

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-WC-00448

JOHNSON ELECTRIC AUTOMOTIVE  
AND ZURICH AMERICAN INSURANCE COMPANY

APPELLANTS

V.

MRS. BETTY A. COLEBROOK

APPELLEE

APPEAL FROM THE CIRCUIT COURT  
OF LOWNDES COUNTY, MISSISSIPPI  
HONORABLE LEE J. HOWARD, PRESIDING  
(Affirming Order of Mississippi Workers Compensation Commission)

BRIEF OF APPELLEE/CROSS APPELLANT - MRS. BETTY A. COLEBROOK

ROBERT H. FAULKS  
MSB No. [REDACTED]  
Post Office Drawer 866  
408 Hwy 145 North  
Aberdeen, MS 39730  
Telephone: (662) 369-8099  
Telefax: (662) 369-6075  
E-mail: rfaulks@bellsouth.net

Attorney for Appellee/Cross-Appellant

ORAL ARGUMENT IS NOT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-WC-00448

JOHNSON ELECTRIC AUTOMOTIVE  
AND ZURICH AMERICAN INSURANCE COMPANY

APPELLANTS

V.

MRS. BETTY A. COLEBROOK

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Mrs. Betty A. Colebrook  
Columbus, MS

Zurich American Insurance Company  
Nashville, TN

Johnson Electric Automotive

Robert H. Faulks, Attorney for Mrs. Betty A. Colebrook - Appellee/Cross-Appellant

Joseph T. Wilkins, III, Attorney for Appellants - Johnson Electric Automotive, Zurich American Insurance Company

Hon. Lee J. Howard, Circuit Court Judge

Respectfully submitted,



Robert H. Faulks (MSB No. 5157)  
Post Office Drawer 866  
Aberdeen, MS 39730  
Telephone: (662) 369-8099  
Telefax: (662) 369-6075  
E-mail: rfaulks@bellsouth.net

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE ISSUES.....	1
On direct-appeal, whether the Commission award was arbitrary and capricious, or not supported by substantial evidence, or contrary to law? .....	1
On cross-appeal, whether the Commission erred in failing to award temporary disability benefits to Mrs. Colebrook for the additional period that she did not work from July 20 through August 9, 2000, as a result of the on-the-job injury and under express orders from a physician not to work?.....	1
On cross-appeal, whether the Commission erred in apportioning Mrs. Colebrook's right extremity injury award by 22% since her prior shoulder injury did not result in any permanent medical restrictions and no occupational disability, and she had returned to work full-time after being released from treatment after her prior shoulder injury? .....	1
On cross-appeal, whether the Commission erred in not also awarding benefits to Mrs. Betty Colebrook for a whole body injury? .....	1
STATEMENT OF THE CASE.....	2
Course of Proceedings. ....	2
Statement of Facts.....	3
ARGUMENT .....	13
CONCLUSION.....	24
CERTIFICATE OF SERVICE .....	25

## TABLE OF AUTHORITIES

### CASES

<u>Barber Seafood, Inc. v. Smith</u> , 911 So. 2d 454, 462 (Miss. 2005) .....	13
<u>Bryan Foods, Inc. v. White</u> , 913 So. 2d 1003, 1008 (Miss. Ct. App. 2005) .....	14
<u>Chapman, Dependents of v. Hanson Scale Co.</u> , 495 So. 2d 1357 (Miss. 1986).....	19
<u>Clements v. Welling Truck Service, Inc.</u> , 739 So. 2d 476, 478 (Miss. Ct. App. 1999) .....	18
<u>Compere’s Nursing Home v. Hamledary</u> , 841 So. 2d 154 (Miss. Ct. App. 2002) .....	15, 22
<u>Cooper Tire &amp; Rubber Co. v. Harris</u> , 837 So. 2d 789 (Miss. Ct. App. 2003) .....	18
<u>Craft v. Millcreek Rehabilitation Center</u> , 854 So. 2d 508 (Miss. Ct. App. 2003) .....	19
<u>Fought v. Stewart C. Irby Co.</u> , 523 So. 2d 314, 317 (Miss. 1988).....	13
<u>Ga. Pac. Corp. v. Taplin</u> , 586 So. 2d 823, 827 (Miss. 1991) .....	24
<u>Hale v. Ruleville Health Care Center</u> , 687 So. 2d 1221, 1224 (Miss. 1997).....	13
<u>Harrell v. Time Warner/Capitol Cablevision</u> , 856 So. 2d 503, 511 (Miss. Ct. App. 2003) .....	14
<u>Johnson v. Ferguson</u> , 435 So. 2d 1191, 1193-1195 (Miss. 1983) .....	18
<u>Marshall Durbin v. Warren</u> , 633 So. 2d 1006, 1010 (Miss. 1994) .....	18
<u>McGowan v. Orleans Furniture Inc.</u> , 586 So. 2d 163, 167 (Miss. 1991) .....	24
<u>Miller Transporters, Inc. v. Guthrie</u> , 554 So. 2d 917, 918 (Miss. 1989) .....	14
<u>Moore v. Indep. Life &amp; Accident Ins. Co.</u> , 788 So. 2d 106, 114 (Miss. Ct App. 2001) .....	21
<u>Mueller Copper Tube Co., Inc. v. Upton</u> , 930 So. 2d 428 (Miss. Ct. App. 2005) .....	18
<u>Penrod Drilling Co. v. Etheridge</u> , 487 So. 2d 1330, 1333 (Miss. 1986) .....	15
<u>Prince v. Nicholson</u> , 229 Miss. 718, 91 So. 2d 734 (1957) .....	19

