THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Full Commission Review
Derrick Williams, Commissioner

RECEIVED
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S.C. Supreme Court

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

Patricia D. Johnson...~~Appellant~~ Petitioner,

v.

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

And

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

APPENDIX 2

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0813280 and 0823253

PATRICIA D. JOHNSON, EMPLOYEE, CLAIMANT/APPELLANT,

- v -

BMW MANUFACTURING CORPORATION, LLC, EMPLOYER,

- and -

HARTFORD INSURANCE COMPANY OF THE MIDWEST AND SPECIALTY RISK SERVICES, INC., CARRIER, DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina on January 25, 2010 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed April 27, 2010

APPEARANCES:

Claimant/Respondent represented by
Albert V. Smith, Esquire of Spartanburg, South Carolina

Defendants/Appellants represented by
Vernon F. Dunbar, Esquire of Greenville, South Carolina

TPGL 3135238v1

STATEMENT OF THE CASE

The worker's compensation claim of Patricia Dianne Johnson, claimant/appellant, was heard by Commissioner T. Scott Beck in Spartanburg, South Carolina on April 23, 2009. Appellant is a 58 year old married female, who graduated from high school. Appellant later obtained a certificate for completing computer classes at Spartanburg Technical College. Appellant began working as a production associate for BMW Manufacturing Corporation, LLC, defendant/respondent, on November 13, 2000.

Appellant alleges that various job duties as production associate resulted in a disabling injury to her back on or about August 23, 2008. Specifically, appellant contends repetitive activity involving overhead lifting; pulling racks; and bending to install screws on doors caused her to sustain an injury to her low back or lumbar spine. As a consequence of the allegation of sustaining an injury to her low back arising out of and in the course of her employment, Ms. Johnson seeks an adjudication of compensability; payment of temporary total disability compensation benefits from August 23, 2008 to the present; and additional medical treatment.

Conversely, respondents, BMW Manufacturing Corporation, LLC, and its worker compensation insurance carrier, Hartford Insurance Company, argue that appellant did not sustain an accidental injury or aggravating injury to her back on or about August 23, 2008 or at any time during the course and scope of her employment. Respondents contend that appellant's condition is as a result of residual problems stemming from a prior back surgery that occurred in 2005. Specifically, appellant developed low back problems as a result of non-occupational maladies and progressive degenerative

conditions of her back. Because appellant's back condition is chronic and progressive with respect to degenerative disc disease, Respondents argue Ms. Johnson's inability to work is as a consequence of the preexisting congenital condition and extensive use of narcotic pain medications.

In sum, respondents assert that appellant's need for additional medical treatment emanates from a long-standing chronic back condition caused by the continued progression of degenerative disc disease of the lumbar spine, as opposed to an occupational injury.

The evidentiary submissions of the parties consisted of approximately 258 pages of medical evidence, and the deposition testimonies of Drs. Calvert McCorkle and Richard Bannon.

Dr. Bannon testified that appellant had 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 respect to appellant's chronic pain condition. With respect 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 a door. Dr. Bannon admitted that his opinion on causation was based in large part upon information provided to him by appellant's counsel. Finally, Dr. Bannon testified that any conclusion he reached that appellant's job duties aggravated her preexisting back condition consisted of "an educated speculation".

Dr. Calvert McCorkle, the neurosurgeon who performed surgery on appellant's back in 2005, admitted that he had not seen Ms. Johnson since December 2005. Likewise, Dr. McCorkle had not discussed appellant's employment activities with her or with a representative of BMW. To this end, Dr. McCorkle admitted that he was unaware of the frequency required for claimant to perform various activities and the intensity needed to perform certain jobs.

Dr. Phillip LaTourette, a pain management 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.

On August 26, 2009, Commissioner Beck issued the following order with respect to appellant's claims surrounding the alleged work related accident to her back:

IT IS HEREBY ORDERED that because Claimant failed to meet her burden of proof with respect to proving the occurrence of a compensable work related accident on or about August 19 or August 23, 2008, either by specific accidental injury or by repetitive trauma, the claimant is hereby denied and dismissed.

