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

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 BRIEF

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STATEMENT OF THE CASE

The Appellant is a 58 year old female who is 5'4" tall and at the time of the hearing before the single commissioner she weighed 145 pounds. This hearing was held on April 23, 2008 before Commissioner T. Scott Beck in Spartanburg, South Carolina.

The Appellant filed two Form 50's. She alleged in form the 50 with WCC # 0823651 that she suffered compensable injures to her right and left upper extremities on March 14, 2008 as a result of repetitive trauma that had arose out of and in the course of her employment with the employer.

The Appellant alleged in her Form 50 associated with WCC# 0813280 that she suffered a specific injury to her back on August 19 or 23, 2008 or she suffered an aggravation of a pre-existing injury to her back as a result of repetitive trauma insults to her body. The Appellant sought medical treatment from Dr. Richard B/ Bannon, and the employer took an incident report and referred her to plant Dr. Ken Hommel.

The Appellant had worked at the employer job site in Spartanburg County since November 13, 2000, and her job required that she do repetitive activities that involved overhead lifting, pulling racks and bending to install screws on automobile doors. At the hearing on before the single commissioner, the Appellant testified that she began working for BMW Manufacturing as a production associate on November 13, 2000. She worked in assembly which required her to work on door liners. She indicated that this was a job that required physical activity. She was required to stand on her feet, lift overhead and pull out racks, bend and stoop below the knees to put screws in the doors for up to ten hours a day. The job, also, required fast hand to eye coordinated work. She was doing this same job in 2008 that he did in August of 2005.

The Appellant had back surgery in May 20, 2005. The surgery was performed by Dr. Cavert McCorkle and was a decompressive partial hemilaminectomy for stenosis at L4-L5 and L5-S1. The reason for this back surgery was not reported as a job related matter, but the Appellant testified that there was a specific work incident that precipitated her pain.

Dr. McCorkle performed another back surgery on the Appellant on June 24, 2005 to re-exploration of the previous surgery and removal, also, of disc material from the L5-S1 in addition to the lateral disc removal. The Appellant returned to work in six months, but continued to have pain. As a result, Dr. McCorkle referred her to Dr. Phillip Latourette at the Carolinas Center for Advanced Management of Pain because of continued pain complaints from the Appellant.

The Appellant admits that at the time of her injures in 2008, she was on stronger paid medication from Dr. Latourette, and her job requirements had not changed. She indicated that it became impossible for her to work, and Dr. Latourette, even though he did not state an opinion regarding causation, did say the Appellant was totally disabled now.

At the hearing before the single commissioner, the Respondents admitted that repetitive trauma did cause work related injuries to the left and right upper extremities of the Appellant, and they would accept coverage on these injures and provide compensation pursuant to the South Carolina Workers Compensation Act, but they denied that the Appellant suffered a compensable injury to her back with a specific insult, and, also, denied she suffered an injury due to repetitive trauma.

The single commissioner issued his Decision and Order denying the Appellant's request for workers' compensation benefits for her back on August 29, 2009 and the full commission issued its Decision and Order affirming the single commissioner's ruling on April 27, 2010. Timely appeals were filed in both instances.

STATEMENT OF FACTS

The Claimant/Appellant (Appellant) Patricia Johnson is 58 years old, is 5'4" tall and weighs 145 pounds. She has had a number of jobs since finishing high school and all of them involved a certain amount of manual labor.

The Appellant began working for BMW Manufacturing as a production associate on November 13, 2000. She worked in assembly which required her to work on door liners. She indicated that this was a job that required physical activity. She was required to stand on her feet, lift overhead and pull out racks, bend and stoop below the knees to put screws in the doors for up to eight hours or more a day. The job, also, required fast hand to eye coordinated work. She was doing this same job in August 2008 that she was doing in 2005. (R. 66-69)

In 2005, the Appellant had to leave her job and have surgery on her back. She testified that she hurt her back on the job in 2005. She said that she was getting some mirror caps out of a rack, but in order to do this, she had to turn the bin that they came in around. She testified that the fork lift operators had turned the bins around at one time, but they were no longer assisting with this task. She said the bin was very hard to turn around, and later that morning in 2005 when she went home, she started having pain in her back and legs. She said the back problems for her at that time just continued to get worse. (R. 69-70). She was treated for the back problem by Doctor Cavert K. McCorkle. Surgery was performed on her back in the latter part of May in 2005. She was out of work for about six months. (R. 71-72).

The Appellant did not report this as a work related injury, and decided to go back to work performing the same job and doing the same job duties. She was again

required to manually turn the bins around. (R.73). She then began treating with Dr. Phillip Latourette because of continuing pain issues. Dr. Latourette operates the Carolinas Center for Advanced Management of Pain.

The Appellant, even though she was experiencing pain, she continued to work, to wit:

Q. All of that pain, did you work with that pain?

A. I worked with it.

Q. Okay, And how many hours a day were you working?

A. Ten.

Q. How many days a week?

A. Four days a week.

Q. Four days a week?

A. Yes.

Q. Did you report to work on a regular basis?

A. Every day. I never missed a day when I was with BMW. (R. 76)

The Appellant, in addition to having to aggravate her preexisting back problems every work day on the same job that required a great deal of physical activity, she suffered an accidental injury to her back on August 19, 2008, to wit:

Q. Tell the Commissioner what happened and describe how it happened?

A. I was on–out on doing some rework area. And I was bending over to put screws in the bottom of the door which is very, very, low. Excuse me. And when you are doing a job the car is moving. And I had a gun in my hand to put the screws in, drill gun. And when I went to bend over, I was pushing it in

and I felt something pull in my back. I felt something like slip in my back. And it hurt, you know. It was hurting me, but it hurt worse as the time passed on. It got worse. (R. 77-78). Also, see First Reports of Injury and Incident Report attached hereto and made a part hereof as Exhibit 1.

The Appellant reported this incident to the plant nurse and went to the doctor. See reports of Dr. Ken Hommel that are attached hereto and made a part hereof as Exhibit 2. The Appellant was, also, treated by her family doctor, Dr. Richard B. Bannon.