<u>Raytheon Aerospace v. Miller</u> , 850 So. 2d 1159, 1176 (Miss. Ct. App. 2002) .....	14, 18
<u>Raytheon Aerospace Support Serv. v. Miller</u> , 861 So. 2d 330, 336 (Miss. 2003) .....	16-17
<u>Sharpe v. Choctaw Electronics Enterprises</u> , 767 So. 2d 1002, 1006 (Miss. 2000).....	14, 19
<u>Smith v. Jackson Const. Co.</u> , 607 So. 2d 1119, 1123-1124 (Miss. 1992) .....	14
<u>South Central Bell Telephone Co. v. Aden</u> , 474 So. 2d 584, 589 (Miss. 1985).....	13
<u>Stewart v. Singing River Hospital System</u> , 2005 So. 2d (2004-WC-00707-COA) .....	23
<u>Stuart's Inc. v. Brown</u> , 543 So. 2d 649 (Miss. 1989) .....	22
<u>Vance v. Twin River Homes, Inc.</u> , 641 So. 2d 1176, 1180 (Miss. 1994).....	13
<u>Walls v. Hodo Chevrolet Co., Inc.</u> , 302 So. 2d 862 (Miss. 1974) .....	22
<u>White v. Superior Products, Inc.</u> , 515 So. 2d 924, 927 (Miss. 1987) .....	15
 <u>STATUTES</u>	
Miss. Code Ann. §71-3-7.....	6

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-WC-00448

JOHNSON ELECTRIC AUTOMOTIVE  
AND ZURICH AMERICAN INSURANCE COMPANY

APPELLANTS

V.

MRS. BETTY A. COLEBROOK

APPELLEE

STATEMENT OF THE ISSUES

1. On direct-appeal, whether the Commission award was arbitrary and capricious, or not supported by substantial evidence, or contrary to law?
2. On cross-appeal, whether the Commission erred in failing to award temporary disability benefits to Mrs. Colebrook for the additional period that she did not work from July 20 through August 9, 2000, as a result of the on-the-job injury and under express orders from a physician not to work?
3. On cross-appeal, whether the Commission erred in apportioning Mrs. Colebrook's right arm injury award by 22% since her prior shoulder injury did not result in any permanent medical restrictions and no occupational disability, and she had returned to work full-time after being released from treatment after her prior shoulder injury?
4. On cross-appeal, whether the Commission erred in not also awarding benefits to Mrs. Betty Colebrook for a whole body injury?

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-WC-00448

JOHNSON ELECTRIC AUTOMOTIVE  
AND ZURICH AMERICAN INSURANCE COMPANY

APPELLANTS

V.

MRS. BETTY A. COLEBROOK

APPELLEE

STATEMENT OF THE CASE

Course of Proceedings.

The Mississippi Workers' Compensation Commission, in a unanimous decision by the three Commissioners, determined that Mrs. Betty A. Colebrook had suffered on-the-job injuries during her employment by Johnson Electric Automotive on or about April 6, 2000, and primarily on or about July 18, 2000. The Full Commission Order of April 5, 2006 ordered the Employer to provide and pay for appropriate medical treatment, and to pay Mrs. Betty A. Colebrook temporary disability benefits at the rate of \$303.35 per week for the period of October 4, 2000 to June 3, 2002, with a credit to the Employer for the benefits it had previously paid. The Full Commission Order also ordered the Employer to pay permanent partial disability benefits, commencing June 4, 2002, for a 78% loss of use of her right arm [the benefits otherwise due for 100% loss of use of her right arm after reduction of 22% due to a previous injury to the arm] and for a 50% loss of use of her left arm, at the rate of \$303.35 per week. Penalties and interest were included in the award, as provided by law.

Johnson Electric Automotive and Zurich American Insurance Company filed a Notice of Appeal to the Lowndes County Circuit Court, dated April 25, 2006. Mrs. Betty A. Colebrook filed a Notice of Cross Appeal dated May 4, 2006. After conducting a hearing, the Lowndes County Circuit Court affirmed the Full Commission decision by its Order dated March 7, 2007.

Johnson Electric Automotive and Zurich American Insurance Company filed a Notice of Appeal to the Mississippi Supreme Court/Court of Appeals dated March 15, 2007. Betty A. Colebrook filed a Notice of Cross Appeal dated March 26, 2007.

Statement of Facts.

Mrs. Betty A. Colebrook had been a long time employee at the location that was last operated by Johnson Electric Automotive, which was her employer in the year 2000, where she suffered on-the-job injuries.

Mrs. Betty Colebrook is now 53 years old with a birth date of May 3, 1954, a resident of Columbus, attended school to the 10<sup>th</sup> grade, and first became employed at United Technologies Automotive, the predecessor to Johnson Electric Automotive at this work location in February 1973. She held a number of assembly lines, manual labor type jobs at this location for almost 30 years.

On September 30, 1997, Mrs. Colebrook suffered an on-the-job injury at this location, which was then being operated by United Technologies Automotive, when she was handling a 12 pound motor, and slipped and fell. Mrs. Colebrook was treated by Dr. Joseph Hillman, a local Columbus physician, and eventually underwent surgery by Dr. Felix Savoie in Jackson on April 1, 1999, which included surgery on her right shoulder for a rotator cuff tear and on her wrist for an endoscopic carpal tunnel release.

Mrs. Colebrook returned to work in July 1999 for half days, was later released to work 5 hour



days, then later released to work 6 hour days, and was eventually released to work full 8 hour days by February 2000. Dr. Felix Savoie assigned a partial permanent impairment rating of 22% to the right arm due to the shoulder and wrist injuries, but did not place any restrictions on her work after final discharge. FN1

A "Days Worked in 2000" document prepared by Martha Hutcheson (Human Resources Administrator with Johnson Electric), showed that Mrs. Colebrook's hourly wage was \$10.38, that she frequently worked more than 40 hours a week, and worked overtime hours on many occasions during February through June 2000, as well during 1 week in mid-July 2000, and that Mrs. Colebrook last worked on October 3, 2000. This document also revealed that Mrs. Colebrook did not work from July 20 through August 9, 2000, which amounted to 15 work days or 3 work weeks.