IT IS FURTHER ORDERED that defendants are not responsible for payment of medical treatment, temporary total or temporary partial disability compensation benefits or permanent partial disability compensation benefits.

IT IS FURTHER ORDERED that claimant's claim with respect to compensable upper extremity injuries are hereby held in abeyance and shall be adjudicated once claimant has attained maximum medical improvement or upon further order of the Commission, if the case is not resolved voluntarily by the parties.

AND IT IS SO ORDERED.

Within the statutory period, Appellant filed an Application for Review in the case setting forth reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on January 25, 2010. All proffered testimony has been taken. Such testimony, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission Appellate Panel and has since been under study and consideration.

By appeal, appellant respectfully submits the following:

1. That the Commissioner erred in finding that the claimant did not suffer compensable injury by accident due to an accidental injury or by an aggravation of a preexisting injury when the overwhelming evidence from the claimant and medical experts gave opinions that the claimant suffered an accidental injury by aggravation of a preexisting injury and/or a workers' compensation injury to her back on August 23, 2008 as she was bending over at work performing work duties in repetitive nature, repetitive job injury.

2. That the Commissioner erred in finding that the claimant did not suffer a compenable injury by accident as a result of aggravation of a preexisting injury from the work site when in fact the Commissioner accepted the employer and carrier's position that indeed the claimant did suffer an aggravation of preexisting injuries and/or repetitive injury to her upper extremities, and the findings as to the back are inconsistent with the admissions made by the employer and carrier at the time of the hearing on the upper extremities.

3. That the Commissioner erred in finding that the claimant failed to prove she sustained a compensable work related accident to her back by greater weight of the medical evidence and late testimony when in fact the claimant aggravated her preexisting history of extensive back problems as testified to me by Dr. Cavert K. McCorkle and by Dr. Richard Bannon.

4. That the Commissioner erred in giving little weight to the opinion testimonies of Drs. McCorkle and Bannon with respect to the issue of causation and aggravation of a preexisting condition after these doctors, who had a history of treatment with the claimant, and had described to them the working conditions about the claimant was required to work on hundreds of automobiles a day for up to ten (10) hours a day for four days a week when these working conditions, by the admissions of the employer and carrier existed, aggravating the preexisting conditions and/or caused repetitive damages to the claimant's upper extremities.

5. That the Commissioner erred in giving great weight to the opinion of Dr. Phillip LaTourette when Dr. LaTourette says he is unable to give an opinion as to causation, when in fact, he did not refute or deny that the claimant's injuries were either caused by an accident at her job site or aggravated by her job requirements to her preexisting conditions.

6. That the Commissioner erred in finding as a fact that the Defendant's refuted claimant's contention that the installation of screws on a door resulted in an injury to her back and caused her to become disabled when in fact the claimant had worked on the job site with back conditions since 2005 on a repetitive basis when in

fact the claimant's employer's reprenstative admitted that there was repetitive and constant work requirements at the claimant's job site as she described.

7. That the Commissioner erred in failing to find that the claimant was entitled to TTD compensation benefits and medical treatment as a result of the work related accident caused by repetitive trauma and/or an accident specifically when the greater weight of the evidence clearly shows by the employer and carrier's admission that there was repetitive requirements at the claimant job site on the date of the alleged injuries.

In an appellate review of a Single or Hearing Commissioner's Decision and Order, the Appellate Panel shall, pursuant to Section 42-17-50 of the South Carolina Code of Laws Ann. (2010), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Full Commission Appellate Panel, by unanimous vote, has determined all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are affirmed. Accordingly, the Order is affirmed in its entirety based upon the following findings of fact:

FINDINGS OF FACT

1. Appellant failed to prove by a preponderance of the evidence that she sustained an injury by accident to her back on or about August 23, 2008 or any other time in 2008 as a consequence of her occupational duties. Appellant failed to prove by a preponderance of the evidence that she sustained an injury to her back either by specific accident or as a consequence of repetitive trauma. Appellant further did not

prove by a preponderance of the evidence that she suffered an aggravating injury of her preexisting back condition.

