

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. EDWARD WELMAKER, Circuit Court Judge

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Case No. 2009-CP-23-7978

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Maria E. McGaha.....Respondent

vs.

Honeywell International, Inc., Employer,  
and Zurich North America, Carrier.....Appellants

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**BRIEF OF APPELLANTS**

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**CERTIFICATE OF COUNSEL AND COMPLIANCE**

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The undersigned hereby certifies the Final Brief and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

The undersigned also certifies that the Final Brief and Final Reply Brief of Appellants comply with the South Carolina Supreme Court's Order dated April 20, 2011, concerning personal data identifiers and other sensitive information.

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT RESPONDENT PROVED HER ENTITLEMENT TO PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS FROM MARCH 4, 2005, TO THE PRESENT, WHEN THE AWARD IS BASED UPON SPECULATION, CONJECTURE, AND SELF-SERVING STATEMENTS?**
- II. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FAILING TO FIND AS A FACT AND CONCLUDE AS A MATTER OF LAW THAT RESPONDENT HAD NOT SUSTAINED A COMPENSABLE INJURY TO HER NECK AND THAT ANY PURPORTED NECK PAIN HAD NOT RESOLVED SOME SIX YEARS AFTER THE ALLEGED ACCIDENTAL INJURY?**

## **STATEMENT OF THE CASE**

This is an appeal from the Greenville County Court of Common Pleas regarding the affirmation of an appeal from the South Carolina Workers' Compensation Commission. (R. pp. 24-31). The Circuit Court affirmed the Order of the South Carolina Workers' Compensation Commission [hereinafter the "Commission"] finding Maria E. McGaha, Employee/Claimant [hereinafter "Respondent"] had sustained compensable injuries to her neck, left shoulder, and left hand. The Circuit Court also affirmed the Commission's findings that Respondent had proven her entitlement to temporary total disability compensation benefits beginning from March 4, 2005, to the present. (R. pp. 28-31). The Circuit Court's Order affirming the factual findings and legal conclusions of the Commission is dated January 19, 2011. From this Decision, Honeywell International, Inc., Employer, and Zurich North America, Workers' Compensation Carrier [hereinafter "Appellants"] appeal to this honorable Court.

By way of background, Respondent alleged injuring her neck, left shoulder, and left arm, on or about August 4, 2003, as a consequence of engaging in repetitive employment activities. Respondent retained counsel, who filed a Form 50 claim, dated July 9, 2004. (R. pp. 32-33). Respondent did not request an adjudicatory hearing seeking benefits, despite Appellants denying compensability of the claims. (R. pp. 32, 176, 186, 190-191). Appellants attempted to have claim dismissed by virtue of failure to prosecute or inaction in 2008. Thereafter, Claimant filed a Form 50, dated September 11, 2008, requesting an adjudicatory hearing and an award of workers' compensation benefits. (R. pp. 34-35).

On January 5, 2009, Derrick L. Williams, Hearing Commissioner, heard Respondent's claim and found Claimant had sustained injuries to her neck, left hand, and left shoulder, as a consequence of her work-related activities. (R. pp. 1-14). Respondent had contended that she was entitled to temporary total disability compensation benefits beginning on or about August 1, 2003, to the present. (R. p. 32). The Hearing Commissioner awarded Respondent temporary total disability compensation benefits beginning on March 4, 2005, to the present. (R. pp. 12-14).

Thereafter, Respondent and Appellants appealed the Hearing Commissioner's Decision and Order to the South Carolina Workers' Compensation Full Commission Appellate Panel. By Order, dated August 20, 2009, the Full Commission Appellate Panel affirmed the Hearing Commissioner's Decision and Order. (R. pp. 15-23). Commissioner Andrea Roche did dissent on the payment of temporary total benefits issue. (R. pp. 23, 42). From the Appellate Panel's Decision and Order, Appellants timely appealed to the Greenville County Court of Common Pleas. After oral arguments had been heard by the Court, an Order, dated January 19, 2011, was promulgated, affirming the Commission's Decision and Order. (R. pp. 24-31). From this Decision, Appellants have appealed to this Court.

### **FACTS**

Maria E. McGaha, Respondent, began working at Honeywell International, Inc. on or about March 23, 1998. (R. pp. 178-180, 205). McGaha alleged a work-related injury to her neck, left hand, and left shoulder on or about August 1, 2003. (R. pp. 24, 45). McGaha first received treatment from Mountain View Family Practice, wherein she

was diagnosed as having carpal tunnel syndrome. (R. pp. 64-71). McGaha presented a medical note from Mountain View Family Practice to her supervisor indicating the left carpal tunnel syndrome was work related. (R. p. 70). The note authorized McGaha to remain off work for two weeks. (R. pp. 70, 195). Appellants did not dispute the diagnosis of left carpal tunnel syndrome. (R. p. 80, 184). Appellants referred McGaha to WorkWell for additional medical treatment, evaluation and assessment. (R. pp. 108-115).

McGaha later underwent nerve conduction studies to verify the initial diagnosis of carpal tunnel syndrome. Dr. Kent Kistler, neurologist, performed nerve conduction studies, which were normal. (R. pp. 80, 160 and 163). Dr. Kistler advised McGaha to discontinue use of the wrist splint because the nerve conduction studies had ruled out that she suffered from carpal tunnel syndrome. (R. p. 109).

WorkWell physicians later diagnosed McGaha as having degenerative disc disease. (R. pp. 114-121). The physicians did not relate this condition to McGaha's occupational duties. McGaha was prescribed anti-inflammatory medications, a brace, muscle relaxers, and physical therapy. (R. pp. 108-113).

Because McGaha's left arm and hand maladies persisted, McGaha underwent an MRI of the cervical spine. (R. p. 114). The MRI revealed degenerative disc disease at C4-5 through C6-7 with evidence of hypertrophic foraminal encroachment. (R. pp. 114-116). McGaha then began treating with Dr. Michael Bucci, a neurosurgeon. (R. pp. 122-128). Dr. Bucci eventually concluded that McGaha's cervical spine problems did not warrant surgery and was not causing left shoulder pain. (R. pp. 163-164).

On January 21, 2004, McGaha began treating with Dr. Stephen Geary, who diagnosed McGaha as having impingement of the left shoulder, along with a component of arthritis of the AC joint. Dr. Geary administered an injection to the AC joint. (R. pp. 132-134).

Dr. Geary completed a medical questionnaire dated February 9, 2005. Dr. Geary opined that McGaha's left shoulder problems had been aggravated by her work-related activities at Honeywell International. (R. p. 135).

McGaha next treated with Dr. Robert Schwartz, a physiatrist or pain management physician. Dr. Schwartz provided medical treatment for McGaha's left shoulder problems. (R. pp. 136-138). Dr. Schwartz noted in a report dated February 22, 2005, McGaha's shoulder problems may result from an automobile accident that occurred during the 1990's. Dr. Schwartz reached this conclusion as a result of McGaha's inability to identify the cause or etiology of her shoulder, hand, and neck complaints. (R. pp. 154-161). Dr. Schwartz was the last physician to treat McGaha. Drs. Schwartz or Geary never authorized Respondent to remain out-of-work due to left shoulder pain and problems.