Dr. Joseph Hillman had first treated Mrs. Betty A. Colebrook, when she was referred to him by United Technologies Automotive, after her first injury on September 30, 1997. Dr. Hillman is a physician in Columbus, who received his medical school training at the University of Mississippi, received additional training in internal medicine at Oxford University in Oxford, England, completed an internship at the University of Mississippi, and became Board certified in family medicine in 1978. He had been practicing industrial medicine for 31 years, and served as Medical Director for several companies.

On July 19, 2000, Mrs. Betty Colebrook came to Dr. Joseph Hillman's office, and complained about an injury she suffered while working at Johnson Elective Automotive. A

---

1 United Technologies Automotive and its carrier the Insurance Company of the State of Pennsylvania treated this earlier injury as compensable, paying temporary benefits, providing for medical treatment and paying permanent benefits calculated on the partial permanent impairment rating of 22% to the right arm. Later, Mrs. Colebrook and United Technologies Automotive settled her claim for the September 30, 1997 rotator cuff shoulder injury and the right carpal tunnel wrist injury for the sum of \$14,000.00, a portion of which was set aside for any future medical expenses associated with the September 30, 1997 shoulder and the wrist injuries. The settlement was approved by the Commission, and

contemporaneous Progress Note was prepared by Dr. Hillman after taking a history and a physical examination of Mrs. Colebrook. See copy of Progress Note in Record Excerpt "1". Mrs. Betty Colebrook reported that she had worked all day on July 18, 2000, working with her right arm reaching in front of her and pulling toward her body. She stated that this was difficult for her to do, and that it caused pain and swelling in her right hand, elbow, upper arm and shoulder. She also complained of tightness and she was unable to bend or flex her elbow. Dr. Hillman also noticed edema or fluid and swelling. He instructed her not to return to work at this time, and noted on his record that this was a new Worker's Compensation injury.

On the next day, July 20, 2000, a Progress Note of Dr. Hillman stated that Mrs. Colebrook had returned and was also complaining of intense pain in her right neck. See copy of Progress Note in Record Excerpt "2". Mrs. Colebrook said that she had returned to work, was only able to work 5 hours after being assigned to pick up caps and push rubber gaskets, and that she hurt so badly from this work that she attempted to do the work with her left arm. Dr. Hillman also documented that Mrs. Colebrook's supervisor was Faye Latham. Dr. Hillman again restricted her from returning to work, and prescribed medication.

Dr. Hillman testified that neither the former nor the current employers and carriers would agree who was responsible for this treatment, and no one would authorize treatment. The records of Johnson Elective Automotive show that Mrs. Colebrook was absent from work from July 20 through August 9, 2000, and that Johnson Elective Automotive recorded that the reason was due to a "leave of absence". See copy of "Days Worked in 2000" document in Record Excerpt "3". Even though neither carrier would authorize treatment, Dr. Hillman provided treatments including anti-

---

expressly reserved Mrs. Colebrook's right to pursue her claims against Johnson Electric Automotive.

inflammatory injections and sample medications, and prescribed physical therapy.

Dr. Hillman determined that Mrs. Colebrook should be examined by Dr. George Housley in September 2000 and should also undergo a nerve conduction study, which was done by Dr. Marshall J. Handleman in October 2000. Dr. Housley submitted a report to Dr. Hillman, stating that Mrs. Colebrook had myofacial neck/shoulder pain, inflammation, and puffy hands, but no rheumatoid arthritis, and recommended physical therapy. See copy of Housley Note in Record Excerpt "4".

Dr. Marshall J. Handleman, a Board Certified Neurologist, submitted a report of his findings, which noted on the Sensory NCS that there were peak latencies of the left and right Med-D1, Med-D3, and palmar responses that were mildly prolonged. The EMG examination was also abnormal, that a mild degree of motor axon loss was noted in the right biceps and deltoid muscles. See copy of Handleman Note in Record Excerpt "5". Handleman reported that the nerve conduction study revealed a right-sided C-5 radiculopathy and bilateral median neuropathies. Dr. Handleman also reported that the finding fit Mrs. Colebrook's complaints.

Dr. Hillman took Mrs. Colebrook off work permanently on October 4, 2000. Johnson Elective Automotive's record of attendance states that her absences were due to a "leave of absence". Dr. Hillman attempted to convince the employer to authorize treatment for Mrs. Colebrook and testified that he wrote a letter in October 2000 to the Safety Director at Johnson Electric stating that he believed Mrs. Colebrook's current neck injury had initially manifested itself on April 6, 2000 at work.

Keith Holten, an owner of Magnolia Rehab and a certified physical therapist, treated Mrs. Colebrook on orders of Drs. Hillman and Housley. Holton testified that he first examined Mrs. Colebrook on October 6, 2000, when she had extensive neck pain and radiculariations going down to

exceeding 3 pounds, not use her hands repetitively, not push or pull anything exceeding 3 pounds, not to flex her neck repetitively or lift anything above her shoulders.

In a letter dated May 25, 2001, Martha Hutcheson, Human Resources Administrator for Johnson Elective Automotive advised Mrs. Colebrook that she had reviewed her doctor's restrictions and that Johnson Electric was not comfortable with Mrs. Colebrook returning to work. See copy of Hutcheson letter dated May 25, 2001 in Record Excerpt "6".

There were a number of "independent" medical examinations demanded and arranged by the Employer/Carrier. One of these examinations was done by a Dr. Robert Buckley. His report of July 17, 2001 was admitted as Exhibit 10 and contrary to representations in the Appellant's brief, Dr. Buckley really does not contradict the treating physician's diagnosis or plan of treatment. Buckley's report identifies his "Impression" of Mrs. Colebrook as: "1) bilateral upper extremity pain, right greater than left; 2) neck pain; 3) tingling and numbness in the ulnar distribution, right upper extremity, and left upper extremity; and 4) swelling bilateral hands, per patient history". Buckley states that Mrs. Colebrook "is most likely having a progression of symptoms related to her heavy manual labor. It appears that she did obtain some relief from her initial surgery however when placed back into heavy repetitive motion activity, she develops complaints of pain in her hands, wrists, elbows, shoulders, and neck." Dr. Buckley's report adds that "she may require further evaluation of her neck to make sure she does not have any significant impingement type problems in her neck". He recommended that she continue to see Dr. Hillman for physical therapy.