The Appellant filed a Form 50 alleging in case number 0813280 that she suffered an accidental injury to the back and upper extremities, aggravation of a pre-existing condition, and /or in the alternative, repetitive trauma to the back that aggravated the pre-existing condition. In WCC file number 0823253 the Appellant alleged an on the job injury to the right and left upper extremities caused by repetitive trauma, and/or aggravation of a pre-existing condition.

At the hearing on WCC file number 0823253 Employer/Respondent (Respondents) took this position, to wit:

In fact, a Consent Order was executed memorializing this position. (See Consent Order).

Commissioner Beck heard the testimony and rendered a decision that found the Appellant's back problems did not arise out of or in the course of her employment.

ARGUMENT I

DID THE FULL WORKERS' COMPENSATION ERR BY FINDING THAT THE APPELLANT DID NOT SUFFER A COMPENSABLE ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH A SPECIFIC INJURY THAT AGGRAVATED A PRE-EXISTING BACK INJURY WHEN THE APPELLANT GAVE SPECIFICS ABOUT THE INJURY TO COMPANY OFFICIALS, INCLUDING THE COMPANY PHYSICIAN?

The substantial evidence rule governs the standard of review in workers compensation decisions. *Frame v. Resort Servs. Inc.,* 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct.App.2004). The Appellate Panels decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.,* 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct.App.2005). An appellate court can reverse or modify the Appellate Panel's decision only if the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund,* 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct.App.2005). *Bartley v. Allendale County School Dist.* 381 S.C. 262, 270, 672 S.E.2d 809, 813 (S.C.App., 2009). The Appellant recognizes this as the law in South Carolina, but would take the position that the Decision and Order by the full panel of the Workers' Compensation Commission is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

The Appellant gave specifics about a work related injury, to wit:

Q. Tell the Commissioner what happened and describe how it happened?

A. I was on–out on doing some rework area. And I was bending over to put screws in the bottom of the door which is very, very, low. Excuse me. And when you are doing a job the car is moving. And I had a gun in my hand to

put the screws in, drill gun. And when I went to bend over, I was pushing it in and I felt something pull in my back. I felt something like slip in my back. And it hurt, you know. It was hurting me, but it hurt worse ass the time passed on. It got worse. (R. 77-78). Also, see First Reports of Injury and Incident Report attached hereto and made a part hereof as Exhibit 1.

The Appellant gave specifics about the injury as evidenced by the incident report that she gave to her employer representative on August 25, 2008. (See APA 212-213).

The Appellant had worked in a job that required repetitive movement of her back, upper and lower extremities. The Respondents, in a separate action but on the same day as the hearing before the single in this case, admitted that the Appellant had suffered injuries to her upper extremities due to repetitive motion requirements on the job. "They do, in fact, admit compensability of both upper extremities due to repetitive trauma, would assert that the Claimant is not at MMI for the upper extremities. However, to note the initial date of complaint as to the upper extremities was March 4, 2008." (R.61). In fact, a Consent Order was executed memorializing this position. (See Consent Order)

On August 25, 2008, in a visit to Dr. Hommel's office, the doctor's notes reveal that the Appellant reported, "...that she injured her low back for a second time approximately 2 weeks ago. She reports that she was bent forward installing screws on the door panel when she noticed the back pain. She reports the pain became worse and she went to her family doctor to evaluate her back. She reports that he did an MRI of her low back....She has also had epidural injections. She reports that she recently had onset of increased low back pain while working."

On September 5, 2008, Dr. Hommel notes, "This associate works on line assembly production job. She recently reported that her back started hurting more at work from bending forward to install bolts and filed a work comp claim.

In an office note of Dr. Latourette dated September 12, 2007, it is noted, "Patient reports she know neurontin helps but she does not want to take, she wants to take less meds if possible. She is bending a lot at work which she notes can increase pain...patient notes the days that she works she has to take 4 Percocet. If she is not working she can cut back on percocet."

Dr. Cavert K. McCorkle stated in his deposition the following, to wit.

Q. And the movement for a 10-hour day as noted in your records, if that was unchanged and she was still being required to work 10-hour days, do you have an opinion as to whether or not that kind of job requirement in 2008 could have aggravated a pre-existing condition that she had in 2005.

A. Most probably, yes, sir.

Q. And, doctor, there is no doubt, I believe, that she's got a bad back. Is that correct?

A. That's correct, yes, sir. (R.452).

Q. If she continued aggravation of her pain syndrome, do you have a reasonable degree of medical certainty opinion as to whether or not this job setting would have contributed to it or aggravated it?

A. It would have aggravated it at least, yes, sir. (R.453).

Dr. Bannon, a treating physician, says, in a letter dated September 10, 2009 that "...her work activities definitely aggravate these physical conditions." The letter is attached hereto as Exhibit 4.

Dr. Latourette, while not rendering an opinion on the question of whether or not the Appellant's work environment caused her current problems, does note in his medical records that the Appellant, without hesitancy, on a regular basis, says that the work requirements caused her increased pain. There is one significant thing to be revealed from the note of Dr. Latourette, and that is that he says the Appellant is now totally disabled. (See Latorette Note dated 11-7-2008, APA 197). The record is clear that the Appellant returned to work six months after her surgery in 2005. She worked every day since then up to ten hours a day doing repetitive motions on an assembly line with few exceptions prior to August 2008. For an injury to be compensable, it must arise out of and in the course of employment. S.C.Code Ann. § 42-1-160(A) (Supp.2007). An injury arises out of employment if a *272 causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Bartley *v. Allendale County School Dist.* 381 S.C. 262, 271-272, 672 S.E.2d 809, 814 (S.C.App., 2009). The conditions that required the Appellant to subject her body to repetitive motion over a period of time is apparent to rational minds that such activity will bring her injury within the confines of the South Carolina Workers'

the already injured back of the Appellant. The work requirements of the Appellant almost don't need an expert opinion as to causation.