2. The finding that Appellant failed to prove she sustained a compensable work related accident to her back is based upon the greater weight of the medical evidence, which clearly shows an extensive history of back related problems beginning in 2004/2005 through the date of the alleged injury, August 23, 2008. Specifically, Dr. McCorkle performed a decompressive partial hemilaminectomy for lumbar stenosis and nerve root compression at L4-L5 and L5-S1 on May 20, 2005. Appellant underwent a second surgery on June 24, 2005, which consisted of a re-exploration of L4-5 and L5-S1 with the removal of disc at the L5-S1 level. Since Appellant's surgeries in 2005, she has continued to suffer with persistent and constant chronic pain, for which she has received treatment from 2005 to the present from Dr. Phillip Latourette at The Carolina Center for Advance Management of Pain.

3. Appellant's condition is chronic and progressive as a result of the degenerative disc disease. This finding is corroborated by the testimony of Dr. Richard Bannon noting that a comparison of the MRI tests in 2005 and 2008 reveal a progression of the degenerative disc disease. The progression of the disc disease constitutes the cause of Appellant's current pain. Before Appellant's alleged date of accident, she took medications and received spinal injections regardless of the level of activities. Not only has the degenerative disc disease affected Appellant's low back, but has also caused symptoms in her cervical spine.

4. Appellant's complaints of chronic back pain with radicular pain into the left leg and foot constitute neither a new accidental injury nor an aggravation of and underlying preexisting condition. The overwhelming evidence reflects a continuation and clear progression of symptoms and complaints of pain and discomfort from 2005 to the present based upon the type of medications prescribed and claimant's need for constant medical supervision as a result of the deteriorating condition of the spine.

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

6. The opinion of Dr. Phillip Latourette was afforded great weight. Specifically, Dr. Latourette has continuously treated Appellant on a routine basis since 2005 to the present. Dr. Latourette opined in a handwritten report to Appellant's counsel dated November 7, 2008, that he was unable to relate Appellant's back pain and disability to the alleged work related accident or the occupational duties of August 23, 2008. (APA p. 197). Given Dr. LaTourette's consistent familiarity with Appellant's

activities and complaints of pain and discomfort, he was in the best position to render an expert opinion in a medically complicated case.

7. Respondents refuted Appellant's contention that the installation of screws on a door resulted in an injury to her back and caused her to become disabled. The testimony of John Huss reflects that Appellant did not engage in repetitive activities on a frequent or intense basis which would have resulted in an injury to her back. Appellant further had asserted she was not disabled and was capable of returning to work on September 4, 2008, as is reflected in a note from IHS. (Dr. Bannon's Depo., Defendants' Exhibit "3").

8. Appellant failed to prove she is entitled to temporary total disability compensation benefits as a consequence of the aforesaid work related accident, which has been found to be non-compensable.

9. Appellant's admitted work related injuries to her upper extremity are premature for adjudication and did not emanate from her work activities of August 19 or 23, 2008.

CONCLUSIONS OF LAW

1. S.C. Code Ann. §42-1-160 (2009) governs the occurrence of accidental injuries arising out of and during the course and scope of employment.

2. S.C. Code Ann. §42-1-120 (2009) governs the payment of temporary total disability compensation benefits. Temporary total disability compensation benefits are paid when an individual is totally incapacitated from all gainful employment.

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.

3. S.C. Code Ann. §42-15-60 (2009) governs the payment of medical benefits and the provision of medical treatment.

4. S.C. Code Ann. §42-9-30 (2009) governs the payment of permanent disability benefits which arise out of and during the course and scope of one's employment as a consequence of an accidental injury.

5. S.C. Code Ann. §42-17-50 (2009) governs review of awards and rehearing by the Commission.

ORDER

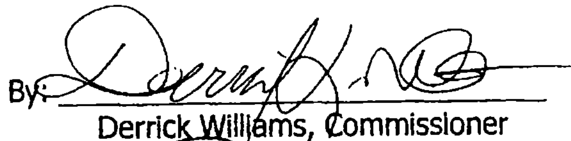
IT IS THEREFORE ORDERED that the Order of the Single Commissioner filed in the above referenced matter on August 26, 2009, is hereby affirmed by the Full Commission Appellate Panel.