On August 21, 2001, Mrs. Colebrook was next examined by Dr. Savoie at the request of Johnson Electric/ Zurich. Dr. Savoie had been the specialist who did the carpal tunnel surgery on her wrist and the rotator cuff repair on her right shoulder.

Dr. Savoie noted in his report of August 21, 2001, that prior to his release of Mrs. Colebrook in early 2000 a nerve conduction study had been done that was normal and did not show evidence of C-5 radiculopathy or carpal tunnel, that her shoulder looked good and she had been released to return to work without restrictions. See copy of Dr. Savoie Note in Record Excerpt "7".

However, on August 21, 2001, Dr. Savoie observed some atrophy of the deltoid on the right shoulder which he had not previously seen, which caused him some concern. Dr. Savoie also noted that Mrs. Colebrook had a tight spasm of the trapezius, and a decreased motion of the neck. **Dr. Savoie concluded that Mrs. Colebrook had recovered significantly from her old injuries, and that her neck problem was a new problem and that he concurred with Dr. Hillman.** Dr. Savoie also reported that he wanted to direct some of the physical therapy to eliminate the shoulder, elbow and wrist pain she was having from the radiculopathy.

Dr. George Housley examined Mrs. Colebrook a few days later, and in his report dictated August 24, 2001, noted his disagreement with the surgeon, Dr. Savoie, concerning her shoulder. See copy of Dr. Housley Note in Record Excerpt "8". Housley's report states: "I would have to politely disagree with the surgeon. It is clear that she has lateral epicondylitis and De Quervain tenosynovitis and probably some rotator cuff dysfunction on that right shoulder. It is highly unlikely that surgery on the right neck is going to do anything whatsoever for that, although it may certainly benefit symptoms relating to the radiculopathy. ... I have talked to her a little bit about shoulder and elbow exercises ... and we will leave her on the current regimen."

Physical therapist Keith Holton also noted that in November 2001, Mrs. Colebrook's reflexes were decreased along the C5 - C6 region, and her headaches were a primary involvement. Record, Transcript Volume (May 11, 2004) at p. 139.

Dr. Evan Zeiger, a neurosurgeon, reported to Dr. Hillman in a letter dated March 12, 2002, that his "only explanation" of Mrs. Colebrook's test results was "that the C5 nerve was damaged" but that there was "no ongoing compression". Dr. Hillman stated that Zeiger also informed him that, while Mrs. Colebrook's C-5 nerve root was damaged, it was not currently compressed due to the long period of traction and physical therapy. FN2

On March 21, 2002, Zurich American Insurance Company finally relented and issued a check payable to Mrs. Betty Colebrook, in the sum of \$21,112.26 for past due temporary total disability. See copy of Zurich check in Record Excerpt "9". While the check identified a date of loss of April 6, 2000, the check stated that it was for payment service dates of October 4, 2000 to April 3, 2002, or 78 weeks of TTD (temporary total disability) at a weekly rate of \$270.67. Zurich American Insurance Company subsequently issued checks for TTD calculated at a weekly rate of \$303.35. The carrier's Notice of Suspension of Payment Form (dated November 19, 2003) stated that Zurich had continued to pay worker's compensation benefits to November 13, 2003; at a compensation rate of \$303.35 and that the average weekly wage was \$455.00. Zurich unilaterally and without Commission authorization terminated disability payments for any period subsequent to November 13, 2003. [At the hearing before the Full Commission, the Employer's attorney was asked why the carrier had not corrected the first lump sum payment issued at the weekly rate of \$270.67 rather than the correct weekly figure of \$303.35, and was advised that Zurich planned to settle up at the end].

In the meantime, on her own, Mrs. Colebrook applied for Social Security disability benefits. Social Security determined that Mrs. Colebrook was disabled beginning October 4, 2000, and

---

2 On June 12, 2003, Zeiger stated after a second office visit that Mrs. Colebrook "definitely" had diabetic neuropathy and possibly a radiculopathy due to a "work stretch injury". In a later purported handwritten note, Zeiger apparently concluded that she did not have a pinched nerve or diabetic neuropathy, but had mild carpal tunnel syndrome.

contrary to representations in Zurich's appeal brief, Social Security identified the primary diagnosis as "cervical disc disease" and the secondary diagnosis as "carpal tunnel." See copy of Social Security disability determination in Record Excerpt "11". Her initial monthly disability payment was \$409.00. See copy of Social Security letter in Record Excerpt "12".

Dr. Hillman testified at the hearing and opined that he was absolutely certain that Mrs. Colebrook suffered an injury at work on July 18, 2000, while reaching in front and pulling towards her body, that the pain, the deltoid atrophy, the muscle spasm and the suffering she experienced in her neck and shoulders were caused by that on-the-job injury and the overuse of her left arm, that she will continue to require medication to control the pain, and that there is nothing surgically that can be done for it. Record, Transcript Volume (December 3, 2003) at pp. 53-54. Dr. Hillman opined that Mrs. Colebrook suffered a C-5 neck injury and an injury to her right shoulder, elbow and wrist as a result of the July 18, 2000 on-the-job injury, and she had continued to injure both extremities by the recurrent, repetitive nature of her work. Id. at p. 54. Utilizing the American Medical Association Guidelines to Impairment (4<sup>th</sup> edition), Dr. Hillman opined that Mrs. Colebrook had a 6% impairment rating to the body as a whole due to a cervical condition, that her right extremity had progressed to a 33% impairment rating, and that even her left extremity had a 33% impairment rating due to overuse, as of June 3, 2002, a date of maximum medical recovery. Id. at pp. 55-57.

