employee to remove a door panel on the F-1A line. (R. p. 126, lines 12-22) Moreover, Huss testified that even assuming Johnson was putting on a door panel when she injured her back, only minor and very limited bending would be involved. According to Huss, BMW has mechanical processes to raise and lower the carriers which would place the door at its lowest position 20 inches to a maximum height of 44 inches. (R. p. 128, lines 1-7) Last, Huss disputed the fact that the re-work area required constant bending and that Johnson injured her back performing this particular work activity. (R. p. 129, lines 3-21)

STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-380 establishes the "substantial evidence" rule as the standard of review for decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, the circuit court reviewing an award or denial of benefits may only reverse or modify the agency's decision if the findings, rulings, and conclusions of the administrative agency are "clearly erroneous in view of the reliable and substantive evidence of the whole record." *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

> Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, "[t]he Circuit Court's role is appellate only, and is limited to deciding whether the Commission's decision is not supported by substantial evidence or is controlled by some error of law." *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers' Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry's, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

ARGUMENT

Johnson contends various job duties as a production associate resulted in a disabling injury to her back on August 19 or 23, 2008. Specifically, Johnson contends repetitive activities involving overhead lifting; pulling racks; and bending to install screws on doors caused her to sustain an injury to her low back. Respondents contend, and the Full Commission agreed, that Johnson failed to sustain her burden of proving accidental injury or aggravating injury to her back at any time during the course and scope of her employment. Instead, Johnson's condition results from residual problems from a prior back surgery in 2005, as well as non-occupational maladies and progressive degenerative disease conditions of the back. Because Johnson's back condition is chronic and progressive with respect to degenerative disc disease, her inability to work is as a consequence of the preexisting degenerative condition and extensive use of narcotic pain medications and is not compensable as a work-related injury. (R. pp. 338-345, 363, 431)

Johnson's need for medical treatment stems from a long-standing chronic back condition caused by the progression of degenerative disc disease of the lumbar spine and not an occupational injury. Because substantial evidence supports this conclusion, the order of the South Carolina Court of Appeals affirming the Decision and Order of the Full Commission denying benefits should be affirmed.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION BY THE WORKERS' COMPENSATION COMMISSION AND THE COURT OF APPEALS THAT APPELLANT DID NOT SUSTAIN A COMPENSABLE ACCIDENTAL INJURY.

South Carolina Code Ann. § 42-1-160 defines "injury" and "personal injury" as "injury by accident arising out of and in the course of employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident."

"Repetitive trauma injury" likewise is defined by statute as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A). Compensation for repetitive trauma injury claims is "determined only under the provisions of this statute. *Id.*; *see also Murphy v. Owens Corning*, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct. App. 2011) ("We agree that the compensability of a repetitive trauma injury must be determined by the Commission under the provisions of section 42-1-172."). Further, repetitive trauma is compensable under the South Carolina Workers' Compensation Act only when an injury is unexpected, and such injury is not expected or intended to result from the employment activities from which the unexpected injury arose. *See Pee v. AVM, Inc.*, 352 S.C. 167, 573 S.E.2d 785 (2002).

It is an injured employee's burden to prove facts that render an alleged injury compensable. *Kennedy v. Williamsburg County*, 242 S.C. 477, 131 S.E.2d 512 (1963). The burden rests upon the injured employee to show by competent testimony and evidence, either lay or expert, not only the fact of an injury, but that such an injury occurred in connection with the employee's employment duties. *Clade v. Champion Laboratories*, 330 S.C. 8, 496 S.E.2d 856 (1998); *Fowler v. Abbott Motor Company*, 236 S.C. 226, 113 S.E.2d 737 (1960). Claimants in repetitive trauma cases bear the additional burden of proving their claims with "medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." S.C. Code Ann. § 42-1-172(B) (Supp. 2010). "'Medical evidence' means expert opinion or testimony stated to a reasonable degree of stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C. Code Ann. § 42-1-172(D) (Supp. 2010);

see also Michau v. Georgetown County, 396 S.C. 589, 595-596, 723 S.E.2d 805, 808 (2012) (addressing the contours of the medical evidence requirement).

The South Carolina General Assembly also has established parameters governing Morrett's claim. To that end, a claim for stress, mental injury, or mental illness alleged to have been aggravated by a work-related accident is not compensable unless the claimant establishes that the aggravation is:

> (1) admitted by the employer/carrier; (2) noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part causally-related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition; (3) found to be causally-related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or (4) noted in a medical record or report of the employee's physician as causally-related or connected to the injury or accident.