The Workers Compensation Act for the state recognizes that a preexisting condition maybe aggravated by an on the job aggravation, to wit: (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits in the following manner: Code 1976 § 42-9-400. The full commission erred by finding that the Appellant did not suffer an on the job injury by the aggravation of a pre existing condition, and the Decision and Order should be over ruled.

ARGUMENT II

DID THE FULL WORKERS' COMPENSATION COMMISSION ERR BY FINDING THAT THE APPELLANT DID NOT SUFFER A COMPENSABLE WORK RELATED INJURY TO HER BACK BY REPETITIVE TRAUMA WHEN RESPONDENTS ADMITTED THAT REPETITIVE TRAUMA CAUSED INJURIES TO THE APPELLANT'S UPPER EXTREMITIES AND SHOULD BE BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL TO DENY THE APPELLANT'S BACK INJURY?

The Respondents, at the single commission hearing on April 26, 2009 stated to the single commissioner that repetitive trauma caused injures both the left and right upper extremities. These injures to the Appellant would have occurred in March of 2008. "They do, in fact, admit compensability of both upper extremities due to repetitive trauma, would assert that the Claimant is not at MMI for the upper extremities. However, to note the initial date of complaint as to the upper extremities was March 4, 2008." (R.61). This comment came directly from the mouth of the Respondents' lawyer.

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. The Respondents took diabolically opposing positions with regard to this Appellant. On the one hand they say she did not suffer an injury by repetitive motion to her back, but she did suffer repetitive motion injury to her upper extremities. "The following elements are necessary for the doctrine of judicial estoppel to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another, (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other, (3) the party taking the position must have been successful in maintaining that position and have

received some benefit, (4) the inconsistency must be part of an intentional effort to mislead the court, and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 592 S.E.2d 629 S.C., 2004." The Appellants position clearly fits under the above doctrine as applied by the courts in South Carolina and should be applied here.

"FN2. According to Dr. Rittenberg, "within a reasonable degree of medical certainty ... [White's] job duties [were] of such a nature that they could have aggravated or exacerbated his pre-existing chronic back pain [from 1997], ultimately resulting in disc herniation." We agree with the circuit court that substantial evidence supports the finding that White's injury was the result of repetitive trauma, which arose out of and in the course of White's employment." *White v. Medical University of South Carolina* 355 S.C. 560, 566-567, 586 S.E.2d 157, 161 (S.C.App., 2003). "In medically complex case, medical evidence and lay testimony, considered together, were sufficient to establish that discitis was present prior to date of claimant's back injury and, thus, substantial evidence supported award of temporary total benefits plus medicals to claimant for aggravation of the condition. *Tiller v. National Health Care Center of Sumter*, 513 S.E.2d 84(S.C., 1999). This Court has considered issues like this before and decided in favor of the claimant, and should do here. In any event, the commission found Claimant's repetitive trauma injury was compensable as an injury by accident. We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma. We therefore conclude the commission's finding is supported by substantial evidence. *See Anderson, Id.* (findings of commission are presumed correct and will be set aside only if unsupported by substantial evidence)." *Pee, Id* Clearly, the expert and lay

evidence support this position, and the Decision and Order should be reversed...

ARGUMENT III

DID THE FULL WORKERS' COMPENSATION COMMISSION ERR BY FINDING THAT THE APPELLANT DID NOT SUFFER A WORK RELATED INJURY TO HER BACK BY PLACING GREAT WEIGHT ON THE TESTIMONY OF DR. PHILLIP LATOURETTE WHEN DR. LATOURETTE'S OPINION DID NOT AFFIRM OR DENY THE APPELLANT'S BACK INJURY AND WAS RENDERED WITH AN OPINION THAT WAS WITHIN A REASONABLE DEGREE OF MEDICAL CERTAINTY?"

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." 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.

This position adopted in this case by the full commission is contrary to the law requirements in South Carolina in medically complex cases. "(E) In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. For purposes of this subsection, "medically complex cases" means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic techniques." Code 1976 § 42-1-160. If this law applies to the Appellant in proving her case, then the same standard as to proof applies to the Respondents in proving the opposite.

Expert medical testimony is designed to aid the Workers' Compensation Commission in coming to the correct conclusion, and therefore, the Commission determines the weight and credit to be given to the expert testimony. *Sharpe v. Case Produce, Inc.* (S.C. 1999) 336 S.C. 154, 519 S.E.2d 102. See South Carolina Code 1976 § 42-17-40. Expert medical testimony is designed to aid the South Carolina Workers'

Compensation Commission in coming to the correct conclusion; therefore, Commission determines the weight and credit to be given to expert testimony. *Tiller, Id.* rehearing denied. See South Carolina Code 1976 § 42-17-40. If medical expert testimony is not solely relied upon to establish causation, fact finder in workers' compensation case must look to facts and circumstances of the case. *Tiller,* supra. Expert medical testimony, in this case, was offered to aid the hearing Commissioner as it relates to the type of work the Appellant did and how the body mechanics involved in accomplishing the task could aggravate the pre-existing condition of the back. The Respondents did not offer any objections to Dr. McCorkle being offered as an expert witness concerning causation, (R.439), and offered no objection to Dr. Bannon being offered as an expert on causation. (R.477-478). Experts are allowed to give opinions based solely on the record, and this is what Dr. McCorkle did. He looked at the record and gave his opinion that, based on what he saw in the record, the type work that was required of the Appellant, her back problems were most likely aggravated by the work requirements. The hearing Commission, in his Order, says he gave "light weight" to this testimony. At the same time, the Commissioner gave weight to the testimony of John Huss, a supervisor, who offered no firsthand knowledge of the facts, and Dr. McCorkle is a doctor who has operated on the back of the Appellant. He knows, from a medical standpoint, what movements may aggravate the back like that of the Appellant. On appeal from a decision of the appellate panel of the Workers' Compensation Commission, appellate court must review the evidence, and state the facts and the reasonable inferences there from, in the light most favorable to claimant, and any reasonable doubts as to construction of workers' compensation law should be resolved in favor of coverage. *Johnson v. Beauty Unlimited Landscape Co.* 379 S.C. 403,

665 S.E.2d 656 (S.C.App.,2008). The facts are most favorable to the Appellant in this particular instance.

Therefore, the full commission's Decision and Order should be reversed and benefits under the South Carolina Workers' Compensation Act awarded to the Appellant.