Dr. Hillman stated that Mrs. Colebrook is not able to do any kind of work. She needs to wear carpal tunnel splints at all times. She's not able to lift her arms above shoulder height. She's not able to use her arms or hands repetitively for anything. She is not able to lift, pull or push anything greater than 3 pounds.

Mrs. Betty Colebrook testified at the hearing, and her deposition was also admitted as an

exhibit. In April 2000, Mrs. Colebrook had been working at Johnson Electric Automotive, building and packing motors. She was standing on a stool and reached over into a carton to pull caps and armatures, and she felt pain in her neck. The motor was about 2 pounds. In July 2000, she experienced the pain again, when she had to place an armature and a cap in place and then feed motors to other workers all day. She said her neck felt so bad that she had to stay in the restroom for a long while, and then told a supervisor Warren Carter that she couldn't do that job and needed to see a doctor. She was then assigned to supervisor Faye Latham and told her she was in pain running an automatic machine, left, and went to the doctor.

Mrs. Colebrook testified about the kinds of motions that she is unable to do, or that cause her pain, both at work and at home. She had been awarded Social Security disability effective October 4, 2000, and the primary condition for the disability was identified as cervical disc. She thought she was drawing \$402.00 and expected an increase to \$476.00. She had sought employment, contrary to the instruction of Dr. Hillman, but had not been successful in applying for work at FasTax in Columbus, Payless Shoes in Columbus, Columbus Lowndes Recreation Center, Baptist Memorial Hospital in Columbus, and MARS in Memphis. She is able to drive, but feels vibrations. She feels pain, numbness and tingling. She no longer does any physical work. She explained how she could no longer do the work she had been assigned at Johnson Electric.

Martha Hutcheson, human resource administrator at Johnson Electric, did recall that at some point in time Mrs. Colebrook said that her job was bothering her. Hutcheson also recalled that Mrs. Colebrook had complained that she was still hurting, and that her job aggravated her condition.

The employer's own rehabilitation specialist Morris Selby concurred that Mrs. Colebrook is "not able to work", and "that nobody's going to hire her". Record, Transcript Volume (August 10,



2004) at pp. 276, 277.

## ARGUMENT

### The standard of review

An appellate court must defer to the Commission's findings of fact if there is "even a quantum of credible evidence which support's the agency's decision." Hale v. Ruleville Health Care Center, 687 So. 2d 1221, 1224 (Miss. 1997). "This highly deferential standard of review essentially means that ... courts will not overturn a Commission decision unless said decision was arbitrary and capricious." *Id.* at p. 1225.

Indeed, the Court has a duty to defer to the Commission when its decision can be supported. Fought v. Stuart C. Irby, Co., 523 So. 2d 314, 317 (Miss. 1988). Appellate courts may not reevaluate the evidence and substitute its decision for that of the Commission. *Id.* A court does not review the facts on appeal to determine how it would resolve the factual issues were it the trier of fact, but rather its function is to determine whether the decision by the Commission is supported by substantial credible evidence. South Central Bell Telephone Co. v. Aden, 474 So. 2d 584, 589 (Miss. 1985). In other words, an appellate court may reverse an order of the Commission, "only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence." Vance v. Twin River Homes, Inc., 641 So. 2d 1176, 1180 (Miss. 1994).

It is not the function of the Court to determine questions of credibility. Barber Seafood, Inc. v. Smith, 911 So. 2d 454, 462 (Miss. 2005).

The Commission is the ultimate fact-finder, and may reject findings of its administrative judge. Vance v. Twin River Homes, Inc., 641 So. 2d 1176, 1180 (Miss. 1994). The decision of the Commission, not that of the administrative law judge, is the agency decision entitled to deference

from the Court. Smith v. Jackson Const. Co., 607 So. 2d 1119, 1123-1124 (Miss. 1992).

Even doubtful claims should be resolved in favor of compensation, so as to fulfill the beneficial purposes of statutory law. Sharpe v. Choctaw Electronics Enterprises, 767 So. 2d 1002, 1006 (Miss. 2000).

1. On direct appeal, the Commission award was not arbitrary and capricious, was supported by substantial evidence, or was not contrary to law. Mrs. Betty Colebrook did suffer a new or aggravated injury at work in July 2000 and the medical proof was adequate to justify the award

The injured employee bears the general burden of proving her claim by a preponderance of the evidence that: (1) an accidental injury occurred arising out of and in the course of employment, (2) a disability is suffered, and (3) a causal connection between the work injury and the claimed disability exists. Bryan Foods, Inc. v. White, 913 So. 2d 1003, 1008 (Miss. Ct. App. 2005). The causal connection between the injury and disability must be proven with competent medical proof and based upon a reasonable degree of medical probability. Harrell v. Time Warner/Capitol Cablevision, 856 So. 2d 503, 511 (Miss. Ct. App. 2003)

Mrs. Colebrook met her burden of proof that she suffered a new or aggravated injury during incidents at work in April and primarily on July 18 and 19, 2000, that the injuries were disabling and required medical treatment, and that she has suffered a permanent injury. Miller Transporters, Inc. v. Guthrie, 554 So. 2d 917, 918 (Miss. 1989) (even “doubtful cases should be resolved in favor of compensation so as to fulfill the beneficial purposes of the statutory law”); Raytheon Aerospace v. Miller, 850 So. 2d 1159, 1176 (Miss. Ct. App. 2002) (“where the matter be an even question, [courts have] found and will likely continue to find in favor of the injured worker”).

Not one single co-worker appeared at any hearing to contradict Mrs. Betty Colebrook’s account of how she injured herself in April 2000, which she testified occurred when Mrs. Colebrook

had been working at Johnson Electric Automotive, building and packing motors. She was standing on a stool and reached over into a carton to pull caps and armatures, and she felt pain in her neck. The motor was about 2 pounds.

