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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.: 2012-206589

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 REPLY BRIEF

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I. Substantial evidence does support the Petitioner's Workers Compensation Commission claim that she suffered a compensable accidental injury by way of a specific injury or alternatively an injury through repetitive motion.

The Petitioner alleges she injured her back in a specific accident and/or, in the alternative, aggravated a pre-existing back injury on or about August 19th or August 23rd, 2008 as a result of repetitive motion requirements from her job. The Respondents deny both allegations, but they offer no proof to support their position. The Petitioner worked on a job that required constant body movement.[1] They deny that the Petetioner had a specific injury or an injury that aggravated a previous back injury even though the Petetioner gave specifics about the injury.[2] They, also, continue to deny that the pre-existing back condition was aggravated by repetitive motion requirements of the job while admitting at the same time that repetitive motion requirements caused work related injures to both upper extremities.[3]

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[1] 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 subassssemblies, such as side frames, underbodies, doors, hoods, and trunk lids....(R. p. 387).

[2] 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).

[3] Defendants are providing medical treatment to the claimant for her upper extremity injures 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)

The Petitioner gave detailed description to the single commissioner how she got hurt.[4] The only evidence that was offered to refute the testimony of the Petitioner was John David Huss. In fact, He did more to support the Petitioner's claim than he did to dispute it.[5] The Petitioner worked the main line and the re-work line.

The Petetioner gave a detail description of how she got hurt at the hearing before the single commissioner.[6] This is evidence of an injury, even though it was refuted somewhat by her supervisor who wasn't even on the job when the alleged accident occurred.

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[4] "I was on–out on doing some rework area. And I was bending over to put screws in the bottom of the door which is very, very, low. Excuse me. And when you are doing a job the car is moving. And I had a gun in my hand to put the screws in, drill gun. And when I went to bend over, I was pushing it in and I felt something pull in my back. I felt something like slip in my back. And it hurt, you know. It was hurting me, but it hurt worse as the time passed on. It got worse." (Tr. pp. 24-25.

[5] "The main line is definitely going to be repetitive. (R. p. 125, lines 17 and 18).....

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 o 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 a -- it five shelf drawers. We actually pull them 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 the connections are made. You -- most of the them have an impact glove which they use. And then basically they it the panels and knock the clips in. And then clip them on the bottom. As far as doing any screws or anything on that process, that is not a part of that process. (R. p. 127, lines 5-22).

[6] "I was on–out on doing some rework area. And I was bending over to put screws in the bottom of the door which is very, very, low. Excuse me. And when you are doing a job the car is moving. And I had a gun in my hand to put the screws in, drill gun. And when I went to bend over, I was pushing it in and I felt something pull in my back. I felt something like slip in my back. And it hurt, you know. It was hurting me, but it hurt worse as the time passed on. It got worse." (R. p. 77, line 23, p. 78, line 8.)

The same history was given by the Petetioner to the plant physician, Dr. Ken Hommel.[7] On September 5, 2008, she had some complaints about her pain and the cause of her pain. She told the story again to Dr. Hommel.[8]

Dr. Phillip Latourette, a treating physician for the Petetioner, also, noted job related injures to the back of the Petetioner as he noted on September 12, 2007.[9] You have the Petitioner, Dr. Hommel, and Dr. Latourette describing an on the job injury that affected the back of the Petitioner and aggravating conditions on the job aggravating the back of the Petitioner. There are other supporting reports, as well.

Therefore, the Petitioner believes the Full Commission Order should be reversed. The Petitioner cite again the precedent established by the Courts in South Carolina that previous injuries may be aggravated by a new injury to the same body part, to wit: "The rule 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

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[7] "...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).

[8] On September 5, 2008, she again reported problems related to pain and work to Dr. Hommel.[8] said, "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).

[9] "Patient reports she knows neurontin helps but she does not want to take, she wants to take less meds if possible. She is bending a lot at work which she notes can increase pain (R. p. 530)...patient notes the days that she works she has to take four Percocet. If she is not working she can cut back on Percocet." (R. p. 531).

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 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)."

Therefore, the Court of Appeals opinion should be reversed.

II. Petitioner did raise the doctrine of judicial estopple in her argument before the Full Commission and that argument was preserved for appellate review.

The Petitioner did preserve this argument for review. The Petetioner's attorney argued the point to the Full Commission,[10] The Petitioner's re-iterated this point to the full commission, to wit:[11]

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[10] "But certainly the puzzling part to us is how they could come in and admit that they had repetitive trauma to the upper extremities on March 23, 2008 and the same kind of injury not impact the back on the aggravation of a pre-existing condition." (R. p. 145, line 22, p. 146, line 2. Full Commission Hearing, January 25, 2010.)

[11] " What is puzzling to me is that the argument put forth by the employer/carrier, how you can take two upper extremities, healthy up until March 23 of 2008, no complaints on them at all, and they will admit that these two healthy upper extremities were aggravated to the point by repetitive trauma that it caused some work related injury, and taking that, now your looking at two healthy upper extremities, no complaints on it in 2005, 2006, 2007....that is the history and I think this is absolutely inconsistent positions to admite two and deny one, how can you separate them?" (R. p. 156, line 14, p. 157, line15).

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.

To further support the Petitioner's position that the argument of judicial estopple was preserved, reference is hereby made to the petitioner's brief to the Full Commission.[12] The argument was preserved, and the Full Commission Order should, therefore, be reversed.