Despite McGaha's allegation of an alleged work related accident of August 1, 2003, the initial Form 50, dated July 9, 2004, was not prosecuted by McGaha until she requested a hearing by virtue of a Form 50 dated September 11, 2008. (R. pp. 34-36).

At the hearing, McGaha testified that she sustained an injury to her neck, left and right arms, left and right shoulders, and left hand, as a consequence of her employment duties. (R. pp. 206-208). According to McGaha, her neck and left hand

problems have resolved since she last worked at Honeywell in August 2003. (R. p. 146; p. 219, lines 8-17; p. 225, lines 18-20). McGaha no longer suffers from left carpal tunnel syndrome. (R. p. 146; p. 219; lines 13-17). Despite having last worked in 2003, McGaha alleges she presently suffers with left shoulder pain. McGaha attributes the left shoulder problems to her past work related activities. (R. p. 221, lines 8-15).

McGaha did not prosecute her claim for a compensability determination of the denied left shoulder and neck injury claims or the payment of temporary total disability compensation benefits for five years. (R. pp. 34-36). McGaha admitted that during this five-year span she was preoccupied with her spouse's poor health. (R. pp. 222-225). In particular, McGaha's spouse has suffered with colon cancer, liver cancer, heart attacks, paralysis, and strokes. (R. p. 213, lines 2-24). McGaha's spouse was also in a coma for a substantial period of time and had been hospitalized on the date of the workers' compensation hearing in 2009. (R. p. 213, lines 23-24). McGaha admitted that her husband's poor health required her to provide him with medical assistance 24 hours a day/7 days a week due to chemotherapy treatments. (R. pp. 223-225).

Mary Gilboy, company nurse at Honeywell International, Inc., testified modified work would have been available to the McGaha had she indicated the neck, left arm, and shoulder problems were as a consequence of a work-related accident. ((R. pp. 227-229). On the contrary, Ms. Gilboy testified the medical reports provided to Honeywell reflected that McGaha's disability stemming from her neck and shoulder problems was because of arthritis and degenerative disc disease and not from McGaha's occupational duties. (R. p. 60).

Despite Ms. Gilboy's testimony and the medical evidence, the Hearing Commissioner found and concluded that McGaha's job as deburrer was the proximate cause of an accidental injury to the neck, left shoulder and/or left upper extremity. The Hearing Commissioner further found and concluded that McGaha is entitled to medical treatment for her shoulder problems as recommended by Dr. Stephen Geary. Finally, the Hearing Commissioner awarded McGaha temporary total disability compensation benefits from March 4, 2005 to the present.

Although there was testimony from Respondent that she no longer suffers with neck pain or hand/wrist pain (carpal tunnel syndrome), the Order of the Commission potentially awards Claimant additional medical treatment for maladies that have not been symptomatic since 2004.

Appellants initially denied the compensability of Respondent's left shoulder maladies. However, since the ruling by the Full Commission, Appellants accept compensability of the left shoulder claim, but deny compensable and permanent injuries to the neck and hand.

### **STANDARD OF REVIEW**

The Appellate Court in a workers' compensation appeal has the authority to review the facts to determine whether or not there is any competent evidence to support the findings of the fact-finding body. Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E.2d 830 (1971). To this end, an award of the South Carolina Workers' Compensation Commission may be reversed if there is an absence of substantial competent evidence to support it. See Linen v. Ruscon Construction Co., 286 S.C. 67,

332 S.E.2d 211 (1985) and Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d (1960).

In assessing the term "substantial evidence", South Carolina Appellate Courts have ruled that such is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its action. See Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); and Muir v. C. R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).

An Appellate Court has the authority to reverse or modify the Decision of the South Carolina Workers' Compensation Commission if the substantial rights of Appellants have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by an error of law. See Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); and *S.C. Code Ann. § 1-23-380 (A)(6)(d)* (Law. Co-op. 2003).

## ARGUMENTS

I. **THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT RESPONDENT IS ENTITLED TO PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS FROM MARCH 4, 2005, TO THE PRESENT, BECAUSE THE AWARD IS BASED UPON SPECULATION, CONJECTURE, SURMISE, AND SELF-SERVING STATEMENTS.**

The record contains no medical evidence, report or expert medical testimony opining Respondent has been temporarily and totally incapacitated from gainful employment from March 4, 2005, to the present. In the absence of any corroborating evidence, other than Respondent's self-serving statements, the Commission's award of temporary total disability compensation benefits is based upon complete speculation, conjecture, surmise, and self-serving statements. As such, this Court cannot affirm the lower Court's Order. Thus, the Commission's Decision and Order must be reversed as a matter of law. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965); and Scott v. Havnear Motor Co., 226 S.C. 580, 86 S.E.2d 475 (1955).

Section 42-1-120 defines the term "*disability*" as the incapacity to earn wages because of a work related injury. *S.C. Code Ann. § 42-1-120* (2010). Temporary total disability compensation is not awarded for the physical injury as such, but rather for "disability" produced by such injury. The disability is to be measured by the employee's capacity to earn wages which he/she was receiving at the time of the injury Outlaw v. Johnson Service Co., 254 S.C. 486, 176 S.E.2d 152 (1970).

McGaha waited five years before she requested an adjudicatory hearing to decide the issue of temporary total disability compensation. Although workers' compensation laws constitute a form of social legislation and is afforded a liberal construction and furtherance of the beneficial purposes for which it is designed, the Workers' Compensation Act is not to be converted into a form of welfare insurance. Phillips v. Dixie Stores, Inc., 186 S.C. 374, 195 S.E. 646 (1938). See also, Price v. B. F. Shaw Co., 224 S.C. 89, 77 S.E.2d 491 (1953).

McGaha's five (5) year delay in adjudicating her claim was as a consequence of Ms. McGaha's justified pre-occupation with her spouse's serious and critical health conditions and illnesses. Unlike the situation in the case of Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996), the alleged injury did not prolong the period for which McGaha could not work, rather it was McGaha's choice not to work during this period of time in order to care for her ailing spouse. *Id.* McGaha was not under the care of a physician during this time period. There is no medical note, excuse or evidence excusing her from work because of the shoulder injury. There is no indication McGaha was temporarily and totally disabled beginning on March 4, 2005. *S.C. Code Ann. § 42-1-120 (2009)*. McGaha's ability to provide care for her spouse reflects she was not totally incapacitated from working. (R. pp. 224-225).

Aside from McGaha's self-serving testimony, there is no objective medical evidence of McGaha's **total incapacity** to work because of shoulder maladies caused by her work activities. None of the evaluating physicians opine that McGaha is totally incapable of engaging in gainful employment; and no physician authorized her to

remain off of work. Mary Gilboy testified that McGaha was paid short-term disability benefits until she was advised she could return to work as was ordered by Dr. Michael Bucci. (R. pp. 126-127; 229-232).

The objective and credible medical evidence does not support the South Carolina Workers' Compensation Commission's decision to award temporary total disability compensation benefits to McGaha beginning on March 4, 2005. A medical report dated February 24, 2005, is a Diagnostic Musculoskeletal Ultrasonography from Dr. Robert Schwartz, the last physician to provide medical treatment. (R. p. 159). Dr. Schwartz had ordered the Musculoskeletal Ultrasonography, a diagnostic test, in order to obtain an image of the cervical spine and shoulder. Dr. Schwartz's clinical impression questions the etiology of the left shoulder problems and longstanding cervical spine problems. (R. p. 137). Although the Commission relies upon this last medical report as the basis for ordering temporary total disability compensation benefits, the report does not authorize McGaha to remain out-of-work or excuse her from performing occupational activities. (R. p. 159). It is simply a diagnostic test report and is not even a treatment note.