Furthermore, not one single co-worker appeared at any hearing to contradict Mrs. Betty Colebrook's account of how she injured herself again in July 2000, which she testified occurred when she experienced the pain again, when she had to place an armature and a cap in place and then feed motors to other workers all day. There is no disputed issue of fact on the issue whether an on-the-job injury occurred particularly on July 18 and 19, 2000. "[T]he undisputed testimony of a claimant which is not so unreasonable as to be unbelievable, given the factual setting of the claim, generally ought to be accepted as true." White v. Superior Products, Inc., 515 So. 2d 924, 927 (Miss. 1987). A "claimant is competent to prove his own claim, and his testimony may be accepted without corroboration." Penrod Drilling Co. v. Etheridge, 487 So. 2d 1330, 1333 (Miss. 1986).

The Carrier/Employer argue that the Commission erred when it decided that Mrs. Colebrook sustained an on-the-job injury since she allegedly did not give notice of a new injury. This argument is disputed factually and would not prevent an award of benefits in any event. See Compere's Nursing Home v. Hamlehary, 841 So. 2d 154 (Miss App 2002)(conflict in the evidence regarding whether claimant had reported alleged injury did not render evidence insufficient to support finding that claimant had suffered a compensable injury). Martha Hutcheson, human resource administrator, admitted that "Ms. Colebrook would come in to see [her] and tell [her] that her job was bothering her." Record, Transcript Volume (August 10, 2004) at p. 261. Hutcheson admitted that she "really can't dispute Ms. Colebrook in saying that she told [her about] whatever job that she was doing that's described in Dr. Hillman's July 19<sup>th</sup> and 20, 2000, records". Id. at p. 262. Hutcheson admitted

that she did not make a record of every time Colebrook complained about work hurting her. Id.

Mrs. Colebrook testified in her deposition [General Exhibit 8] that she reported her neck pain to Martha Hutcheson, who in turn made her appointment with Dr. Hillman. Deposition at p. 45. During the next morning, Mrs. Colebrook complained to supervisor Warren Carter that she needed to see a doctor and could not work a certain machine, and he moved her off that job and put her on another. Id. at p. 49. Mrs. Colebrook next complained to supervisor Faye Latham, who also simply moved her off one job and put her on another. Id. at p. 50. Zurich and Johnson Electric did not call any co-worker, or any supervisor such as Warren Carter or Faye Latham, to contradict Mrs. Colebrook.

The Commission was well aware of the fact that Dr. Hillman had contemporaneous records of the July 2000 work injury. Dr. Hillman's contemporaneous Progress Notes corroborate Mrs. Colebrook's accounts of July 2000 on-the-job injuries. Mrs. Colebrook gave Dr. Hillman's work restriction from this injury to Johnson Electric. Had she failed to do that she would have had unexcused absences, when she was absent from July 20 thru August 9, 2000, and could have been otherwise discharged. In fact, the records of Johnson Elective Automotive show that Mrs. Colebrook was absent from work from July 20 through August 9, 2000, and that Johnson Elective Automotive recorded the self-serving reason for the absences was due to a "leave of absence". Mrs. Colebrook's contemporaneous complaints to her supervisors, to Martha Hutcheson and to Dr. Hillman actually corroborate and support the Commission's findings.

Zurich/Johnson Electric argue that the Commission erred in giving greater weight to Dr. Hillman's testimony than the other medical experts, and erred in failing to reconcile the conflict. This is not a proper argument to reverse a Commission award on appeal. Raytheon Aerospace

Support Serv. v. Miller, 861 So. 2d 330, 336 (Miss. 2003) (The Mississippi Supreme Court has held that “whenever the expert evidence is conflicting the court will affirm the Commission whether the award is for or against the claimant”). Further, this entire Zurich/Johnson Electric line of argument is based on the false premise that Dr. Hillman was the only one claiming that Mrs. Colebrook had suffered a new injury. First, Mrs. Colebrook reported to Dr. Hillman about new injuries in July 2000.

Physical therapist Keith Holton testified extensively about Mrs. Colebrook’s condition, and how the symptoms and the treatments differed for her neck and extremity injuries and her prior rotator cuff and carpal tunnel injuries. Dr. Marshall J. Handleman reported that the nerve conduction study revealed a right-sided C-5 radiculopathy and a bilateral median neuropathy in her wrists. Dr. Handleman also reported that the finding fit Mrs. Colebrook’s complaints. These were objective findings that had not previously been observed.

In August 2001, Dr. Savoie observed some atrophy of the deltoid on the right shoulder which he had not previously seen. He also noted that she had a tight spasm of the trapezius, and a decreased motion of the neck. Dr. Savoie concluded that she had recovered significantly from her old injuries, and that her neck problem was a new problem and that he concurred with Dr. Hillman.

Dr. Housley reported that Mrs. Colebrook had neck/shoulder pain, inflammation, and puffy hands.

Dr. Housley even concluded that her rotator cuff condition had worsened. The C-5 radiculopathy into her arms and related clinical findings were clearly manifested to Drs. Hillman, Savoie, Handleman and Housley, and therapist Holten after the July 18, 2000 injury, regarding injuries to her neck, right shoulder, arm, elbow and hand.

Dr. Howard Katz was retained by the attorney representing Johnson Electric Automotive.

Katz reviewed medical records but never personally examined or treated Mrs. Colebrook. Marshall Durbin v. Warren, 633 So. 2d 1006, 1010 (Miss. 1994) (expert testimony based upon inadequate or incomplete examination does not carry as much weight); Johnson v. Ferguson, 435 So. 2d 1191, 1193-1195 (Miss. 1983) (Commission decision was against overwhelming weight of evidence when it disregarded testimony of treating physician and instead relied on employer's expert).