I. The South Carolina Workers' Compensation Commission did commit legal error and abused its discretion in accepting the report of Dr. Phillip Latourette as evidence and relying upon such in factually finding that Petitioner had not suffered a compensable work related injury.

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[12] **ARGUMENT II**

THAT THE COMMISSONER ERRED IN FINDING THAT THE CLAIMMANT DID NOT SUFFER A COMPENSABLE INJURY BY ACCIDENT AS A RESULT OF AGGRAVATION OF A PREEXISTING INJURY FROM THE WORK SITE WHEN IN FACT THE COMMISSIONER ACCEPTED THE EMPLOYOER AND CARRIER'S POSITION THAT INDEED THE CLAIMKANT DID SUFFER AN AGGRAVATION OF PREEXISTING INJURIES AND/OR REPETITIVE INJURY TO HER UPPER EXTREMITIES, AND THE FINDINGS AS TO THE BACK ARE INCONSISTENT WITH THE ADMISSIONS MADE BY THE EMPLOYER AND CARRIER AT THE TIME OF THE HEARING ON THE UPPER EXTDREMITIES.

The record is void of the Appellant ever having any damage to the upper extremities, yet, the Respondents, at the hearing on the back, admit into the record that repetitive trauma caused injures to the Appellant's upper extremities that arose out of and in the course of her employment. How are the Respondents going to take the back out of the repetitive motion scenario? It is amazing how the Respondents want one to believe that repetitive motion could damage two otherwise healthy upper extremities but do no damage to the lower back since November 2005 when the Appellant returned to work from back surgery. In order for the judicial process to function properly, litigants must approach it in a truthful manner. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. Quinn, supra.

Therefore, because of the inconsistent position taken by the Respondents, the Full Commission should reverse the single Commissioner and find the claim of the Appellant compensable. (R. pp. 538-539).

The Petetioner did not establish the admitting criteria for expert testimony at hearing tribunals in this state. The opinion of Dr. Latourette's testimony is misplaced as a matter of fact and law.[13] The opinion note of Dr. Latourette is outside of the requirements of section 42-1-160 in that his notes are note stated with a reasonable degree of medical certainty. This is the requirement of medical testimony before the Workwers' Compensation Commission for the Plaintiff in order to establish compensability, and if this is the requirement for the Claimant, then this is the same requirement for the Respondents if they are going to rely on the testimony of Dr. Latourette. The Respondents had the opportunity to take the deposition of Dr. Latourette if they wished to test his opinion pursuant to section 42-1-160, and they did not. Therefore, the single commissioner, to rely on any opinion given by Dr. Latourette in this case is misplaced.

Therefore, the Full Commission's Order should be reversed, and workers' compensation benefits awarded to the Petitioner.

I. Lay evidence does support a compensability finding of Petitioner's claim.

Lay evidence is part of the structural backbone of any workers' compensation award. The Commission hears both expert and lay testimony and gives it whatever weight and creditability that, in its discretion, it deems appropriate. *Randolph v. Fiske-*

[13] "(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.

Carter Constr. Co., 240 S.C. 182, 125 S.E. 2d 267 (1962); *Scott v. Havnear Motor Co.*, 226 S.C. 580, 86 S.E. 2d 475 (1955). Expert testimony alone may provide substantial evidence sufficient to support the Commission's finding. *Greer v. Greenville County*, 245 S.C. 442, 141 S.E. 2d 91 (1965); *Anderson v. Campbell Tire Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943). Where medical testimony alone is relied on, however, the opinion cannot be that causation is a mere possibility. The expert must testify that the disability "most probably" resulted from the accidental injury. *Cline v. Nosredna Corp., Inc.*, 291 S.C. 75, 352 S.E. 2d 291 (Ct. App. 1986). Where there is a conflict between lay and expert testimony, the Hearing Commissioner may not arbitrarily disregard medical testimony. *Anderson, Id.* Therefore, based on the lay testimony and the medical expert testimony, the Order should be reversed.

CONCLUSION

There are good reasons for the reversal of the Full Commission's Order in this matter. The lay testimony of the Petetioner is not denied with any relevant testimony. The Respondents offer the testimony of a supervisor that says the Petetioner could not have hurt her back on the job. But that same supervisor is not used to deny the Petetioner hurt her two otherwise healthy upper extremities. There is medical evidence to support the Petetioner's position that she suffered a work related injury to her back.

Respectfully submitted,

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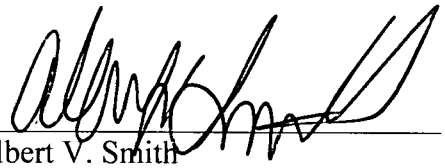
Date: March 11, 2010

CERTIFICATE OF COUNSEL

The Undersigned Counsel for the Petitioner certifies that the Reply Brief of the Petitioner complies with Rule 2211(b), SCACR, as well as the South Carolina Supreme Court's Order dated August 13, 2007.

Date: November 11, 2013

Signed: 
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PROOF OF SERVICE

I certify that I have served the Petitioner's Reply Brief, and a copy of this Proof of Service on Vernon F. Dunbar, Esquire, attorney for Respondents, by depositing a copy of each of the documents in the United States Mail, postage prepaid, on October 1, 2013, addressed to Mr. Vernon F. Dunbar, PO Box 1509, Greenville, SC 29602.

Date: November 12, 2013

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