

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Full Commission Review
Derrick Williams, Commissioner

W.C.C. File No.: 0813280
And
W.C.C. File No.: 0823253

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MAR 30 2012

S.C. Supreme Court

Patricia D. Johnson.....Appellant,

v.

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

And

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

APPENDIX

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Patricia D. Johnson.....Appellant,

v.

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

And

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

APPELLANT'S PETITION FOR REHEARING

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Appellant's Petition for Rehearing

The Appellant moves this Court respectfully pursuant to Rule 221 (a) of the South Carolina Appellate Court Rules for this Honorable Court to reconsider and rehear the Court's Opinion No. 2011-UP-468 filed October 21, 2011 affirming the South Carolina Workers' Compensation Order denying workers' compensation benefits to the Appellant.

Appellant respectfully submits that in affirming the Workers' Compensation Commission Order, the Court failed to adhere to the over whelming evidence in the Record on Appeal and South Carolina Law relating to the Appellant's claim that she aggravated a pre-existing back problem while being exposed to repetitive motion trauma on her job, or, in the alternative she suffered a specific on the job injury on or about August 23, 2011 that aggravated a pre-existing back problem.

I. This Court erred in affirming the Workers Compensation Commission Order because the Workers Compensation Order failed to take into consideration the overwhelming evidence in the Record concerning repetitive motion trauma, and how it may aggravate a pre-existing injury.

The Court did not address the issue of judicial estoppel. This was not addressed in the Workers' Compensation Commission Order, and by adopting this order, the Court did not address the issue either.

The Respondents and the Appellant entered into a Consent order dated July13, 2009 that shows the Parties agreed the Appellant suffered bilateral upper extremity injures arising out of and in the course her of employment that was due to repetitive

trauma. (R.pp.23-25). The Appellant described her job duties to the single commissioner when she began employment with the Respondent Employer. She says she was required to bend, stoop, lift over head, and twist her body to do her job. (R.p.66.1.10-p.69.1.10). The Appellant had back surgery in 2005, and was able to return to work after about six months. She went back to the same job with the same duties. She was performing this job with these duties when she got hurt first in March of 2008 and then in August of 2008. (R.p.73.1.6-p.77.1.10).

Couple this testimony with the Consent Order regarding the upper extremities; there is ample evidence to support the Appellant's accidental injury claim from repetitive motion. The Appellant would argue as a basis for the rehearing that the single commissioner nor the full commission considered the Appellant's argument related to judicial estoppel.. 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). This issue was not addressed by the Workers' Compensation Commission, and it was not addressed by the ruling of this Court. The Respondents admit that repetitive motion caused the injures to the upper extremities, and deny that repetitive motion caused an aggravation of a pre-existing back problem. These are contrary positions, and the Respondents should be judicially estopped from prevailing on the back issue.

The Appellant describes the duties required of her before her surgery in 2005, and she stated the same duties with the same body movements were required of her in 2008. The Court's opinion in this case goes counter to its findings in a recent opinion it issued in March of 2011, to wit: "(A) 'Repetitive trauma injury' means an injury which is

gradual in onset and caused by the cumulative effects of repetitive traumatic events. *Compensability of a repetitive trauma injury must be determined only under the provisions of this statute.....*'repetitive trauma injury' is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury. S.C.Code Ann. § 42-1-172 (Supp.2010) (emphasis added).” Murphy v. Owens Corning, 393 S.C. 77, 83-84, 710 S.E.2d 454, 457-58 (Ct. App. 2011). The difference in the Appellant’s case and *Murphy, id.*, is that the Workers Compensation Commission found in favor of the Claimant and this Court upheld the Order and Award. There are two doctors relating this Appellant’s back injury to repetitive trauma, Drs. Richard Bannon and Dr. Cavert McCorkle.

The Courts in South Carolina have recognized a worker suffering an illness caused by repetitive motion is compensable. “Claimant's carpal tunnel syndrome was compensable under the Workers' Compensation Act as an injury by accident; although claimant experienced her symptoms for some time during her repetitive work activity, there was no indication that she expected or intended the resulting condition of median nerve compression.” *Pee v. AVM, Inc.* (S.C.App. 2001) 344 S.C. 162, 543 S.E.2d 232, rehearing denied, certiorari granted, affirmed 352 S.C. 167, 573 S.E.2d 785. Workers' Compensation § 568.6(2) S.C. Code Ann. § 42-1-160.