ARGUMENT IV

DID THE FULL WORKERS' COMPENSATION COMMISSION ERR IN DENYING THE APPELLANT'S CLAIM BECAUSE IT FAILED TO GIVE LIBERAL CONSTRUCTION TO THE FACTS PRESENTED BY THE APPELLANT?

The Workers Compensation Act for the State of South Carolina requires liberal construction in favor of the claimant. *See Lizee v. South Carolina Dep't of Mental Health,* 367 S.C. 122, 130 n. 2, 623 S.E.2d 860, 864 n. 2 (Ct.App.2005) (noting "the principle that workers' compensation laws in general ... are to be liberally construed in favor of claimants and coverage"). *Reed-Richards v. Clemson University* 371 S.C. 304, 309, 638 S.E.2d 77, 80 (S.C.App., 2006). Clearly, this was not done in this case.

The Appellant reported a specific job injury to her employer on August 25, 2008. She gave a complete history of having been injured specifically on the job to the employer's plant doctor. She had back surgery in 2005, which was known to the employer officials, and she was returned to the same job that required repetitive motion. She is now, according to Dr. Latourette, totally disabled from work, which was not the situation in 2005, 2006, 2007 and part of 2008.

Dr. LaTourette notes in a note dated September 14, 2005 the following, to wit: "I had a long discussion with the patient and her husband about work and disability, and her significant degenerative changes at L4-5 and L5-Sl. At this time, we are going to continue her medication, get her into physical therapy for a month, bring her back and see how she is doing, and we will consider getting her back to working. She does work on an assembly line and there is a question about whether or not she can take her present medication at work, and there is a question about whether or not she can tolerate the increase in activity. She does have significant degenerative changes, post laminectomy

pain syndrome, and lumbar radiculopathy." (APA 96) In medical note dated October 10, 2005, Dr. LaTourette says, "The patient is motivated to return to work, and understands that she could re-injure herself, causing a significant increase in her back pain." (APA 100). On November 23, 2005, Dr. LaTourette notes that the Appellant is working "40 hours per week, 10 hours a day." (APA 102). On February 2, 2006, Dr. LaTourette notes Appellant still hurting and "working night shift." (APA 109). On September 11, 2006, Dr. LaTourette notes that Appellant is "still working full time...she reports bending aggravates her pain." (APA 124).

In an associate medical evaluation dated July 31, 2007, a nurse noted "ice to back after shift." (APA 210). In a medical evaluation note dated August 25, 2008, Dr. Ken Hommel states "may not perform duty in plant." (APA 211). The Appellant's medical condition was noted a number of times by Dr. Hommel. In a medical note dated September 5, 2008, Dr. Hommel notes that the Appellant "... recently reported that her back started hurting more at work from bending to install bolts and filed a work comp claim...I would recommend that work comp carrier and personal insurance review her case to determine what she needs to do with regards to her current lost time." On the 25 of August, 2008, Dr. Hommel notes that Appellant also told him, "Associate advised that she has always ran the purported jobs that she is currently working; she describes putting in screws in the bottom of the door and bending to low and felt pain. (See Exhibit 3 to Dr. Bannon Deposition). All of this goes to show that there is convincing evidence in the record to support the finding of compensability for Appellant on her claim.

The Respondents admit that repetitive trauma, in the interim between August of 2005 and August of 2008, caused work related injuries to the upper extremities of the

Appellant. There were two doctors, Dr. McCorkle and Dr. Bannon, who gave opinions with a reasonable degree of medical certainty that the Appellant's back problems were aggravated by the repetitive trauma she suffered on the job. In addition, the Appellant gave specifics about an on the job insult to her back in August of 2008. None of this was construed favorably for the Appellant by the full Workers' Compensation Commission.

CONCLUSION

Therefore, the Decision and Order of the full commission should be reversed and benefits awarded to the Appellant. There is ample evidence in the record to support a reversal of the full commission Decision and Order. There is simple no basis to give great weight to the testimony of Dr. LaTourette and less weight to other experts who either treated the Appellant in the past and saw her after her August 2008 injury. Dr. LaTourette's notes differ in is expectations of the Appellant's continued employment on the assembly line at the Respondent employer, and yet his one page expression that she is now totally disabled, and he can't say whether it is related to repetitive movement on the job is unbelievable.

Dr. Bannon's and Dr. McCorkle's opinions should be given the greater weight in this instance. There are a number of cases that have been before this court involving chronic back pain that were found to be compensable, and this one should fall into that same category.

Respectfully submitted,

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Date: November 12, 2010

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, Employee .....Appellant,

vs.

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

- and –

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

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Patricia D. Johnson, Claimant/Appellant, appeals the Decision of the Single Commissioner dated August 29, 2009, and the Full Commission Appellate Panel's Decision and Order dated April 27, 2010, denying the compensability of her back injury claim. (R. pp. 26-54). Appellant allegedly injured her back on or about August 19th or August 23rd, 2008. (R. pp. 15-22). Appellant argues that because BMW Manufacturing Corporation, and its worker's compensation insurance carrier, Hartford Insurance Company of the Midwest, Respondents, had accepted compensability of another claim involving bilateral upper extremity injury claims, which is referenced by a date of accident of March 14, 2008 and WCC File No.: 0823651, the low back injury claim should have been adjudicated compensable. (R. pp. 5-8). Appellant argues that Respondents' acceptance of the bilateral upper extremity claim constitutes irrefutable evidence of the compensability of the low back claim. (R. p. 8).

At the hearing before the Commission, Respondents requested that all references to the bilateral upper extremity claim be stricken and not considered as evidence regarding the compensability of a low back claim. In short, Respondents argued that the compensability of a claim involving a particular body part is based upon the unique facts and circumstances of the accident and resulting injury.