The Commission had the right to base its decision on findings of the treating physicians and therapist – Hillman, Savoie, Handleman, Housley and Holton - rather than Katz who simply reviewed records, and never met Mrs. Colebrook, and this is no basis to overturn the Commission award. Compare Raytheon Aerospace v. Miller, 850 So. 2d 1159, 1176 (Miss. App. 2002) (treating physicians' opinions carry more weight than those of physicians who examine the claimant solely for purposes of testifying); Cooper Tire & Rubber Co. v. Harris, 837 So. 2d 789 (Miss. App. 2003) (courts favor testimony of treating physicians); Clements v. Welling Truck Service, Inc., 739 So. 2d 476, 478 (Miss. App. 1999). 3

The Carrier/Employer argues that Mrs. Colebrook alleged the exact same complaints in all her Petitions to Controvert, and that she was never pain-free. The Carrier/Employer never seemed to comprehend that a new complaint about pain in the C-5 area and an old complaint about the C-8 area

---

3 The Commission had the right to base its decision on findings of the treating physicians and therapist rather than any perceived different conclusions by Kirschberg or Zeiger. Kirschberg apparently did a limited EMG study that failed to reveal evidence of radiculopathy in July 2003, but did not otherwise examine or treat Colebrook or testify or offer any other medical opinion. See Mueller Copper Tube Co., Inc. v. Upton, 930 So. 2d 428 (Miss. Ct. App. 2005) ("Commission is entitled to favor the testimony of a treating physician over a physician who had seen the claimant only once"); Raytheon Aerospace Support Services v. Miller, 850 So. 2d 1159 (Miss. App. 2002) (opinion of orthopedist who saw claimant only once could not trump opinion of treating physician). Dr. Hillman testified that the physical therapy tractions done on Mrs. Colebrook would explain the absence of a positive July 2003 EMG study finding, but that she still had a damaged nerve. Zeiger saw Colebrook twice and never testified, but initially opined that Mrs. Colebrook had a C5 nerve that was damaged without ongoing compression in March 2002, then later opined that she had definitely had diabetic neuropathy and possibly radiculopathy in June 2003, and apparently last opined that she had neither diabetic neuropathy nor a pinched nerve in July 2003. It is difficult to reconcile Zeiger's own opinions, much less attempt to reconcile them with opinions of other doctors from either side.

of the neck are different even though they are both in the neck. The Carrier/Employer never seemed to comprehend that a new complaint about pain radiating from the neck down into the shoulder is a different complaint than an old complaint about a rotator cuff tear in the shoulder, even though both cause pain in the shoulder.

The treating doctors stated that they were observing different problems. Even if the injuries were in fact in the same area it would not aid the Employer/Carrier. Compensation can be awarded for aggravation of old injuries or injuries resulting from cumulative, repetitive trauma. See Chapman, Dependents of v. Hanson Scale Co., 495 So. 2d 1357, 1360 (Miss. 1986) (“injury ... arises out of and in the course of employment even when the employment merely aggravates, accelerates or contributes to the injury”); Craft v. Millcreek Rehabilitation Center, 854 So. 2d 508 (Miss. App. 2003)(when an injury comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury bearing a causal relation to the disability is liable for the entire compensation).

The Carrier/Employer also argues that Mrs. Colebrook had diabetic neuropathy, menopause, hypertension and other health problems, that Mrs. Colebrook told the Social Security Administration about her health problems, and that this somehow indicates that she did not sustain an on-the-job injury and disability. This is of no benefit to the Carrier/Employer and this is no basis to overturn the Commission award. An award can be based on disability that is in part caused by the on-the-job injury. Sharpe v. Choctaw Electronics Enterprises, 767 So. 2d 1002 (Miss. 2000) (claimant’s employment need not have been sole cause of injury to be compensable); Chapman, Dependents of v. Hanson Scale Co., 495 So. 2d 1357 (Miss. 1986) (claim for benefits is compensable if injury is in part work connected); Prince v. Nicholson, 229 Miss. 718, 91 So. 2d 734 (1957) (work of employee

need only be a contributing cause to be compensable). Social Security in fact awarded disability to her for the primary cervical disc condition, even though she had other health problems. The treating doctors and therapist also said it was her work injury that caused her disability, not her other health concerns. She made a full recovery from a subsequent minor stroke and was no longer being treated for that, and her diabetic and other conditions were controlled by medication

Zurich now argues that Mrs. Colebrook's settlement with United Technologies Automotive and its carrier the Insurance Company of the State of Pennsylvania (AIG) for the prior September 30, 1997 rotator cuff shoulder injury and the right carpal tunnel wrist injury indicates that Zurich should not be held responsible for disability resulting from her April 2000 injury.<sup>4</sup>

The argument misstates the actual settlement, which expressly reserved Mrs. Colebrook's right to pursue her claims against Johnson Electric/Zurich. Further, United Technologies and AIG did not acknowledge any responsibility for new or aggravated injuries occurring in April 2000 and in particular in July 2000, when Mrs. Colebrook was employed by Johnson Electric and which was then insured by Zurich. Not only is this argument totally lacking in any merit, this argument was raised for the first time during appeal to the Circuit Court, and should not be considered. The Employer/Carrier's Answer admitted coverage in response to Paragraph 7 of the Petition, and failed to raise any insurance coverage issues in its 3 Pretrial Statements filed in the case. In fact, at the inception of the hearing before the Administrative Judge, there was no mention of any insurance coverage issue.

The Carrier/Employer also contends that there was no basis for an award for the left side extremity. This ignores the fact that Mrs. Colebrook complained about pain and difficulty on her left

---

<sup>4</sup> One wonders what Johnson Electric thinks of this argument.



side. This argument ignores the fact that the therapist Holton objectively measured limitation of bending and rotation on her left side, and that her complaints were consistent with the objective findings. This ignores the fact that Drs. Hillman, Housley and Buckley reported bilateral conditions, in both extremities. It ignores the fact that Dr. Hillman related the left side condition to Mrs. Colebrook trying to compensate for her right extremity by overusing the left extremity at work and the C-5 radiculopathy. The other doctors and therapist noted the cumulative, repetitive work causing this injury. It ignores the fact that the AMA guidelines to impairment expressly provide for impairment ratings based on pain and limitation of motion, without requiring surgery as a basis for impairment rating. Dr. Hillman indicated that her left side impairment would be reduced after the condition was stabilized, and the Commission concluded that her left side disability was only half of the right side disability. The Commission has "considerable discretion and latitude" in determining a claimant's wage earning capacity. Moore v. Indep. Life & Accident Ins. Co., 788 So. 2d 106, 114 (Miss. Ct App. 2001).