Dr. Phillip K. Latourette’s opinion should be discounted. Dr. Latourette did not meet the standard set forth under 42-1-172. Dr. Latourette, in a note dated November 7, 2008 (APA 197) says, “I am prepared to declare that Ms. Johnson is fully disabled. I am not prepared to declare her pain disability is due to a work related injury.” (R.p. 363). The

Respondents never asked Dr.Latourette to declare this with a reasonable degree of medical certainty. Yet, the single commissioner and the full commissioner gave “great weight” to this note. (R.p.40). In other words, Dr. Latoourette did not have butt one opinion, and that was that the Appellant is now “disabled”. The Appellant worked for three years subsequent to her back surgery in 2005 before Dr. Latourette makes the statement that she is now disabled. There is but one thing that could have caused the disability, and that is the repetitive motion requirements of her job. The Respondents should be judicially estopped to declare otherwise.

II. The Court, by affirming the Workers’ Compensation Commission in an unpublished opinion, erred by not finding that the Appellant suffered, in the alternative, a specific injury to her back that aggravated a pre-existing condition.

The Appellant gave details about a specific injury. She stated that she was doing some rework and bending over to put screws in the bottom of the door which she described as being very, very low, and she felt something pull in her back. (R.p.77,l. 23-p.82, l. 19). There is no testimony in the record to deny that this occurred. The Respondents produced the testimony of John Huss, a section leader for the Appellant, who was not present when the Appellant made this complaint., and in fact, had not even seen the incident report until sometime after the incident. (R. p. 132,ll 14-15).

The Appellant, therefore, would argue that by affirming the Workers’ Compensation Commission Order and Award, this Court erred by not giving liberal

construction to the Workers' Compensation Act in favor of the Appellant. "The Workers' Compensation Act is to be given liberal construction, with doubts of jurisdiction resolved in favor of inclusion of employees within workers' compensation coverage." Code 1976, § 42-1-10 et seq. Cases that cite this headnote. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). There is no other person brought forward by the Respondents to deny the specific injury. They did not produce as witnesses the company nurse nor did they produce the company doctor.

Conclusion

The Appellant would therefore argue that she is entitled to a rehearing before this Court because there is overwhelming evidence in the Record to support her claim that she aggravated a pre-existing condition in her back by repetitive trauma, or, in the alternative, she suffered a specific injury to her back that aggravated the pre-existing back injury.

Respectfully Submitted

Date: November 2, 2011

Albert V. Smith, P. A.

By: 

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Full Commission Review
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W.C.C. File No.: 0813280
And
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Patricia D. Johnson.....Appellant,

v.

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

And

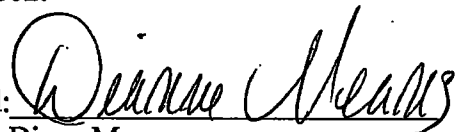
Hartford Insurance Company of the Midwest
and Specialty Risk Services, Inc.....Carrier, Respondent.

PROOF OF SERVICE

I, Diane Means, certify that I have served the Notice of Intent to Appeal on Respondents above named by depositing a copy of it in the United States mail, postage prepaid, on November 2, 2011, addressed to their attorney of record, Vernon F. Dunbar, Post Office Box 1509, Greenville, South Carolina 29602.

May 20, 2010.

Signed:



Diane Means
Paralegal to Albert V. Smith
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Spartanburg, South Carolina 29304
(864) 585-8174
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
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Full Commission Review
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WCC File No.: 0813280

APR 10 2012

- and -

WCC File No.: 823651

S.C. Supreme Court

Patricia D. Johnson, EmployeeAppellant,

vs.

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

- and -

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

**RESPONDENTS' RETURN TO APPELLANT'S
PETITION FOR REHEARING**

I. INTRODUCTION

This Court affirmed the South Carolina Worker's Compensation Commission Appellate Panel's Decision and Order in an unpublished Decision filed October 21, 2011. (Unpublished Opinion No. 2011-UP-468). Specifically, this Court affirmed the South Carolina Workers' Compensation Commission's Order which found as a fact and concluded as a matter of law that Appellant, Patricia

D. Johnson, had failed to satisfy her burden of proving the occurrence of a compensable work related accident and back injury. Appellant filed her Petition for Rehearing in accordance with Rules 221(a) and 240 of the South Carolina Rules of Appellate Procedure by letter dated November 2, 2011.