Appellant contends that various job duties as a production associate resulted in a disabling injury to her back on or about August 19th or August 23rd, 2008. Specifically, Appellant contends repetitive activities involving overhead lifting; pulling racks; and bending to install screws on doors caused her to sustain an injury to her low back. Ms. Johnson sought an adjudication of compensability; payment of temporary total disability

compensation benefits from August 23, 2008 to the present; and additional medical treatment.

Conversely, Respondents argued that Appellant did not sustain an accidental injury or aggravating injury to her back on or about August 19th or August 23rd, 2008 or at any time during the course and scope of her employment. Respondents argue Appellant's condition is as a result of residual problems stemming from a prior back surgery that occurred in 2005. Appellant's low back problems are as a result of non-occupational maladies and progressive degenerative disease conditions of the 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 degenerative condition and extensive use of narcotic pain medications. (R. pp. 338-345; 363; 431).

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

Dr. Richard Bannon, Ms. Johnson's family physician, testified Appellant 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. Finally, 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).

Dr. Calvert McCorkle, a neurosurgeon, had performed surgery on Appellant's back in 2005. Dr. McCorkle testified that 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. Dr. McCorkle last treated Appellant in 2005. (R. pp. 454-459).

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).

The adjudicatory hearing before the Single Commissioner was heard on April 23, 2009. On August 26, 2009, the Single Commissioner promulgated an Order denying the compensability of the low back injury based upon lay evidence, medical evidence, and testimonies of Appellant and other witnesses. (R. pp. 23-42). Appellant appealed the Single Commissioner's Decision to the Full Commission Appellate Panel, which also affirmed the non-compensability of Appellant's claim. (R. pp. 43-54). From that Decision, Appellant appeals to this Court.

FACTS

Patricia Dianne Johnson testified that in 2005, she injured her lumbar spine and low back as a consequence of retrieving mirror caps. (R. p. 69, lines 9-24). The 2005

incident was never reported as a work related accident by Appellant. According to Ms. Johnson, she had felt pain in her lower back that radiated into her legs. Because of constant back pain, Appellant began treating with her family physician, Dr. Richard Bannon. (R. p. 70).

Dr. Bannon referred Appellant to Dr. Cavert McCorkle, who performed surgery on Appellant's low back in May 2005. Ms. Johnson did not report the occurrence of back pain as a work related accident to BMW nor to any of the medical providers. Appellant filed all medical charges associated with her 2005 back condition on her group health insurance. (R. pp. 71-72; p. 94, lines 21-25; pp. 95-96). Appellant was unable to work as a consequence of her back surgery for approximately six months. (R. p. 72, lines 15-22).

Ms. Johnson testified that because of continuing pain subsequent to her surgery, Dr. McCorkle referred her to Dr. Phillip C. Latourette of The Carolina Center for Advanced Management of Pain. (R. pp. 74, 96-97; p. 274). Dr. Latourette has continuously treated Appellant from 2005 to the present. (R. p. 75; pp. 257-374). Dr. Latourette initially treated Appellant's chronic pain condition with medications such as Avinza and Lortab. (R. p. 96, lines 20-25; p. 97; p. 274). Because the aforesaid medications failed to alleviate Appellant's chronic pain condition, Dr. Latourette prescribed Percocet, a stronger medication. (R. p. 97, lines 11-20; p. 278).

Appellant testified that despite experiencing continuous chronic and radicular pain from 2005 until August 23, 2008, she was able to work four days a week, ten hours a day on a regular basis. (R. p. 76, lines 10-25; p. 77, lines 1-4). During this time, Dr. Latourette continued to treat Appellant for chronic pain.

Ms. Johnson testified that on August 23, 2008, she was working in the re-work area. Appellant testified that as she was bending to install screws in the bottom of a door she injured her back. (R. pp. 77-78). Appellant did not apprise her supervisor of the occurrence of the work related accident. (R. p. 79, lines 5-9). Appellant testified the pain she was experiencing in August 2008 was different from pain she had previously experienced as a result of her back injury in 2005. (R. p. 80).

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

Ms. Johnson contends that subsequent to her surgery in 2005, officials at BMW were aware she was consuming narcotic medications for her chronic back condition. However, Appellant admitted that at the time of her alleged 2008 injury, she was taking stronger narcotic medications for her chronic back condition, namely Morphine and Oxycodone. (R. pp. 97-98, lines 1-3).

Although Appellant testified the alleged August 23, 2008 work related accident resulted in different and increased symptoms of back and leg pain, the medical records contradicted Appellant's account. In particular, Appellant had continuously treated with Dr. Phillip Latourette from August 10, 2005 through February 5, 2009, for the same complaints of continuous chronic low back pain, with pain radiating into the legs and

feet. Appellant treats with Dr. Latourette approximately one time per month, wherein Dr. Latourette inquires about her pain and the location of the pain. (R. pp. 98-100).

After Appellant's surgeries in 2005, Ms. Johnson and her husband discussed the degenerative disc disease condition and permanent disability. Mr. and Mrs. Johnson discussed applying for Social Security disability benefits with Dr. LaTourette on September 14, 2005. (R. p. 102, lines 14-25; p. 103, lines 1-17; p. 262).

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

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

John David Huss, Section Leader on the door line and Appellant's supervisor, testified on behalf of the Respondents. Mr. Huff testified he is familiar with the assembly line upon which Ms. Johnson was employed and the re-work department. Mr. Huss acknowledged that at the time of Appellant's alleged injury, she was working in the re-work department. (R. pp. 122-123). According to Mr. Huss, the re-work position consists primarily of inspection duties. In the re-work department, an employee is

required to physically examine the doors to make certain the seals are lined up and to make small adjustments. (R. pp. 123-124).

Mr. Huss testified that the re-work job is a preferred job because it is not as physical as working on the assembly line. (R. p. 124, lines 13-21; pp. 125-128).