The Commission's award of temporary total disability compensation benefits is not supported by any evidence much less substantial evidence as is required by law. Hucks v. Green's Fuel of S.C., 247 S.C. 457, 148 S.E. 2d 149 (1966). In order to affirm the Commission's award of temporary total disability compensation benefits, clearly the Circuit Court and the Commission engaged in speculation, conjecture, and surmise, in absence of evidence corroborating the Commission's award of temporary total disability compensation benefits. See Hucks v. Green's Fuel of S.C., (Supra.).

Because the Commission's award of temporary total disability compensation benefits from March 4, 2005, is not supported by substantial evidence, it was legal error for the Circuit Court to affirm the Commission's Decision. *Id.* Accordingly, Appellants respectfully request that the Commission and the Circuit Court be reversed on the issue of payment of temporary total disability compensation benefits.

**II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION LEGALLY ERRED IN FINDING RESPONDENT HAD INJURED HER NECK OR IN THE ALTERNATIVE FAILING TO FIND AND CONCLUDE THAT RESPONDENT DID NOT SUFFER ANY DISABILITY FROM HER NECK STRAIN.**

The burden of proof is upon the injured worker to show that he or she sustained a work-related accident arising out of and in the course of employment by credible and objective evidence. Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E. 753 (Ct. App. 2007). An injured worker's burden of proof to prove an accident cannot be predicated upon surmise, conjecture or speculation. Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999).

In the instant case, the reports of Dr. Robert Schwartz reflect that Respondent could not identify the etiology of her neck, shoulder, or hand complaints. (R. pp. 160-161). More importantly, the initial medical report of Honeywell dated July 17, 2003, reflects Respondent denied a specific injury involving her arm pain. (R. p. 58). The arm pain was initially diagnosed as carpal tunnel syndrome and admitted as compensable. Carpal tunnel syndrome was later dismissed as an inaccurate diagnosis. (R. pp. 80, 145).

A report from St. Francis Hospital dated July 17, 2003, does not reflect Respondent's arm, neck, and hand pain result from work-related activities. (R. pp. 108, 110). As a matter of fact, in a St. Francis medical report dated August 1, 2003, it is noted that Respondent's neck problem and radicular pain into the left arm are not work related. (R. p. 115).

Respondent applied for and received short-term disability benefits. (R. p. 194, p. 216, lines 7-12). According to Mary Gilboy, Respondent was prohibited from receiving short-term disability benefits stemming from a work related accident. (R. p. 229, lines 7-25). Thus, the applications completed by Respondent denied the occurrence of a work related accident. Respondent admits receiving short-term disability benefits as a consequence of problems and complaints with her left shoulder and neck. (R. p. 216, lines 7-12).

Respondent did not report that she had sustained an injury to her neck and shoulder as a consequence of work related activities. Respondent had only claimed that the carpal tunnel syndrome emanated from her work duties. (R. p. 241, lines 14-21; p. 243, lines 9-24).

In short, given the information contained on the patient intake forms and the testimonies of the Respondent and Mary Gilboy, and the medical reports of Dr. Robert Schwartz and Dr. Robert Dameron, the South Carolina Workers' Compensation Commission's decision to find the neck claim compensable constitutes an error of law and abuse of discretion. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

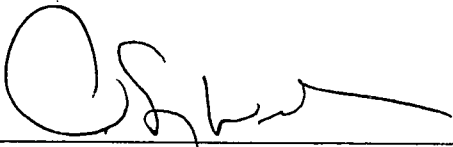
In the alternative, assuming this Court affirms the Commission's finding claimant suffered a compensable injury to her neck, there was ample evidence presented at the hearing for the Hearing Commissioner to have found Respondent had attained maximum medical improvement and suffered no disability as a consequence of the carpal tunnel syndrome and neck injury. (R. pp. 122, 146). See Turner v. Campbell Soup Co., 252 S.C. 446, 166 S.E.2d 817 (1969). The Hearing Commissioner's failure to address the attainment of maximum medical improvement with respect to the left hand and neck claim, ostensibly permits Respondent to request medical treatment for maladies for which she has sought no treatment since 2003; or to seek permanent disability benefits for maladies that have long resolved.

### **CONCLUSION**

Based upon the foregoing arguments, it is respectfully submitted that the South Carolina Workers' Compensation Commission's Decision awarding temporary total disability compensation benefits from March 5, 2004 to the present be reversed due to Respondent's failure to meet her burden of proof that she was temporarily and totally disabled proximately as a consequence of the purported injury to her left shoulder.

Appellants further argue that the Commission's Decision finding a compensable neck injury claim be reversed because this Finding of Fact is not supported by substantial evidence of the case. More importantly, assuming Respondent sustained some type of injury to the neck, it appears to have been a temporary problem that resulted in no disability.

Respectfully submitted,

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

- I. Is the Commission's determination that McGaha sustained compensable injury to her neck in addition to her admitted left carpal tunnel syndrome and left shoulder injuries supported by substantial evidence on the record and free from error of law?
- II. Is the Commission's determination that McGaha is entitled to temporary total disability compensation benefits from March 4, 2005 to the present and continuing supported by substantial evidence on the record and free from error of law?

## STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. By Order dated February 17, 2009, the Hearing Commissioner found Maria McGaha sustained compensable injuries to her neck and left shoulder in addition to the admitted left carpal tunnel syndrome and that she is entitled to past and continuing medical treatment at the recommendation of Dr. Geary. The Commissioner further found that she is entitled to temporary total disability compensation from March 4, 2005 to the present and continuing and that Honeywell International and its workers' compensation insurance carrier, Zurich North America (together "Honeywell"), are not entitled to credit for any short-term disability benefits paid. (R. pp. 1-14)

Both parties appealed to the Full Commission Panel, but by Order dated August 20, 2009, the Commission affirmed the Hearing Commissioner's Order. (R. pp. 15-23)

Honeywell appealed to the Circuit Court for Greenville County contending only that the Commission erred in finding McGaha sustained compensable injury to her neck and erred in finding she is entitled to temporary total disability compensation from March 4, 2005 to the present and continuing. By Order dated January 6, 2011, the Honorable G. Edward Welmaker affirmed the Commission's Order and award in its entirety. (R. pp. 24-31)

Honeywell now appeals to this honorable Court.