S.C. Code Ann. § 42-1-160(D). In addition, "[t]he employee shall establish by a preponderance of the evidence, including medical evidence, that: (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or (2) the preexisting condition or the permanent physical impairment aggravates the subsequent impairment." S.C. Code Ann. § 42-9-35(A).

In the instant case, Johnson failed to present any credible and reliable medical evidence that she sustained a compensable work-related injury.

A. Appellant's Medical Evidence Does Not Support A Finding Of A Compensable Repetitive Trauma Injury.

The deposition testimony of Dr. Richard B. Bannon, Johnson's family physician, was submitted into evidence. (R. pp. 473-517) Dr. Bannon is board certified in the area of family practice, and he has been practicing medicine for 33 years. (R. p. 477, lines 5-6, lines 16-18) Dr. Bannon first began treating Ms. Johnson in 1981. (R. p. 478, lines 13-

23) On November 18, 2004, Dr. Bannon treated Johnson for back pain and sciatica. (R. p. 480, lines 5-6) Dr. Bannon's partner ordered an MRI that was taken January 12, 2005, and degenerative disc changes at L4-L5. (R. p. 480, lines 14-22)

Because of Johnson's complaint of back pain and the "severe" degenerative changes noted in Johnson's MRI, Dr. Bannon referred her to Dr. Cavert McCorkle, a neurosurgeon, for surgery. (R. p. 480, line 19 - p. 481, line 4) At that point in time, Johnson never indicated to Dr. Bannon that she had sustained a work-related injury. (R. p. 481, lines 17-19) Dr. Bannon last saw Appellant on May 19, 2005 and did not evaluate or treat her again until August 14, 2008. (R. p. 481, lines 7-22)

Dr. Bannon testified that on August 14, 2008, Appellant had complained of chronic back pain, chronic headaches and blood pressure problems. (R. p. 481, lines 20-25) He noted that at the time he began treating Appellant on August 14, 2008, she was already taking potent narcotic medications for chronic back pain. (R. p. 482, lines 16-18; p. 488, lines 2-6) In fact, Dr. Bannon testified that "the Chronic Pain Clinic already had her on very potent pain medicines. They had her on Avinza and Oxycodone four and five times a day, so that's really about as high a dose of narcotics as you can go." (R. p. 482, lines 16-21) Dr. Bannon then prescribed Naprosyn, an anti-inflammatory medication. (R. p. 482, lines 12-21).

Dr. Bannon stated that the conditions of the degenerative disc disease and stenosis progress as one ages and would "play[] a part in her chronic pain. . . ." (R. p. 491, lines 17-21). Degenerative disc disease plays a large role with respect to Appellant's chronic pain condition. (R. pp. 491-492). Dr. Bannon noted that Appellant had been taking narcotic medications prescribed by Dr. Latourette before her alleged work related

accident in August 2008. (R. p. 497, lines 3-20; p. 498-499).

Dr. Bannon acknowledged he did not know the size or the weight of the screws Appellant installed on the doors; or the amount of time Appellant spent working on a door. (R. p. 513) Dr. Bannon admitted that his opinion on causation was based upon information provided to him by Appellant's counsel. Dr. Bannon opined that his conclusion that Appellant's job aggravated her preexisting back condition consisted of "an educated speculation". (R. p. 513, lines 19-23) Going further, Dr. Bannon also testified that when Johnson presented in August of 2008, "[s]he just mentioned that she had hurt her back at work when she was bending over. That's all I dictated, so that's all I can really attest to." (R. p. 492, lines 11-14) He had never been to Employer's facility to examine how work is performed and had no real understanding of the tools Johnson used on the job. (R. p. 492, line 15 - p. 493, line 22)

In spite of offering an opinion that Johnson's August 2008 problems might be attributable to her employment, Dr. Bannon testified that a comparison of the 2005 MRI scan and the 2008 MRI scan shows a progression of Johnson's degenerative disc disease. (R. p. 515, lines 1-11) Dr. Bannon also testified that absent Johnson performing any occupational duties, it was still probable she would experience chronic lumbar pain. (R. p. 515, lines 4-11) Finally, Dr. Bannon noted that because Johnson was not working, but still complained of chronic pain, it required some degree of speculation to associate her current symptoms of pain with her occupational duties. (R. p. 515, lines 12-21).