Addressing 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 very limited bending would be involved. According to Mr. Huss, BMW has mechanical processes to raise and lower the carriers which would place the door at its lowest position 20 inches to a maximum height of 44 inches. (R. p. 128, lines 1-7). Last, Mr. Huss disputed the fact that the re-work area required constant bending and that Appellant injured her back performing this particular work activity. (R. p. 129, lines 3-21).

STANDARD OF REVIEW

Factual findings in an administrative proceeding are subject to a highly deferential standard of review. Muir v. C.R. Bard, Inc., 336 S.C. 266, 281-82, 519 S.E.2d 583, 591 (Ct. App. 1999). The Administrative Procedures Act governs judicial review of Workers' Compensation Commission decisions and it establishes the "substantial evidence" rule as the standard for reviewing the Full Commission's factual findings. S.C. Code Ann. §1-23-380; Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894-95 (2006); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981).

Under the substantial evidence rule, the Full Commission is the ultimate fact finder; the reviewing court "may not substitute its judgment for the judgment of the [Full Commission] as to the weight of the evidence on questions of fact," and must affirm its findings of fact if they are supported by substantial evidence. S.C. Code Ann. §1-23-380(5); Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Tiller v. National Health Care Ctr., 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the [Full Commission] reached." Tiller, 334 S.C. at 338, 513 S.E.2d at 845. In essence, the Full Commission's findings may not be overturned unless they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the record." Id. at 339, 513 S.E.2d at 845.

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT COMMIT LEGAL ERROR IN FINDING AND CONCLUDING THAT APPELLANT DID NOT SUFFER A COMPENSABLE ACCIDENTAL INJURY TO HER BACK ON OR ABOUT AUGUST 19TH OR AUGUST 23RD, 2008.

Section 42-1-160 defines "*injury*" as "*injury*" by accident arising out of and in the course of employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident. *S.C. Code Ann. §42-1-160 (2010).* Further, repetitive trauma is compensable under the South Carolina Workers' Compensation Act when an injury is unexpected, and such injury is not expected or

intended to result from the employment activities from which the unexpected injury arose. See Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d (2002).

It is an injured employee's burden of proof to prove facts which render an alleged injury compensable. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963). The burden rests upon the injured employee to show by competent testimony and evidence, either lay or expert, not only the fact of an injury, but that such an injury occurred in connection with the employee's employment duties. Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998); and Fowler v. Abbott Motor Company, 236 S.C. 226, 113 S.E.2d 737 (1960).

In the instant case, Appellant failed to present any credible and reliable lay or medical evidence that she sustained a compensable work-related injury to her low back or aggravated a pre-existing condition without engaging in speculation, surmise, and conjecture. Id. (R. pp. 26-54).

A. APPELLANT'S MEDICAL EVIDENCE DOES NOT SUPPORT A FINDING OF A COMPENSABLE WORK-RELATED INJURY.

The deposition testimony of Dr. Richard B. Bannon, Appellant's family physician, was submitted into evidence. Dr. Bannon is board certified in the area of family practice; and he has been practicing medicine for the past 33 years. Dr. Bannon first began treating Ms. Johnson in 1981. (R. p. 478, lines 13-23). On November 18, 2004, Dr. Bannon treated Appellant for back pain and sciatica. (R. p. 480, lines 5-6). An MRI was ordered and revealed Appellant had degenerative disc changes at L4-L5 as of January 12, 2005. (R. p. 480, lines 14-22).

Because of Appellant's complaint of back pain, Dr. Bannon referred Appellant to Dr. Cavert McCorkle for surgery. Dr. Bannon last saw Appellant on May 19, 2005 and did not evaluate or treat her again until August 14, 2008. (R. p. 481).

Dr. Bannon testified that on August 14, 2008, Appellant had complained of chronic back pain, chronic headaches and blood pressure problems. (R. p. 481, lines 20-25). Dr. Bannon noted that at the time he began treating Appellant on August 14, 2008, she was already taking potent narcotic medications for chronic back pain. (R. p. 482, lines 16-18; p. 488, lines 2-6). Dr. Bannon then prescribed Naprosyn, an anti-inflammatory medication. (R. p. 482, lines 12-21).

Dr. Bannon stated that the conditions of the degenerative disc disease and stenosis progress as one ages. Degenerative disc disease plays a large role with respect to Appellant's chronic pain condition. (R. pp. 491-492). Dr. Bannon noted that Appellant had been taking narcotic medications prescribed by Dr. Latourette before her alleged work related accident in August 2008. (R. p. 497, lines 3-20; pp. 498-499).

Dr. Bannon acknowledged he did not know the size or the weight of the screws Appellant installed on the doors; or the amount of time Appellant spent working on a door. (R. p. 513). Dr. Bannon admitted that his opinion on causation was based upon information provided to him by Appellant's counsel. Dr. Bannon opined that his conclusion that Appellant's job aggravated her preexisting back condition consisted of "an educated speculation". (R. p. 513, lines 19-23).

Dr. Bannon testified that a comparison of the 2005 MRI scan and the 2008 MRI scan shows a progression of Appellant's degenerative disc disease. (R. p. 515, lines 1-11). Dr. Bannon testified that absent Appellant performing any occupational duties, it

was still probable she would experience chronic lumbar pain. (R. p. 515, lines 4-11). Finally, Dr. Bannon noted that because Appellant was not working, but still complained of chronic pain, it required some degree of speculation to associate Appellant's current symptoms of pain with her occupational duties. (R. p. 515, lines 12-21).

In support of her claim of compensability, Appellant submitted a letter dated October 29, 2008 from Dr. Cavert McCorkle. Dr. McCorkle last treated Appellant in December 2005. Dr. McCorkle had not seen Appellant since December 2005, but yet he opined that Appellant's occupational duties of repetitive pushing, pulling, bending, lifting, walking long distances and standing for long periods of time most probably aggravated her preexisting back condition.