## STATEMENT OF FACTS

McGaha testified that she began working for employer-defendant in 1998 and that she worked as a deburrer, which required the extensive use of her upper extremities. (R. p. 205, line 8-p. 206, line 19) On or about July or August 2003, she was performing her regular work duties, when she began having pain and problems in her left shoulder, the left side of her neck and down her left arm. McGaha testified that she reported these problems to employer-defendant. She was sent to the company nurse, who referred her to the company doctor at St. Francis Workwell. (R. p. 206, line 20-p. 207, line 7) McGaha was eventually placed on light duty work restrictions by the company doctor. However, employer-defendant could not accommodate these restrictions. McGaha was terminated from her job. (R. p. 210, line 9-p. 212, line 24; p. 215, lines 12-19) McGaha saw Dr. Brunson for her left upper extremity pain, and he recommended an MRI of the left shoulder. However, the insurance carrier denied the MRI. Dr. Brunson also recommended referral to neurosurgeon, Dr. Michael Bucci, and to orthopaedic specialist Dr. Stephen Geary, who recommended possible future left shoulder surgery. McGaha testified that she was unable to have the surgery because her health insurance was cancelled when she lost her job. (R. p. 207, line 7-p. 210, line 6)

McGaha stated that her husband suffered from several illnesses during this time, including colon cancer in 2000, two strokes in 2005, and liver cancer, and that he continued to have problems to that day, for which he was hospitalized. (R. p. 212, line 25-p. 214, line 13; p. 222, line 24-p. 225, line 17)

McGaha testified that her neck and wrist pain is better, but that she continues to experience pain and problems in her left shoulder. She testified that she has difficulty

performing activities involving her left upper extremity. As an example, she stated that she has difficulty lifting juice from the refrigerator with her left arm. While her sisters-in-law help her care for her husband, McGaha testified that she has mostly cared for him on her own. McGaha further testified that she is right-hand dominant but is only able to use her left hand as a helper hand. She testified that she wants further treatment with Dr. Geary and is unable to return to any work as a result of her continuing left shoulder pain. (R. p. 214, lines 13-25; p. 218, line 18-p. 222, line 24; p. 225, line 23-p. 226, line 9)

Mary Gilboy, human resources manager for employer-defendant, testified before the single Commissioner, and her testimony confirms the nature of McGaha's work requiring the use of her upper extremities, as well as the fact that McGaha did complain to employer-defendant about left shoulder problems. She also specifically testified that McGaha was not returned to work because her restrictions were too great for the company to accommodate her and return her to work. (R. p. 227, line 12-p. 229, line 6; p. 230, line 8-p. 231, line 23; p. 234, line 14-p. 240, line 2; p. 240, line 16-p. 241, line 4)

Nurses' notes from McGaha's employment file dated July 17, 2003 indicate that McGaha had been evaluated at Mountain View Family Practice for likely work-related carpal tunnel syndrome, and that she had been written out of work for a period of two weeks. These notes further show that McGaha was experiencing pain in her neck and left arm, but that she did not want to miss time from work. The attending nurse recommended sending McGaha to Workwell to see if she could perform one-handed duty, and noted that McGaha was agreeable to this plan. On July 18, 2003, the attending nurse noted that Workwell said McGaha could work with restrictions, and on July 23, 2003, it was noted that McGaha had been approved for an MRI. The nurses' notes further indicate that McGaha was offered a lighter duty job which

involved "airflow/waterflow." While the attending nurse noted that McGaha was grateful to be offered a job, she noted after an extended conversation that she was favoring her right arm. On August 1, 2003, the company nurse noted that an MRI of the cervical spine revealed degenerative disc disease at C4-5 through C6-7 levels. On October 28, 2003, the attending nurse noted that McGaha had seen Dr. Merriweather at St. Francis Workwell for her return to work evaluation and that he had restricted her from overhead work, interior lifting, and lifting greater than five pounds. However, it was further noted that no work was available within those restrictions and that McGaha was upset that she may lose her job. On April 15, 2004, the attending nurse spoke with McGaha, noted that she continued to have pain in her shoulder and that she may need surgery. She further noted that McGaha had been referred to orthopaedic specialist Dr. Stephen Geary, who recommended surgery, but that McGaha was having issues regarding her insurance. McGaha signed the authorization for defendants to obtain her medical notes from Dr. Geary at that time. (R. pp. 58-63)

On June 21, 2003, Dr. Brunson evaluated McGaha for left arm pain and numbness from her neck to her fingers which had reportedly been present for six months. Dr. Brunson noted that McGaha's job requires the almost continuous use of her arms and hands in a deburring process. He diagnosed carpal tunnel syndrome and cervicgia. Upon evaluation on July 17, 2003, Dr. Brunson noted that McGaha was unable to wear splints at work due to the nature of her job. He diagnosed work-related carpal tunnel syndrome due to repetitive motion and restricted McGaha from working for a period of two weeks. In a note to employer-defendant, Dr. Brunson further indicated that this claim should be considered a workers' compensation injury. He noted that McGaha continued to work other jobs for employer-defendant, but still had pain which was exacerbated by work. Dr. Brunson opined that

McGaha needed to be out of work while her claim was sorted out and restricted her from work from August 4, 2003 to August 25, 2003. Upon evaluation on August 21, 2003, he recommended an MRI of McGaha's left shoulder and indicated that he had spoken with Gail Pless, the rehabilitation nurse. Dr. Brunson continued to restrict McGaha from work through September 4, 2003. On September 8, 2003, he noted that the MRI of the left shoulder had been denied by McGaha's insurance. (R. pp. 64-86)

On September 17, 2003, Dr. Brunson noted that McGaha was experiencing depression and persistent pain. He further noted that McGaha's health insurance carrier, Cigna, had directed her to orthopaedist Dr. Jernigan, but that Dr. Jernigan wanted to review her records before deciding whether to treat McGaha and that, in the meantime, she was in limbo. McGaha began treatment for depression while Dr. Brunson continued to restrict her from work through October 19, 2003. On October 9, 2003, Dr. Brunson noted that McGaha's short term disability benefits had been denied due to a lack of information, even though he had faxed the notes to a representative for the insurance company. Dr. Brunson continued to restrict McGaha from work from October 14, 2003 through November 15, 2003. On October 22, 2003, he noted that McGaha's short term disability was at its limit and that McGaha must either be released from treatment or returned to work. He further noted that McGaha had been told by employer-defendant that short term disability had been denied due to a lack of information, but that McGaha wanted to return to work. On November 14, 2003, Dr. Brunson noted that McGaha's records had been faxed at least twice, but that employer-defendant claimed those records had never been received. On February 14, 2005, Dr. Brunson opined that McGaha's left upper extremity and neck problems were caused by her repetitive work at Honeywell. (R. pp. 87-107)

On July 17, 2003, the attending nurse practitioner at St. Francis Workwell noted left neck, arm and hand pain. She further noted that McGaha was motivated and did not want to be out of work, even though she was having difficulty secondary to this pain. On July 21, 2003, the attending physician continued to note left shoulder pain and diagnosed cervical radiculopathy. On August 1, 2003, the attending physician recommended referral to a spine specialist and noted that McGaha would discuss this treatment with Mary at Honeywell. In the meantime, the attending physician recommended limited twisting and bending of the neck at work and restricted McGaha from lifting greater than five pounds with her left arm. (R. pp. 108-115)

Records of Metlife dated October 6, 2003 show that McGaha's disability claim was denied due to lack of information. In her disability claim, McGaha's job was described as involving the repetitive use of both hands seven to eight hours a day, firm grasping with both hands for four hours per day, and use of the head and neck five to six hours a day. (R. pp. 190-196)