IT IS FURTHER ORDERED that the Appellant's claim of a compensable back injury purportedly emanating from a work related accident on either August 19 or 23, 2008 is hereby denied and dismissed because of Appellant's failure to meet her burden of proof; and to prove the occurrence of a compensable accident by credible and objective evidence and testimony. The Appellate Panel's Decision is further corroborated by its review of the witnesses' testimonies and a review of the historical accounts provided in the medical records. The evidence supporting a legal and factual finding of the non occurrence of a compensable work related accident is not as a result of hearsay, self-serving statements and speculative evidence.

IT IS FURTHER ORDERED that Appellant's request for medical treatment; future medical treatment and payment of temporary and permanent disability compensation benefits are hereby denied and dismissed.

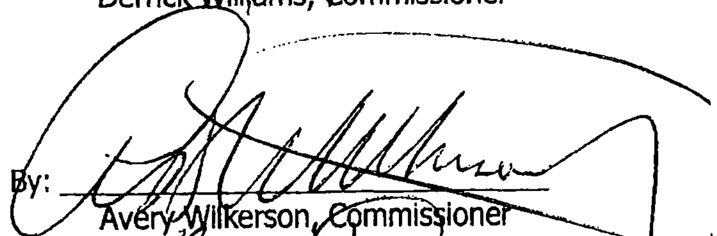
IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



By: ______________________
Derrick Williams, Commissioner

CONCUR IN AFFIRMATION:



By: ______________________
Avery Wilkerson, Commissioner

By: ______________________
Andrea Roche, Commissioner

April 27, 2010

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 27 day of April, 2010

By ______________________

Administrative Assistant to the Commissioner

Albert V. Smith
Vernon F. Dunbar

TPGL 3135238v1

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
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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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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.l.10-p.69.l.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.l.6-p.77.l.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 estopple.. 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 *Murplhy, 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: March 2, 2011

Albert V. Smith, P. A.

By: ____________________

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION
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Hartford Insurance Company of the Midwest
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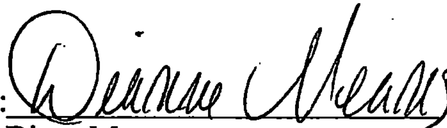
PROOF OF SERVICE

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 Stated 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
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The South Carolina Court of Appeals

Patricia D. Johnson, Employee, Appellant,

v.

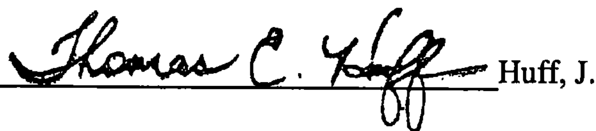
BMW Manufacturing Corporation, LLC, Employer, and Hartford Insurance Company of the Midwest and Specialty Risk Services, Inc., Carrier, Respondents.

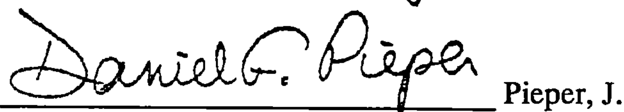
South Carolina Workers' Compensation Commission
Appellate Panel
Trial Court Case No. 2008-WC-40-13280
And
Trial Court Case No. 2008-WC-40-23253

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.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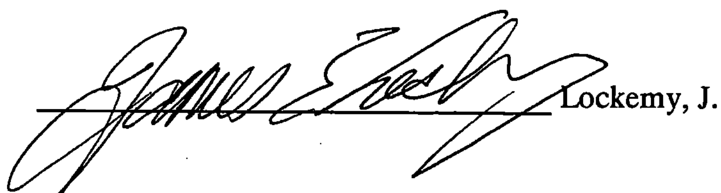
Lockemy, J.

Columbia, South Carolina

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

FILED
19 December 2011