Dr. McCorkle admitted in his deposition that at the time he rendered his opinion in a letter to Appellant's counsel dated October 10, 2008, he had not seen Ms. Johnson in almost three (3) years; nor had he discussed with Appellant her occupational duties. (R. pp. 454-455). Similarly, Dr. McCorkle had not discussed Appellant's occupational duties with a representative of BMW. (R. p. 454, lines 13-25; p. 455). Dr. McCorkle admitted he was unaware of the frequency required for Appellant to perform various work activities and the intensity needed to perform certain job duties. (R. p. 451, lines 18-21; p. 455). Dr. McCorkle further admitted that at the time of his written medical opinion in October 2008, the only source of information regarding Appellant's job activities was from counsel's letter dated October 10, 2008 describing Ms. Johnson's work related activities. (R. pp. 456-457).

Dr. McCorkle testified that after he performed surgery, Appellant was referred to Dr. Latourette for pain control because her underlying degenerative disc disease condition was long term. (R. p. 464).

Dr. McCorkle further testified he was not privy to Dr. Phillip LaTourette's medical reports since he had not treated Appellant since 2005. (R. pp. 457-458). Dr. McCorkle stated that Appellant had been diagnosed with degenerative disc disease of her spine in 2005. According to Dr. McCorkle, degenerative disc disease can get worse with age and is not necessarily exacerbated by occupational duties. (R. p. 459, lines 11-25). The condition can be exacerbated by non-occupational duties. To this end, Dr. McCorkle testified that he did not inquire and was unaware of Appellant's non-occupational duties. (R. pp. 459-460).

Dr. Latourette, a pain management physician, who has continuously treated Appellant since 2005 to the present responded to a letter from Appellant's counsel regarding an opinion on causation with respect to the alleged work related accident of August 23, 2008. On November 7, 2008, in a handwritten note, Dr. Latourette stated:

I am prepared to declare that Ms. Johnson is fully disabled. I am not prepared to declare her pain & (sic) disability is (sic) due to a work related injury. (R. p. 363).

Dr. Kevin Kopera evaluated Appellant. Dr. Kopera diagnosed Appellant as having chronic low back pain with chronic degenerative disc disease and a left chronic L4 and L5 radiculopathy. (R. pp. 429-431). Dr. Kopera further noted that Ms. Johnson's chronic low back pain has been associated with narcotic dependence with respect to managing her chronic pain condition. Upon examining Appellant and obtaining a

description of the job of installing screws, Dr. Kopera opined that he did not believe the activity of installing screws on August 23, 2008, proximately produced back pain that Appellant was experiencing. Dr. Kopera noted that Appellant had performed this activity on a daily basis in the past without any apparent difficulty. Moreover, Dr. Kopera noted that if the activity as described by Appellant did produce or aggravate back pain, such would only be temporary and not permanent. (R. pp. 430-431).

Based upon the foregoing testimonies and overwhelming medical evidence supporting the finding of a non-compensable work-related accident to the low back, it is respectfully submitted that the Commission's Decision be affirmed.

II. APPELLANT DID NOT ARGUE THAT THE DOCTRINE OF JUDICIAL ESTOPPEL WAS APPLICABLE BEFORE THE COMMISSION, THEREBY, THE ARGUMENT HAS BEEN WAIVED AND IS NOT 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 based upon the evidence. Specifically, Respondents did not take any conflicting positions or misrepresented 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.

On the contrary, Appellant's alleged accident of August 19th or 23rd, 2008 rarely, if ever, involve injuries to the low back. The particular aspects or components of Appellant's job did not require her to utilize her low back according to the testimony of her supervisor, John Huss. (R. p. 129, lines 12-21).

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

Last, 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). Respondents respectfully submit that the Commission's Decision be affirmed.

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

Appellant failed to prove that she sustained an injury to her back by virtue of her employment duties. Appellant has an extensive history of back problems beginning in 2004. Appellant's pre-existing condition had resulted in Dr. Cavert McCorkle performing

a decompressive partial hemilectomy for lumbar stenosis and nerve root compression at L4-5 and L5-S1 on May 20, 2005. Appellant later underwent a second surgery on June 24, 2005, which consisted of a re-exploration of L4-5 and L5-S1, which included the removal of the disc at L5-S1. Since Appellant's surgeries in 2005, she has continued to suffer with persistent and constant, chronic pain. (R. p. 262). Appellant has received medical treatment from 2005 to the present from Dr. Philip Latourette.

Because Dr. Latourette has continuously treated Appellant on a routine basis, the Commission placed great weight upon Dr. Latourette's hand-written report to Appellant's counsel dated November 7, 2008. In the hand-written note, Dr. Latourette opined that he was unable to relate Appellant's back pain and disability to the alleged work-related accident of August 23, 2008. (R. p. 363.) Because of Dr. Latourette's consistent familiarity with Appellant's activities, complaints of pain, and discomfort, he was in the best position to render an expert opinion in a medically-complicated case on the issue of causation. (R. pp. 262 and 363). *S.C. Code Ann. §42-1-160 (2010)* Thus, Dr. Latourette's opinion was afforded great weight for finding that Appellant did not injure her back on August 19 or 23, 2008.

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

According to John Huss, supervisor, the re-work position consists primarily of inspection duties. In the re-work department, an employee is required to physically examine the doors to make certain the seals are properly aligned and to make small adjustments. (R. pp. 123-124).

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).

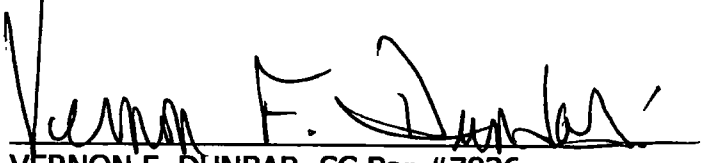
In order for the South Carolina Workers' Compensation Commission to award benefits, the injured worker must first prove by a preponderance of the evidence that he or she sustained a compensable work related accident which arises out of and in the course of employment. Jennings v. Chambers Development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

Substantial evidence in this case clearly reflects Appellant simply failed to prove the occurrence of a compensable back injury by virtue of her employment duties. Accordingly, the South Carolina Workers' Compensation Commission's Decision must be affirmed as a matter of law. Muir v. C. R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. of Apps., 1999).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court affirm the Decisions and Orders of the South Carolina Workers' Compensation Commission.