Dr. Michael Bucci, of the Piedmont Neurosurgical Group, evaluated McGaha on November 4, 2003 for cervical spine problems due to left upper extremity pain and numbness, and he recommended physical therapy. On December 16, 2003, Dr. Bucci assessed persistent left upper extremity weakness and pain, and sought to rule out primary shoulder pathology and HNP. He recommended an MRI of the left shoulder and a CT myelogram of the cervical spine. On December 30, 2003, he insisted the insurance carrier authorize an MRI of McGaha's left shoulder. (R. pp. 117-120, 122-128, 163-167)

On January 7, 2004, McGaha underwent an MRI of her left shoulder at St. Francis Women's and Family Hospital. The results were read by the reviewing radiologist to reveal

mild impingement tendinosis. (R. p. 121)

Pain management specialist Dr. Clifford Monda evaluated McGaha on January 13, 2004 upon referral by Dr. Bucci and assessed pain secondary to her work at Honeywell. He specifically noted left-sided neck, shoulder and arm pain. He noted that McGaha needed to return to work by February 4, 2004 or she would lose her job. He refilled her prescription of the pain medication Lortab, injected the left shoulder, and noted that his office was waiting for the results of McGaha's MRI. In the meantime, he restricted McGaha from lifting, pulling or pushing greater than 10 pounds. (R. pp. 129-131, 171-175)

Orthopaedic specialist Dr. Stephen Geary evaluated McGaha on January 21, 2004 for left shoulder pain and noted the pushing and pulling she was required to perform at work. He diagnosed left shoulder subacromial impingement and cervical spondylosis. He recommended injecting the AC joint, with consideration of future decompression surgery. On February 9, 2005, Dr. Geary opined that McGaha's left shoulder problems were aggravated by her work at Honeywell. (R. pp. 132-135)

Dr. Robert Schwartz evaluated McGaha on February 21, 2005 for complaints of sharp shoulder pain related to work. He noted that she had last worked in September 2003. On February 22, 2005, Dr. Schwartz again evaluated McGaha for complaints of left shoulder pain due to work and diagnosed subacromial arthritis. (R. pp. 136-138, 154-162; R. supp. p. 2) On March 4, 2005, Dr. Schwartz noted that he had seen McGaha for neck pain after a motor vehicle accident in 1990, but further noted her complaints of new shoulder pain related to her work for employer-defendant. (R. supp. p. 2)

Employment records show that McGaha reported her work injury on July 17, 2003. McGaha alleged neck and shoulder pain into her arm and hand due to her work with employer-

defendant. In a fax to Workwell dated July 17, 2003, Mary Gilboy indicated that employer-defendant would accommodate any restriction. On August 4, 2003, McGaha requested family medical leave and it was noted that McGaha had been restricted to a maximum lift of five pounds; however, Mary Gilboy indicated that these restrictions were not work-related. On August 6, 2003, it was noted that the pain in McGaha's left arm and shoulder had been aggravated by repetitive motion at work and that McGaha was restricted from working with her left hand. On January 14, 2004, Ms. Gilboy noted that McGaha's physician had cleared her to return to work. She indicated that this would need to be cleared through the company doctor before employer-defendant would allow her to return. (R. pp. 139-144,176-177, 184-189; R. supp. p.1)

Dr. Robert Dameron performed an independent medical evaluation on December 19, 2008. He noted that McGaha started having problems with her neck and left upper extremity in 2003 and that her job required repetitive activity. Dr. Dameron opined that McGaha's left shoulder problems began with work, that she was not at maximum medical improvement, and that she needed to return to Dr. Geary. (R. pp. 145-147)

## ARGUMENTS

In Brown v. Greenwood Mills, Inc., this Court explained at length the standard of appellate review in workers' compensation cases.

The South Carolina Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the workers' compensation commission. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.

The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial

evidence. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence.

Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct.App.2005)(citations omitted).

**I. The Commission's determination that McGaha sustained compensable injury to her neck in addition to her admitted left carpal tunnel syndrome and left shoulder injuries is supported by substantial evidence on the record.**

At the original hearing of this matter, Honeywell admitted McGaha sustained compensable carpal tunnel syndrome in her left upper extremity/hand, and by not appealing the issue further, Honeywell has now also admitted that McGaha sustained compensable injury to her left shoulder. Honeywell only challenges the Commission's finding that McGaha sustained compensable injury to her neck. However, a review of the record shows that there is substantial evidence to support the Commission's determination that McGaha sustained compensable injury to her neck and, therefore, that finding must be affirmed by this Court.

In order to be entitled to workers' compensation benefits for an injury, an employee must show that the injury arose out of and in the course of her employment. Owings v. Anderson Co. Sheriff's Dep't, 315 S.C. 297, 433 S.E.2d 869 (1993); S.C. Code Ann. § 42-1-160 (2003).

The phrase "arising out of" refers to the origin of the cause of the accident. 'An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.'

Clade v. Champion Lab., 330 S.C. 8, \_\_\_, 496 S.E.2d 856, 857 (1998). "An accident 'arises out of employment' when the employment is a contributing proximate cause." Beam v. State Workers' Comp. Fund, 261 S.C. 327, \_\_\_, 200 S.E.2d 83, 85 (1973). An injury "arises 'in the course of employment' . . . when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto." Id. When deciding whether causation of a particular injury has been established, the Commission may consider both lay and expert evidence, including lay testimony concerning claimant's health before and after an accident. Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999).

Here, the Commission's finding is supported by substantial lay and expert evidence. McGaha testified that she began working for employer-defendant in 1998 and that she worked as a deburrer, which required the extensive use of her upper extremities. (R. p. 205, line 8-p. 206, line 19) On or about July or August 2003, she was performing her regular work duties, when she began having pain and problems **in her left shoulder, the left side of her neck, and down her left arm.** McGaha testified that she reported these problems to her employer and that she was sent to the company nurse, who referred her to the company doctor at St. Francis Workwell. (R. p. 206, line 20-p. 207, line 7; p. 208, lines 8-15; p. 218, line 18-p. 219, line 7) **The company nurse, Mary Gilboy, corroborated McGaha's testimony and admitted that McGaha reported experiencing symptoms in her in her left shoulder, neck, and left arm.** (R. p. 234, line 18-p. 235, line 10)

McGaha stated that she saw Dr. Jack Brunson for her left upper extremity pain and that he recommended an MRI of the left shoulder. Dr. Brunson also recommended referral to neurosurgeon, Dr. Michael Bucci, and to orthopaedic specialist Dr. Stephen Geary, who

recommended possible future left shoulder surgery. However, McGaha testified that the insurance carrier denied authorization for the shoulder MRI and that she was unable to have the recommended surgery on her left shoulder because her health insurance was cancelled when she was terminated from her job. (R. p. 207, line 6-p. 210, line 4)

McGaha testified that she continues to experience pain and problems in her left shoulder, and as a result, she has difficulty performing activities involving her left upper extremity. As an example, she stated that she has difficulty lifting juice from the refrigerator with her left arm. (R. p. 214, lines 13-25; p. 222, lines 14-24) McGaha testified that she wants further treatment with Dr. Geary and is unable to return to any work as a result of her continuing left shoulder pain. (R. p. 212, lines 14-24; p. 214, lines 22-25)