In support of her claim of compensability, Johnson relies upon an October 29, 2008 letter from Dr. McCorkle indicating that "repetitive pushing, pulling, bending, lifting, walking long distances and standing for a long period of time on the job would

most probably aggravate any preexisting condition. . . ." (R. p. 194) At the same time, Dr. McCorkle concedes he last treated Appellant in December 2005. (*Id.*) Moreover, Dr. McCorkle admitted in his deposition that at the time he rendered his opinion on October 10, 2008, he had not seen Johnson in almost three (3) years or discussed with Johnson her occupational duties. (R. pp. 454-455) Similarly, Dr. McCorkle had not discussed Johnson's occupational duties with a representative of BMW. (R. p. 454, lines 13-25; p. 455) Dr. McCorkle admitted he was unaware of the frequency required for Johnson to perform various work activities and the intensity needed to perform certain job duties. (R. p. 451, lines 18-21; p. 455) Dr. McCorkle further admitted that at the time of his written medical opinion in October 2008, the only source of information regarding Johnson's job activities was an October 10, 2008 letter from her attorney describing Johnson's work related activities. (R. pp. 456-457)

Dr. McCorkle testified that after he performed surgery, Appellant was referred to Dr. Latourette for pain control because her underlying degenerative disc disease condition was long term. (R. p. 464) Dr. McCorkle further testified he was not privy to Dr. LaTourette's medical reports since he had not treated Appellant since 2005 and that he had not seen Dr. Bannon's reports until the date of his deposition. (R. pp. 457-458) Like Dr. Bannon, Dr. McCorkle agreed that degenerative disc disease can get worse with age and is not necessarily exacerbated by occupational duties. (R. p. 459, lines 11-25) The condition can be exacerbated by non-occupational duties. To this end, Dr. McCorkle testified that he did not inquire about and was unaware of Johnson's non-occupational duties. (R. pp. 459-460) Dr. McCorkle essentially agreed it is equally likely that Johnson's condition could be equally attributable to her non-occupational duties. (R. p.

460, line 21 - p. 461, line 1)

Dr. Latourette, a pain management physician, who has continuously treated Johnson from 2005 to the present, responded to a letter from Johnson's counsel regarding an opinion on causation with respect to the alleged work related accident of August 23, 2008. On November 7, 2008, in a handwritten note, Dr. Latourette stated: "I am prepared to declare that Ms. Johnson is fully disabled. ***I am not prepared to declare her pain & (sic) disability is (sic) due to a work related injury.***" (R. p. 363) (emphasis added)

Dr. Kevin Kopera also evaluated Johnson on April 1, 2009, and completed a report of his independent medical evaluation. (R. pp. 429-431) Dr. Kopera took into consideration Johnson's "physical examination, as well as her clinicial presentation and available medical records. . . ." and based his analysis upon "reasonable medical probability." (R. p. 431) Dr. Kopera diagnosed Appellant as having chronic low back pain with chronic degenerative disc disease and a left chronic L4 and L5 radiculopathy. (*Id.*) He further noted Johnson's chronic low back pain has been associated with narcotic dependence with respect to managing her chronic pain condition. (*Id.*) After examining Johnson and obtaining a description of the job of installing screws, Dr. Kopera opined that he did not believe the activity of installing screws on August 23, 2008, proximately produced back pain that Appellant was experiencing. (*Id.*) Dr. Kopera also noted that Johnson had performed this activity on a daily basis in the past without any apparent difficulty. (*Id.*) Moreover, Dr. Kopera noted that if the activity as described by Appellant did produce or aggravate back pain, such would only be temporary and not

permanent. (*Id.*) Perhaps most significantly, Dr. Kopera found "no further medical care is required and there is a 0% permanent impairment." (*Id.*)

Based upon the foregoing, the court of appeals correctly affirmed the unanimous finding by the Full Commission that Johnson did not meet her burden of establishing, through competent medical evidence, that she sustained a repetitive trauma injury or that her preexisting condition was aggravated by a work-related injury. On this score, the Full Commission specifically observed