Respectfully submitted,



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November 23, 2010

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

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.

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I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID COMMIT LEGAL ERROR IN FINDING AND CONCLUDING THAT APPELLANT DID NOT SUFFER A COMPENSABLE ACCIDENTIAL INJURY TO HER BACK ON OR ABOUT AUGUST 19TH OR AUGUST 23RD, 2008.

A. APPELLANT'S MEDICAL EVIDENCE DOES SUPPORT A FINDING OF A COMPENSABLE WORK RELATED INJURY.

The Appellant alleges she injured her back in a specific accident and/or, in the alternative, aggravated a pre-existing back injury on or about August 19th or August 23rd, 2008 as a result of repetitive motion requirements from her job. The Respondents deny both allegations. They deny that the Appellant had a specific injury that aggravated a previous back injury even though the Appellant gave specifics about the injury. They, also, continue to deny that the pre-existing back condition was aggravated by repetitive motion requirements of the job while admitting at the same time that repetitive motion requirements caused work related injuries to both upper extremities.

The law in South Carolina is written to favor the Claimant when allegations of a work related injury are made. In this case, the overwhelming evidence in support of the Appellant was ignored.

The Appellant gave a detail description of how she got hurt at the hearing before the single commissioner. She said, "I was on–out on doing some rework area. And I was bending over to put screws in the bottom of the door which is very, very, low. Excuse me. And when you are doing a job the car is moving. And I had a gun in my hand to put the screws in, drill gun. And when I went to bend over, I was pushing it in and I felt something pull in my back. I felt something like slip in my back. And it hurt, you know. It was hurting me, but it hurt worse as the

time passed on. It got worse." (R77-78) This is evidence of an injury, even though it was refuted somewhat by her supervisor who wasn't even on the job when the alleged accident occurred.

The same history was given by the Appellant to the plant physician, Dr. Ken Hommel. Dr. Hommel said, "...that she injured her low back for a second time approximately two weeks ago. She reports that she was bent forward installing screws on the door panel when she noticed the back pain. She reports the pain became worse and she went to her family doctor to evaluate her back. She reports that he did an MRI of her low back....She has also had epidural injections. She reports that she recently had onset of increased low back pain while working." This was from the doctor's note of August 25, 2008.

On September 5, 2008, Dr. Hommel said, "This associate works on the line assembly production job. She recently reported that her back started hurting more at work from bending forward to install bolts and filed a work comp claim."

Dr. Phillip Latourette, a treating physician for the Appellant, also noted job related injuries to the back of the Appellant. Dr. Latourette, in a note dated September 12, 2007, said, "Patient reports she knows neurontin helps but she does not want to take, she wants to take less meds if possible. She is bending a lot at work which she notes can increase pain...patient notes the days that she works she has to take four Percocet. If she is not working she can cut back on Percocet."

You have the Appellant, Dr. Hommel, and Dr. Latourette describing an on the job injury that affected the back of the Appellant and aggravating conditions on the job aggravating the back of the Appellant. There are other supporting reports, as well.

Therefore, the Appellant believes the Full Commission Order should be reversed. I cite again the precedent established by the Courts in South Carolina that previous injuries may be

aggravated by a new injury to the same body part, to wit: "The rule is well established that where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable. *Cole v. State Highway Dept.,* 190 S.C. 142, 2 S.E.2d 490; *Green v. City of Bennettsville*, 197 S.C. 313, 15 S.E.2d 334; *Ferguson v. State Highway Dept.*, 197 S.C. 520, 15 S.E.2d 775. The same principle is equally applicable where the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier, one. 58 *Am.Jur. Workmen's Compensation*, Section 278, p. 775; *Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 23 S.E.2d 19; *Ducker v. Dunean Mills,* 218 S.C. 465, 63 S.E.2d 314.*Gordon v. E. I. Du Pont De Nemours & Co.* 228 S.C. 67, 76, 88 S.E.2d 844, 848 (S.C.1955)." This is from the Appellant's brief.

II. APPELLANT DID ARGUE THAT THE DOCTRINE OF JUDICIAL ESTOPPEL WAS APPLICABLE BEFORE THE COMMISSION, THEREBY, THE ARGUMENT HAS NOT BEEN WAIVED AND HAS BEEN PRESERVED FOR REVIEW.

The Appellant did preserve this argument for review. The Appellant's attorney stated to the Full Commission, "But certainly the puzzling part to us is how they could come in and admit that they had repetitive trauma to the upper extremities on March 23, 2008 and the same kind of injury not impact the back on the aggravation of a pre-existing condition." (R 146-147)

The Appellant's attorney further argued, " What is puzzling to me is that the argument put forth by the employer/carrier, how you can take two upper extremities, healthy up until March 23 of 2008, no complaints on them at all, and they will admit that these two healthy upper extremities were aggravated to the point by repetitive trauma that it caused some work related injury, and taking that, now you're looking at two healthy upper extremities, no complaints on it in 2005, 2006, 2007.....this is Mr. Dunbar on the record, they do in fact—this is on page four of my brief---they do in fact admit compensability of both extremities to repetitive trauma." (Rule 156-157) The Appellant's attorney, also, argued, "And we talked about the inconsistent positions; to admit two and deny one, how can you separate them?"

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. The argument was preserved, and the Full Commission Order should, therefore, be reversed.

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

The Appellant did not establish the admitting criteria for expert testimony at hearing tribunals in this state. The South Carolina Legislature and the state courts have. Because of this, the over reliance by the single commissioner and the full commission review panel on Dr. Latourette's testimony is misplaced as a matter of fact and law. "(E) In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. For purposes of this subsection, "medically complex cases" means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic techniques." Code 1976 § 42-1-160.

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

IV. LAY EVIDENCE PRESENTED DOES SUPPORT THE COMPENSABILITY OF APPELLANT'S LOW BACK CLAIM.

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

CONCLUSION

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

Respectfully submitted,

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