Ms. Gilboy's notes taken from McGaha's employment file indicate on July 17, 2003 that McGaha had been evaluated at Mountain View Family Practice for likely work-related carpal tunnel syndrome and had been written out of work for a period of two weeks. (R. p. 58) **These notes further show that McGaha was experiencing pain in her neck and left arm and that she clearly stated that she thought her work activities were causing the problem** but that she did not want to miss time from work. (R. p. 58)

McGaha was sent to Workwell, the company doctor, to determine if she could perform one-handed duty, and on July 18, 2003, the nurse noted that Workwell had indicated McGaha could work with restrictions. McGaha was offered and gratefully accepted a lighter duty job which involved "airflow/waterflow," but the nurse later noted that McGaha was favoring her left arm quite a bit and was exhibiting facial grimaces while doing this work. (R. p. 59) **The nurse specifically noted on August 1, 2003 that an MRI of McGaha's neck had revealed multilevel degenerative disc disease.** (R. p. 60) Curiously, the nurse indicated in her note

that she told McGaha that her problem was not work-related simply because Dr. Merriwether related it to arthritis in her neck rather than carpal tunnel syndrome. There is no indication that the nurse addressed the fact that McGaha's work activities could have aggravated any arthritic condition in McGaha's neck. (R. p. 60)

Of note, **an FMLA form in McGaha's employment records indicate that Dr. Brunson advised the employer shortly thereafter that McGaha's problem was aggravated by repetitive activities.** (R. pp. 141-144) There is no indication in the nurse's notes that employer-defendant did anything with this information.

On October 28, 2003, the attending nurse noted that McGaha had seen Dr. Merriweather at St. Francis Workwell for her return to work evaluation and that he had restricted her from overhead work, interior lifting, and lifting greater than five pounds. The nurse further noted that McGaha became quite upset that she would lose her job when she was told that there was no work available within those restrictions. (R. p. 61) In fact, McGaha testified that she was terminated because no work was available under the restrictions placed by the company doctor. (R. p. 210, line 6-p. 211, line 15)

Of significant further note, Ms. Gilboy's note from April 15, 2004 indicates that McGaha told to her in a phone call that she was continuing to have pain in her shoulder and may need surgery. (R. pp. 62-63; see also p. 238, line 12-p. 239, line 8) McGaha signed the authorization for Ms. Gilboy to obtain her medical notes from Dr. Geary at that time.

The medical records show that on June 21, 2003, **Dr. Brunson evaluated McGaha for left arm pain and numbness from her neck to her fingers** which had reportedly been present for six months. He noted that McGaha's job requires the almost continuous use of her arms and hands in a deburring process, and after examination, he diagnosed carpal tunnel

syndrome **and cervicalgia**. (R. pp. 64-66) On July 17, 2003, Dr. Brunson noted that McGaha was unable to wear splints at work due to the nature of her job, and he diagnosed work-related carpal tunnel syndrome due to repetitive motion. (R. pp. 67-69) **In a note to employer-defendant, he specifically advised that McGaha's condition should be considered a workers' compensation injury.** (R. p. 70; see also p. 69)

On August 4, 2003, Dr. Brunson noted that McGaha continued to work other jobs for employer-defendant but also continued to experience worsened pain because of these activities, and **he again opined that her condition is a result of her work activities.** He also opined that McGaha needed to be out of work while her claim was sorted out. (R. pp. 72-74) In a form filled out for the employer and its FMLA program on or about August 6, 2003, Dr. Brunson opined that McGaha's left arm and shoulder problem "is aggravated by physical activity, particularly by repetitive motion." (R. pp. 141-144) On August 7, 2003, he noted that McGaha's neck and arm symptoms had improved since she has been out of work and wearing her splint. (R. pp. 76-77)

Upon evaluation on August 21, 2003, Dr. Brunson noted that NCV testing had not shown carpal tunnel syndrome, and after further evaluation, he diagnosed **possible radiculopathy or neuralgia and recommended an MRI of McGaha's left shoulder.** (R. pp. 79-82) Dr. Brunson continued to restrict McGaha from work, and on September 4, 2003, he noted that the MRI of the left shoulder had been denied by McGaha's insurance. (R. pp. 83-86) On February 14, 2005, **Dr. Brunson opined that McGaha's left upper extremity and neck problems were caused by her repetitive work at Honeywell.** (R. p. 107)

On July 17, 2003, **the attending nurse practitioner at St. Francis Workwell – the company physician's office – noted left neck, arm and hand pain.** She further noted that

McGaha was motivated and did not want to be out of work, even though she was having difficulty secondary to this pain. (R. pp. 108-111) The nurse assessed probable left cervical radiculopathy, and though she recorded McGaha's specific description of worsened symptoms as a result of her work duties, she stated that she was "unsure if this is directly related to work" as "she does not relate any specific incidents." (R. p. 110) Of course, **McGaha's description as recorded by the nurse practitioner is clearly a compensable repetitive work injury.**

On August 1, 2003, the attending company physician, Dr. Merriwether, continued to note McGaha's **complaints of neck pain radiating to her left arm, and he specifically noted that McGaha related her symptoms to her work activities. He diagnosed cervical radiculopathy, referred McGaha to a spine specialist, and advised her to speak with Mary at Honeywell to get an appointment arranged.** (R. p. 114) In the meantime, Dr. Merriwether restricted McGaha from twisting and bending of the neck at work and from lifting greater than five pounds with her left arm. (R. p. 114)

Neurosurgeon Dr. Michael Bucci evaluated McGaha on November 4, 2003 for cervical spine problems and left upper extremity pain and numbness. After physical therapy failed to relieve the problem, he assessed persistent left upper extremity weakness and pain and recommended an MRI of the left shoulder and a CT myelogram of the cervical spine to rule out primary shoulder or spine pathology. On December 30, 2003, he insisted the insurance carrier authorize an MRI of McGaha's left shoulder. (R. pp. 122-128)

On January 7, 2004, McGaha underwent an MRI of her left shoulder, and the reviewing radiologist opined the scan showed mild impingement tendinosis. (R. p. 165)

Pain management specialist **Dr. Clifford Monda evaluated McGaha on January 13, 2004 for complaints of left-sided neck and left upper extremity complaints, and he**

**specifically noted that she related her symptoms to her work activities at Honeywell.** (R. p. 129) He also specifically noted that McGaha was very motivated to return to work, as she indicated that she had to return by February 4, 2004 or she would lose her job. **After examination, Dr. Monda diagnosed possible left rotator cuff tear pending results of an MRI and cervical spine pain due to spurring, stenosis, and neuroforaminal narrowing.** (R. p. 130) He refilled her prescription of the pain medication Lortab, injected the left shoulder, and restricted McGaha from lifting, pulling or pushing greater than ten pounds. (R. pp. 130-131)

Orthopaedic specialist Dr. Stephen Geary evaluated McGaha on January 21, 2004 for complaints of left shoulder pain and noted the pushing and pulling she was required to perform at work. (R. p. 132) He diagnosed left shoulder subacromial impingement and cervical spondylosis and recommended injecting the AC joint, but also stated that decompression surgery was the next step if the injection failed to provide relief. (R. pp. 133-134) Of course, McGaha has testified that the injection did not help and that she continues to experience left shoulder pain and is in need of more treatment as recommended by Dr. Geary. (R. p. 214, lines 13-25) On February 9, 2005, Dr. Geary opined that McGaha's left shoulder problems were aggravated by her work at Honeywell. (R. p. 135)