> Little weight was placed upon the opinions of Drs. McCorkle and Bannon with respect to the issue of causation or an aggravation of a preexisting condition because of work. In particular, Dr. McCorkle had not treated or evaluated [Johnson] since December 13, 2005. *Dr. McCorkle's lack of knowledge of [her] specific occupational duties and non-occupational activities since 2005 makes his opinion unreliable and speculative.* Similarly, the opinion of Dr. Bannon on the issue of causation and answers to [Johnson's] counsel's questions were not afforded any appreciable weight because *such was based upon an "educated speculation" and conjecture.*

(R. p. 51, ¶ 5) (emphasis added) In contrast, the Full Commission afforded "great weight" to the opinions of treating physician Dr. Latourette, who treated Johnson on a consistent bases from 2005 forward. Dr. Latourete was "in the best position to render an expert opinion" and declined to attribute Johnson's work to her claimed injuries. (R. pp. 51-52, ¶ 6) In light of this and additional substantial evidence in the record, the decision by the court of appeals affirming the denial of benefits by the Full Commission should be affirmed in its entirety.

II. APPELLANT DID RAISE THE DOCTRINE OF JUDICIAL ESTOPPEL IN HER ARGUMENT BEFORE THE FULL COMMISSION; THEREFORE, THAT ARGUMENT HAS BEEN WAIVED AND IS NOT PRESERVED FOR APPELLATE REVIEW.

The doctrine of judicial estoppel prevents a party from misrepresenting facts and issues to gain an advantage. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). A party may be judicially estopped from adopting a position that is in conflict with the one earlier taken in the same or related litigation. *Cothran v. Brown*, 350 S.C. 358, 566 S.E.2d 548 (Ct. App. 2002).

In this instant case, the doctrine of judicial estoppel is not applicable based upon the evidence. Specifically, Respondents never asserted any conflicting positions and never misrepresented any facts or issues to gain an advantage. Johnson alleged that she sustained two completely different accidents. The first accident allegedly occurred on or about March 14, 2008, and involved injuries to the upper extremities. Because of the type of job Johnson was performing, Respondents accepted the compensability of this claim. Moreover, Respondents' experience with work related injuries on this particular job reflected that injuries to the upper extremities were common.

The particular aspects of Johnson's job in 2008 entailed use of the upper extremities as opposed to the low back. Respondents acceptance of the bilateral upper extremity claim as a compensable work related injury and its opposition or denial of the compensability of the alleged lumbar spine injury was not inconsistent under the circumstances; and did not undermine the integrity of the judicial process or the integrity of the courts with respect to improper or inconsistent statements of fact. *See*, *Hayne Federal Credit Union v. Bailey*, *Supra*. Indeed, the Full Commission appropriately treated the two alleged injuries as separate and distinct, going so far as to observe that

Johnson's "admitted work related injuries to her upper extremity are premature for adjudication and did not emanate from her work activities of August 19 or 23, 2008." (R. p. 10, ¶ 9) In any event, inasmuch as Johnson never raised her judicial estoppel to the Full Commission for its consideration, she has waived review of that issue here. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.") (internal citations omitted).

III. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION IN ACCEPTING THE REPORT OF DR. PHILLIP LATOURETTE AS EVIDENCE AND RELYING UPON SUCH IN FACTUALLY FINDING THAT APPELLANT HAD NOT SUFFERED A COMPENSABLE WORK RELATED INJURY.

While the court of appeals did not address the Full Commission's reliance upon the notes and opinion of Dr. Latourette, Johnson asserts the Full Commission erred in relying on these materials in violation of S.C. Code Ann. § 42-1-170(C) (defining medical evidence). Her argument misses the mark. As the claimant in this case, the burden was on Johnson to prove, and not upon Respondents to disprove, repetitive trauma through "medical evidence" as that term is defined by statute. Dr. Latourette merely stated that he was not prepared to declare Johnson's pain and disability is due to a work related injury, not that it definitively was not. Finally, unlike the physician in *Michau*, Dr. Latourette was Johnson's own long-time treating physician and was not "specially sought out" by Respondents to decide the compensability of Johnson's claim. 396 S.C. at 596, 723 S.E.2d at 808.