Appellant argues the Court erred in affirming the finding that Appellant's back injury did not arise out of and in the course and scope of her employment, despite substantial evidence supporting the South Carolina Workers' Compensation Commission's factual findings. BMW Manufacturing Corporation, and its worker's compensation insurance carrier, Hartford Insurance Company of the Midwest [hereinafter "Respondents"], respectfully request that Appellant's Petition for Rehearing be denied on the following grounds.

First, this Court correctly determined that considering the record as a whole, substantial evidence supported the South Carolina Workers' Compensation Commission's Decision that Appellant failed to prove by a preponderance of the evidence that she had suffered a work related accident or aggravated a preexisting condition to her back as a consequence of her employment duties on or about August 19 or 23, 2008. Second, Appellant did not properly reserve for review the applicability of the argument of judicial estoppel by illustrating that such was properly pled and included in the Commission's Form 30.

II. ARGUMENT

Appellant's Petition for Rehearing is based upon the same facts and arguments raised in her Appellate Briefs. South Carolina Appellate Court Rule

221(a) permits the filing of a Petition for Rehearing where issues of law or fact have been "overlooked or misapprehended" by the Court. In the instant case, there is no omission or misapprehension of the facts or the applicable law. As a matter of fact, Appellant has not argued the Court misapprehended the law or failed to consider applicable law. The Court correctly determined that substantial evidence supported the Commission's Decision with regard to its denial of worker's compensation benefits to Appellant. The substantial evidence in the record was fully explored. Simply, Appellant failed to prove she suffered a work related accident or an aggravation of a preexisting condition by virtue of an accidental injury during the course and scope of her employment with BMW Manufacturing Corporation. *S.C. Annot. §42-1-160 (2011)*.

A. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DECISION TO DENY WORKER'S COMPENSATION BENEFITS TO APPELLANT.

First, Dr. Kevin Kopera in a report dated April 1, 2009 opined that Appellant did not suffer an injury to her back while simply bending to put screws in a door; and that she had performed that activity in the past without apparent difficulty. (R. p. 431). Dr. Kopera further stated that the work activity described by Appellant "typically would not produce low back pain; however, if it did one would expect it to be temporary." (R. p. 431). Dr. Kopera further indicated Appellant had attained maximum medical improvement with regard to her job activities; and that she had suffered no medical impairment and no medical care and treatment was warranted. (R. p. 431).

Second, Dr. Richard Bannon, Appellant's family physician, testified Ms. Johnson has degenerative disc disease with stenosis and osteophyte formation. Dr. Bannon testified that the condition of degenerative disc disease normally progresses as one ages. Dr. Bannon also testified that degenerative disc disease played a large role, with regard to Appellant's chronic pain condition. Addressing to the impact of Appellant's work upon her back condition, Dr. Bannon acknowledged that he did not know the size or the weight of the screws installed on the doors; or the amount of time Appellant spent working on doors. Dr. Bannon admitted that his opinion on causation was based upon information provided to him by Appellant's counsel.

Further, Dr. Bannon testified that any conclusion he reached about whether Appellant's job duties aggravated her preexisting back condition consisted of "an educated speculation". (R. p. 513; lines 19-23; p. 515; lines 17-21).

Third, Dr. Calvert McCorkle, a neurosurgeon, had performed surgery on Appellant's back in 2005. Dr. McCorkle last treated and examined Appellant in 2005. (R. pp. 454-459). Dr. McCorkle testified he had not evaluated Appellant nor discussed Appellant's work activities with her at the time he rendered his opinion on causation nor at the time of his deposition, which was taken on March 23, 2009.

Fourth, Dr. Phillip LaTourette, a pain management physician, the only physician who has continuously treated Appellant since 2005, opined on November 7, 2008, that he was unable to declare that Appellant's pain and

disability emanates from a work related injury or work related accident. (R. p. 363).