Dr. Robert Schwartz evaluated McGaha on February 22, 2005 for complaints of sharp shoulder pain which she stated began in 2003 as a result of her work activities. (R. pp. 136-137) He diagnosed subacromial arthritis and recommended treatment. On March 4, 2005, Dr. Schwartz noted that he had seen McGaha for neck and right arm pain after a motor vehicle accident in 1990 but again noted her complaints of new shoulder pain which she related to her work for employer-defendant. (R. supp. p. 2)

Employment records show that McGaha reported her work injury on July 17, 2003, and the form clearly notes that she alleged neck and shoulder pain which extended into her arm and hand and that she contended her work activities were causing the problem. (R. p. 139) In a form filled out for the employer and its FMLA program, Dr. Brunson opined on August 6, 2003 that McGaha's left arm and shoulder problem "is aggravated by physical activity, particularly by repetitive motion." (R. pp. 141-144)

Orthopaedist Dr. Robert Dameron performed an independent medical evaluation on December 19, 2008. **He noted that McGaha started having problems with her neck and left upper extremity in 2003 and that her job required repetitive activity.** Dr. Dameron opined that McGaha's left shoulder problems began with work, that she was not at maximum medical improvement, and that she needed to return to Dr. Geary. (R. pp. 145-147)

From the foregoing it is very obvious that McGaha has had neck, left shoulder, and left upper extremity problems from the very beginning of this situation and that she reported the same to her employer. All of the physicians who have evaluated her have noted her description of her work activities and her opinion that her problems were caused by her work. Dr. Brunson unequivocally stated that her problems were related to her work activities, and Doctors Geary and Dameron agreed. The Commission's finding that McGaha has sustained compensable injury to her neck in addition to her left shoulder and her admitted left carpal tunnel syndrome is thoroughly supported by substantial evidence on the record and must be affirmed.

**II. The Commission correctly determined McGaha is entitled to temporary total disability compensation benefits from March 4, 2005 to the present and continuing.**

A review of the evidence on the record shows that McGaha has been unable to work because of her injuries since August 1, 2003, and under applicable workers' compensation law, she would therefore be entitled to temporary total disability compensation from that date to the present and continuing until she reaches maximum medical improvement. McGaha alleged the same at the original hearing of this matter, but defendants responded with the allegation that she should not be allowed benefits for that entire period since she spent part of that time caring for her sick husband. In a spirit of compromise, McGaha alternatively contended that she should be awarded benefits from August 1, 2003 to March 5, 2005 and then from December 19, 2008 to the present and continuing. In obvious such compromise, the single Commissioner determined that McGaha is entitled to temporary total disability benefits from March 4, 2005 to the present and continuing. That decision was affirmed by the Commission's Appellate Panel, and in further spirit of compromise, McGaha opted not to appeal further concerning the period from August 1, 2003 to March 4, 2005. On Honeywell's appeal to the Circuit Court, the Honorable G. Edward Welmaker determined that "[a]s the evidence actually shows that McGaha has been totally disabled because of her injuries since August 4, 2003, the Commission's compromise determination that she is entitled to temporary total disability compensation for the lesser time period from March 4, 2005 to the present and continuing is clearly supported by substantial evidence and is affirmed." (R. pp. 28-31) This Court should likewise affirm the Commission's decision, as that finding is clearly supported by substantial evidence and is not affected by any error of law.

Workers' compensation law provides that an injured employee is entitled to and an employer is liable for temporary total disability compensation benefits for all periods of total disability, or inability to earn wages because of the injury in the same or any other employment, until the Commission determines that the worker has reached maximum medical improvement. Smith v. S.C. Dep't of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999); S.C. Code Ann. §§ 42-1-120, 42-9-10 (2003). The Commissioner here found that McGaha has not yet reached maximum medical improvement from her injuries and is in need of additional medical treatment in order to reach that plateau. (R. p. 12, Finding of Fact #20) As the evidence actually shows that McGaha has been totally disabled because of her injuries since August 1, 2003, the Commission's compromise determination that she is entitled to temporary total disability compensation for the lesser time period from March 4, 2005 to the present and continuing is clearly supported by substantial evidence.

Dr. Brunson opined that McGaha needed to be out of work while her claim was sorted out and restricted her from work from August 4, 2003 to August 25, 2003. (R. pp. 69-70, 72-74) He continued to restrict McGaha from work through September 4, 2003 and noted on that date that the MRI he had recommended was denied. (R. pp. 75, 81, 85, 90) He continued to help her pursue medical evaluation and treatment with orthopaedic and neurosurgical specialists and continued to restrict her work duties through November 15, 2003. (R. p. 97, 141-144)

**Employer-defendant sent McGaha to Dr. Merriwether's office, and in a fax to that office dated July 17, 2003, Mary Gilboy indicated that employer-defendant would accommodate any restriction.** (R. p. 196) McGaha was restricted to light duty work by Dr. Merriwether's office, and **Dr. Merriwether finally restricted McGaha from twisting**

**and bending of the neck at work and from lifting greater than five pounds with her left arm when he last saw her on August 1, 2003.** (R. p. 114)

The plant nurse, Ms. Gilboy, noted that McGaha became quite upset that she would lose her job when she was told that there was no work available within Dr. Merriwether's restrictions. (R. p. 61) In fact, McGaha testified that she was terminated because the employer told her that no work was available under those restrictions. (R. p. 210, line 6-p. 211, line 15)

Of course, there can be no dispute that an employee is totally disabled because of her injuries and entitled to full temporary total disability compensation if the employer fails to provide light duty work recommended by the treating physician. Such is the case here, and **such result is especially warranted where, as here, Honeywell specifically told the treating physician that light duty work would be provided and then terminated McGaha stating that those light duty restrictions could not be accommodated.**

Nevertheless, the Commission – as a part of an obvious compromise – determined that McGaha was disabled from working because of her injuries and entitled to temporary compensation benefits from March 4, 2005 to the present. McGaha testified that her husband suffered from several illnesses, including several bouts with cancer and strokes, during this time that she has been out of work due to the injuries sustained at Honeywell (R. p. 212, line 14-p. 214, line 12), and defendants argue that they should not be held responsible for temporary total disability benefits alleging that her need to be with him and care for him is the real reason that she has not worked. However, **the fact that some other circumstance also contributes to the worker's inability to work is immaterial and does not remove an employer's liability for compensation benefits.** See Orr v. Elastomeric

Products, 323 S.C. 342, 474 S.E.2d 448 (Ct.App.1996)(claimant entitled to continued temporary disability benefits despite intervening pregnancy where disability caused by work-related injury, not pregnancy).

In its brief, Honeywell focuses on the March 4, 2005 date and argues that there is no medical record dated on or about that date which proves McGaha became totally disabled at or around that time. However, Honeywell is merely putting a “red herring” before this Court, since the Court must look at the entire record and the circumstances of this claim in order to understand the Commission’s decision. Judge Welmaker picked up on this, and the following exchange between him and Honeywell’s attorney is especially telling:

The Court: So if the Commissioner had found that temporary total should have started in 2003, you really wouldn’t have had a complaint?