Johnson failed to prove that she sustained an injury to her back by virtue of her employment duties. She has an extensive history of back problems beginning in 2004, and her pre-existing condition had resulted in Dr. McCorkle performing a decompressive

partial hemilectomy for lumbar stenosis and nerve root compression at L4-5 and L5-S1 on May 20, 2005. Johnson later underwent a second surgery on June 24, 2005, which consisted of a re-exploration of L4-5 and L5-S1 and removal of the disc at L5-S1. Since Jonson's surgeries in 2005, she has continued to suffer with persistent and constant, chronic pain. (R. p. 262) She has received medical treatment from 2005 to the present from Dr. Philip Latourette, who no doubt was cognizant of her lengthy course of treatment for a preexisting condition and, in light of that knowledge, declined to attribute her condition to work-related activities.

Because Dr. Latourette continuously treated Johnson on a routine basis for many years, the Commission appropriately placed great weight upon Dr. Latourette's hand-written note dated November 7, 2008. (R. p. 363) In light of Dr. Latourette's intimate familiarity with Johnson's activities, complaints of pain, and discomfort, he was in the best position to render an expert opinion in a medically-complicated case on the issue of causation (or lack thereof). (R. pp. 262 and 363) Thus, the Full Commission did not err in affording great weight to Dr. Latourette's opinion.

IV. LAY EVIDENCE DOES NOT SUPPORT A COMPENSABILITY FINDING OF APPELLANT'S ALLEGED LOW CLAIM.

According to John Huss, supervisor, the Johnson's re-work position consisted primarily of inspection duties. In the re-work department, an employee is required to physically examine the doors to make certain the seals are properly aligned and to make small adjustments. (R. pp. 123-124) With respect to Johnson's allegations that she injured her back while installing screws at the bottom of a door, Huss testified it was uncommon for an employee to remove a door panel on the F-1A line. (R. p. 126, lines 12-22) Moreover, Huss testified that, assuming Johnson was putting on a door panel

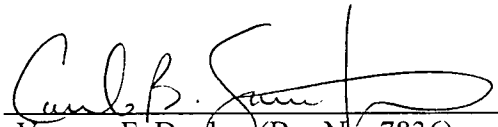
when she injured her back, only minor and limited bending would have been involved. According to Huss, BMW has processes to raise and lower the carriers which would place the door at its lowest position 20 inches to a maximum height of 44 inches. (R. p. 128, lines 1-7) Last, Huss disputed Johnson's contention that the re-work area required constant bending. (R. p. 129, lines 3-21)

In order for the South Carolina Workers' Compensation Commission to award benefits, the injured worker must first prove by a preponderance of the evidence that he or she sustained a compensable work related accident which arises out of and in the course of employment. *Jennings v. Chambers Development Co.*, 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). Appellant failed to meet this necessary criteria with respect to establishing the compensability of a claim. The South Carolina Workers' Compensation Commission cannot assist an injured worker in meeting his or her burden of proof by ignoring the facts and relying upon surmise and conjecture. *Id. See also, Price v. B. F. Shaw Co.*, 224 S.C. 89, 77 S.E.2d 491 (1953).

Substantial evidence in this case clearly supports the Decision and Order by the Full Commission, affirmed by the South Carolina Court of Appeals, that Johnson simply failed to prove the occurrence of a compensable back injury by virtue of her employment duties. Accordingly, the orders challenged on appeal must be affirmed. *Muir v. C. R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Order of the South Carolina Court of Appeals affirming the Decision and Order by the Workers' Compensation Commission denying benefits should be affirmed.

October 24, 2013 By: 

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2012-206586

Patricia D. Johnson, Employee, ... Petitioner,

v.

BMW Manufacturing Corporation, LLC, Employer,
Hartford Insurance Company of the Midwest and
Specialty Risk Services, Inc., Carrier, ... Respondents.

PROOF OF SERVICE

I certify this 24th day of October 2013 that I have served copies of the BRIEF OF RESPONDENTS and CERTIFICATE OF COUNSEL upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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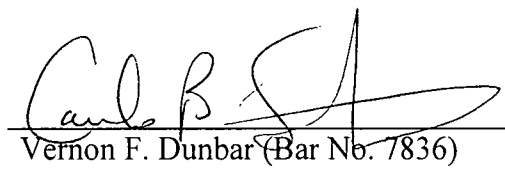
October 24, 2013 By: 

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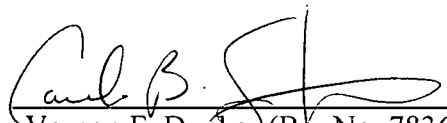
CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondents complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated August 13, 2007.

(Signature page to follow.)

October 24, 2013

By: 

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