In sum, based upon the medical testimonies of Drs. Kopera, Bannon and LaTourette, the Commission's Decision is clearly supported by substantial evidence. Hence, Appellant's Petition for Rehearing should be denied. Shealy v. Aiken County, 341 S.C. 448, 455, 435 S.E.2d 438, 442 (2000).

B. THE TESTIMONY OF APPELLANT'S SUPERVISOR, JOHN HUSS, CONSTITUTES SUBSTANTIAL EVIDENCE IN SUPPORT OF THE COMMISSION'S DECISION.

With respect to Appellant's allegations that she injured her back while installing screws at the bottom of a door, Mr. 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, Mr. Huss testified assuming Appellant was putting on a door panel when she injured her back, only minor and limited bending would be involved. According to Mr. 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, Mr. Huss disputed the fact that the re-work area required constant bending. (R. p. 129, lines 3-21).

Because the South Carolina Workers' Compensation Commission is the ultimate finder of fact, and had determined that greater weight should be placed upon the testimony of John Huss, substantial evidence supports the Commission's finding that Appellant failed to meet her burden of proof. *Id.* See also, Muir v. C. R. Bard, Inc., 336 S.C. 266, 281-82, 519 S.E.2d 583 (Ct. of App., 1999).

C. APPELLANT'S ARGUMENT REGARDING THE APPLICABILITY OF JUDICIAL ESTOPPEL WAS NOT PROPERLY PRESERVED FOR 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 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 the instant case, the doctrine of judicial estoppel is not applicable. First, Respondents did not take any conflicting position or misrepresent any facts or issues to gain an advantage. Appellant sustained two completely different accidents. The first accident occurred on or about March 14, 2008 and involved injuries to the upper extremities. Because of the type of job Appellant 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.

Second, the argument involving judicial estoppel was not preserved for review. *See e.g. Cord v. E. H. Hines Const. Co.*, 220 S.C. 356, 67 S.E.2d 677 (1951). Specifically, Appellant did not appeal this issue and take exception to such in her appeal to the South Carolina Workers' Compensation Commission. (R. pp. 47-49). The argument was improperly raised for the first time in Appellant's Brief to the Full Commission. South Carolina Commission Regulation 67-701 requires that the appealing party first set forth specific grounds for an

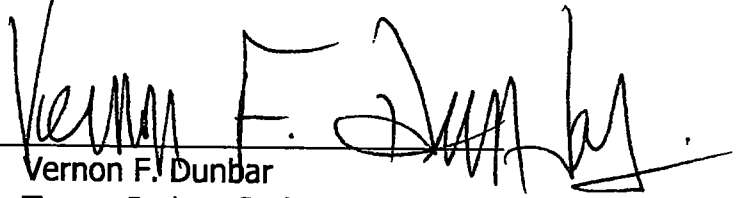
appeal in order for such to be briefed and subsequently considered by the South Carolina Workers' Compensation Commission. In the instant case, Appellant failed to comply with Regulation 67-701, and thus, the argument of judicial estoppel is not properly before this Court.

V. CONCLUSION

The Court's opinion fully addressed all issues on appeal and it correctly decided those issues. Appellant's Petition for Rehearing does not demonstrate otherwise, and there is no reason for the Court to reconsider or revisit its decision. For these reasons, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

By:



Vernon F. Dunbar

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Full Commission Review
Derrick Williams, Commissioner

WCC File No.: 0813280
- and -
WCC File No.: 823651

Patricia D. Johnson, EmployeeAppellant,

vs.

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

- and -

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

CERTIFICATE OF SERVICE

I certify that I have served *Respondents' Return to Appellant's Petition for Rehearing and Certificate of Service* on Albert V. Smith, Esquire, Attorney for Appellant, by depositing a copy of each of the documents in the United States mail, postage prepaid, on November 11, 2011, addressed to Albert V. Smith, Esquire, Post Office Box 5866, Spartanburg, SC 29304.

By: 

Vernon F. Dunbar
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November 11, 2011

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
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MYRTLE BEACH

November 11, 2011

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Attorney at Law

VDunbar@TurnerPadget.com
Direct Dial: (864) 552-4601

The Honorable Tonya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Patricia D. Johnson, Appellant v. BMW Manufacturing Corporation, LLC
and Hartford Insurance Company of the Midwest and Specialty Risk
Services, Respondents
WCC File Nos: 0813280 and 0823651
Appellate Court File No.:

Dear Ms. Gee:

Please find enclosed the original and one copy of **Respondents' Return to Appellant's Petition for Rehearing and Certificate of Service**, in connection with the above-referenced matter. Please return the clocked copy of this letter and Brief to me verifying your receipt in the self-addressed, stamped envelope I have enclosed.