Mr. Dunbar: I don’t think I would have had much of a leg to stand on, to be quite candid. Because then there are medical documents in the record to support temporary total beginning on that date.

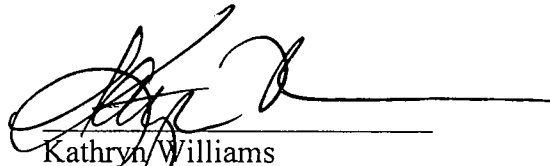
(CCt tr. p. 268, lines 16-22)

**This admission by defendants concedes the very argument they are now making before this Court.** If there is substantial evidence to support McGaha’s entitlement to temporary total disability compensation since 2003, then there is substantial evidence to support the Commission’s award of benefits for the shorter period of time. The Commission’s findings and award on this issue should be affirmed without change.

## CONCLUSION

It is, therefore, respectfully submitted that the Commission's determination that McGaha has sustained compensable injury to her neck in addition to her admitted left shoulder and left carpal tunnel syndrome injuries is fully supported by substantial evidence on the record, and such determination is not affected by any error of law. Furthermore, as the evidence actually proves that McGaha has been totally disabled because of her injuries since August 1, 2003, the Commission's compromise determination that she is entitled to temporary total disability compensation for the lesser time period from March 4, 2005 to the present and continuing is clearly also supported by substantial evidence, and such determination is not affected by any error of law. This Court should affirm the Commission's Order in its entirety.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. EDWARD WELMAKER, Circuit Court Judge

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Case No. 2009-CP-23-7978

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Maria E. McGaha.....Respondent

vs.

Honeywell International, Inc., Employer,  
and Zurich North America, Carrier.....Appellants

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**APPELLANTS' REPLY BRIEF**

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In Respondent's Brief on Page 22, it is asserted Appellants concede and admit Respondent is entitled to temporary total disability compensation benefits. The question posed by the Circuit Court and the answer provided to the Court does not concede, admit nor stipulate payment of temporary total disability compensation benefits are owed beginning on March 4, 2005. The exchange between the Court and Appellants' counsel when read in its entirety and within context reflects that temporary total benefits could have only been potentially awarded for carpal tunnel syndrome. (R. pp. 68-70, 73, 75-81, 85, 90, and 97).

In particular, Appellants' counsel's argument to the Court regarding the payment of temporary total disability compensation confirms that such could not have been awarded as of March 4, 2005.

**The Court: So if the Commissioner had found that temporary total should have started in 2003, you really wouldn't have had a complaint? (R. p. 268, lines 16-18).**

**Mr. Dunbar: I don't think I would have had much of a leg to stand on, to be quite candid. Because then there are medical documents in the record to support temporary total beginning on that date. Now, the only problem is how do you order temporary total six years down the road? Because there is some evidence indicating that she was able to return to work some time in 2004/2005. So we would take the position that the record would support that [temporary total disability benefits] shouldn't have been continuing. But the beginning date, clearly, I would not have much to argue... because the Commission ignored all of those records and arbitrarily chose... one report that just shows she had a test conducted on that date, and no doctor writes her out from work. (R. p. 268, lines 16-25; and p. 269, lines 1-7).**

**Mr. Dunbar: The only documents... the record to support temporary total would be from 2004 back. The reason why the Commission did not order payment of temporary total is**

**because the evidence didn't support such. [Claimant] had carpal tunnel syndrome that was eventually ruled out, which my client had admitted could have resulted from work. [Appellants] denied the shoulder, denied the neck. So the Commission was in a quandary in terms of ordering temporary total from 2003 because what we had admitted was ruled out and the cervical spine wasn't a problem. It was arthritic. (R. p. 281, lines 20-25, p. 282, lines 1-6).**

The arguments of Appellants' counsel evidences Appellants' admission that if claimant had indeed suffered with carpal tunnel syndrome as originally diagnosed and temporary total disability compensation benefits had been ordered, the Commission's decision to award temporary total disability compensation benefits beginning in 2003 would likely have been supported by substantial evidence. The argument was simply that admittedly compensable carpal tunnel syndrome had affected the hands, and thus, would have legally obligated Appellants to pay temporary total disability compensation benefits in 2003. (R. pp. 68-70, 73, 75-81, 85, 90, 97). Respondent received treatment for carpal tunnel syndrome in 2003.

Appellants denied claimant's allegations of injuries to the neck, left shoulder and left upper extremity. Appellants' denial of a compensable injury to the neck or cervical spine is corroborated by the neurosurgical medical reports of Dr. Michael Bucci, who opined that Respondent suffers with arthritis or degenerative disc disease and she is not a surgical candidate. Dr. Bucci never opined Respondent's neck problems emanated or were aggravated by her employment duties. Thus, there would be no basis legally for the Commission nor the Court to have ordered payment of temporary total disability compensation benefits for the alleged neck malady in 2003/2004.

With respect to the left shoulder, Respondent had never been authorized to remain out-of-work due to her left shoulder malady. The Commission's decision to award temporary total disability compensation benefits beginning on March 4, 2005 is not supported by any medical evidence or credible, non self-serving lay testimony.

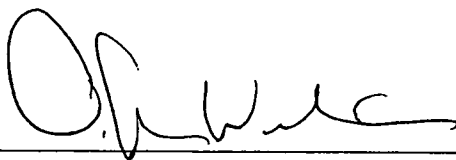
It is incumbent upon an injured worker to seek redress from the South Carolina Workers' Compensation Commission, when he or she believes that he/she has suffered a compensable work related accident and is entitled to indemnity and medical benefits. Respondent did not seek an adjudicatory hearing before the South Carolina Workers' Compensation Commission for five years and after Appellants had moved to have the matter dismissed for lack of prosecution. Because of Respondent's delay in prosecuting her claim, the Commission chose to arbitrarily assign the date of March 4, 2005 as the date Respondent was temporarily and totally disabled.

Last, Respondent's reliance upon the Court's holding in Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996) is misplaced. In Orr the injured worker was receiving temporary total disability compensation and medical benefits. The Court of Appeals ruled simply that because claimant was pregnant, the pregnancy had indirectly prolonged the period during which time she was unemployable because it was unsafe for her to undergo x-rays due to radiation exposure while pregnant. Claimant's injury and not the pregnancy, rendered her unable to work. Orr v. Elastomeric Products, 474 S.E.2d at 449. Substantial evidence overwhelmingly shows that Respondent's caretaking activities because of her spouse's illness was the proximate reason for her inability to work, to seek

work and/or to obtain medical treatment, as opposed to her work related shoulder problem.

Because there is no medical evidence authorizing Respondent to remain out of work for injuries to her right shoulder on March 4, 2005 to the present, the Commission's Decision and Order must be reversed as a matter of law and because of abuse of discretion. See, Scott v. Havnear Motor Co., 226 SC 580, 86 S.E.2d 475 (1955); Schwartz v. Mount Vernon-Woodberry Mills, 206 S.C. 227, 33 S.E.2d 517 (1945) and Mullinax v. Winn-Dixie Stores, 318 SC 431, 458 S.E.2d 76 (Ct. App. 1995).

Respectfully submitted,

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