By copy of this letter to Albert V. Smith, attorney for appellant, I am apprising him of my communication with the Court and serving upon him a copy of Respondents' Return.

With kind and warm regards, I remain

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Vernon F. Dunbar

VFD/jsm

Enclosure: Respondent's Return/COS/SASE

cc: Albert V. Smith, Esquire (w/enclosures)

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S.C. Supreme Court

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SC COURT OF APPEALS

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TPGL 4150407v1

The South Carolina Court of Appeals

Patricia D. Johnson, Employee, Appellant,

v.

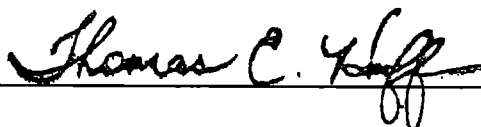
BMW Manufacturing Corporation,
LLC, Employer, and Hartford
Insurance Company of the Midwest and
Specialty Risk Services, Inc., Carrier, Respondents.

South Carolina Workers' Compensation Commission
Appellate Panel
Trial Court Case No. 2008-WC-40-13280
And
Trial Court Case No. 2008-WC-40-23253

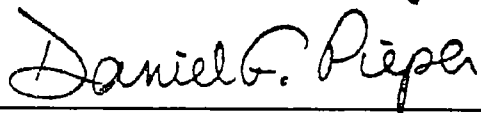
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded.

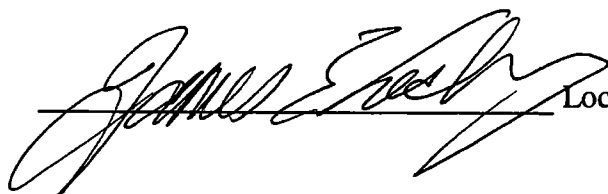
It is, therefore, ordered that the Petition for Rehearing be denied.



Huff, J.



Pieper, J.



Lockemy, J.

Columbia, South Carolina

cc: Albert V. Smith, Esquire
Vernon F. Dunbar, Esquire

FILED

19 December 2011

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Patricia D. Johnson, Employee, Appellant,

v.

BMW Manufacturing
Corporation, LLC, Employer,

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

Respondents.

Appeal From the Appellate Panel
South Carolina Workers' Compensation Commission

Unpublished Opinion No. 2011-UP-468
Heard October 5, 2011 – Filed October 21, 2011

AFFIRMED

Albert V. Smith, of Spartanburg, for Appellant.

Vernon F. Dunbar, of Greenville, for Respondents.

PER CURIAM: In this workers' compensation case, Patricia D. Johnson argues the South Carolina Workers' Compensation Commission (the Commission) erred in finding Johnson failed to satisfy the burden of proving the occurrence of a compensable accident. We find no error of law in the Commission's decision to deny Johnson's claim and we find the decision to be supported by substantial evidence of record; therefore, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 1-23-380(5)(d),(e) (Supp. 2010) (providing this court may not substitute its judgment for that of the Commission as to the weight of the evidence, but may reverse where the decision is affected by an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record); Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 614 (Ct. App. 2004) ("A determination of whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the [Commission]."); id. at 289, 599 S.E.2d at 611 ("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.").

AFFIRMED.

HUFF, PIEPER and LOCKEMY, JJ., concur.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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October 21, 2011

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RECEIVED OCT 21 2011

Vernon F. Dunbar, Esquire
Turner Padgett Graham & Laney, PA
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Greenville, SC 29602

Re: Johnson, Patricia v. BMW Manuf.

Dear Counsel:

Enclosed is the opinion of the Court of Appeals in this case.

Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Appellate Panel of the South Carolina Workers' Compensation Commission after fifteen (15) days, exclusive of the date of filing of this opinion.

No extension for a petition for rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice.

Sincerely,

A handwritten signature in cursive script, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative Specialist

TAG/rj