2. On cross-appeal, the Commission erred in failing to award temporary disability benefits to Mrs. Colebrook for the additional period that she did not work from July 20 through August 9, 2000, as a result of the on-the-job injury and under express orders from a physician not to work.

The claimant, Mrs. Betty Colebrook, was initially temporarily disabled, and in need of active medical management commencing July 18, 2000, and was unable to work from July 20, 2000 through August 9, 2000, or fifteen work days or three work weeks, as a result of her on-the-job injury. Dr. Hillman restricted her from returning to work. The employer and carrier failed to pay any temporary disability benefits to Mrs. Betty Colebrook for this initial compensable period. There is no factual dispute about this oversight, and the Commission should have awarded temporary disability benefits for this period in its award.

3. On cross-appeal, the Commission erred in apportioning Mrs. Colebrook's right arm injury award by 22% since her prior shoulder injury did not result in any permanent medical restrictions and no occupational disability, and she had returned to work full-time after being released from treatment after her prior shoulder injury.

The apportionment statute, Miss. Code Ann §71-3-7, has no application on the facts of this matter. Compere's Nursing Home v. Hamledary, 841 So. 2d 154 (Miss. App. 2002) (evidence supported Commission's finding that claimant's back injury was not a pre-existing injury where treating physician testified that claimant had reached maximum medical improvement before her second injury and that second injury worsened something that had healed or caused something that had healed to rupture again); Walls v. Hodo Chevrolet Co., Inc., 302 So. 2d 862 (Miss. 1974) (To be entitled to apportionment, employer must prove that pre-existing condition continued to exist and was a material contributing factor in the results following the injury complained of).

Perhaps the leading case on apportionment is Stuart's Inc. v. Brown, 543 So. 2d 649 (Miss. 1989). In that case, the claimant Nellie Brown had suffered a prior back injury and underwent laminectomy surgeries, and was assigned a 15% permanent partial medical or functional disability, but eventually returned to work. Brown later suffered another work injury and was unable to return to work. Stuart's Inc. argued that apportionment should apply simply because of the medical or functional disability rating, without any proof of "occupational disability". The Supreme Court held that: in work-connected injury cases where the evidence establishes (a) successive injuries experienced by the employee where following the first injury the employee engages in full-time employment for a substantial period of time prior to the second injury; *or* (b) a preexisting (symptomatic or asymptomatic) condition which causes the employee to experience no pre-injury occupational disability, apportionment may not be ordered. *Id.* at p. 655.

Dr. Savoie noted in his report of August 21, 2001, that prior to his release of Mrs. Colebrook

in early 2000 a nerve conduction study had been done that was normal and did not show evidence of C-5 radiculopathy or carpal tunnel, that her shoulder looked good and she had been released to return to work without restrictions. She returned to work, and had been working considerable overtime hours for several months before the injury of July 18, 2000. Drs. Savoie and Hillman stated that she had a new injury. The old injury was not a material contributing factor and did not prevent her from work at all. Her old injury did not cause any "occupational disability", since she was working full time and had no medical work restrictions. Her new injury award should not have been reduced by the impairment rating from an old injury that did not prevent her from working.

4. On cross-appeal, the Commission erred in not also awarding benefits to Mrs. Betty Colebrook for a whole body injury.

Mrs. Betty Colebrook suffered a medical permanent rating of 6% to her body as a whole from a cervical condition, with limitations that prevent her from returning to her pre-injury employment or any other employment. Her scheduled member injuries of 33% impairment ratings also prevent her from returning to work.

The employer's rehabilitation consultant acknowledged that Mrs. Colebrook is unemployable, and the employer was unable to assign any work to her. Mrs. Betty Colebrook has applied for work at several other places, without success, and has been determined to be totally disabled by the Social Security Administration. She is physically unable to perform the work she was assigned at Johnson Electric Automotive or any other work. Mrs. Betty Colebrook's treating doctor has instructed her not to seek employment anywhere due to her work injuries. Compare Stewart v. Singing River Hospital System, 2005 So. 2d (2004-WC-00707-COA) ("When a claimant has been removed from work and declared totally disabled based on competent medical evaluation, there is no requirement that the claimant go against medical advice and seek employment").

The logical conclusion from these facts is that Mrs. Colebrook has a permanent and total loss of industrial use and a permanent and total loss of wage earning capacity. Mrs. Betty Colebrook established that she is totally and permanently disabled as a result of an on-the-job injury while employed by Johnson Electric Automotive, on July 18, 2000. "Factors which this Court has considered in determining loss of wage earning capacity include the amount of education and training which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances." McGowan v. Orleans Furniture Inc., 586 So. 2d 163, 167 (Miss. 1991). An injured employee establishes a prima facie case of disability by showing that, she cannot secure work in the same or other jobs at pre-injury pay. Ga. Pac. Corp. v. Taplin, 586 So. 2d 823, 827 (Miss. 1991). An award for 450 weeks permanent disability should have been awarded.

#### CONCLUSION

On direct appeal, the Order and Award of the Mississippi Workers Compensation Commission should be affirmed. None of the arguments raised by the Employer/Carrier are a proper basis on appeal to overturn an award by the Commission. The arguments are simply interpretations of evidence, in several matters an incorrect assertion of the evidence actually presented, and Employer/Carrier have not raised any errors of law.

The Commission failed to award temporary disability from July 20 thru August 9, 2000. This appears to be an oversight since it cannot be disputed that Mrs. Colebrook did not work during that period due to doctor's orders for her on-the-job injury.

The Commission should not have given apportionment to Zurich/Johnson Electric because of Mrs. Colebrook's prior injury that simply resulted in an impairment rating, but did not result in any

restrictions by Dr. Savoie or prevent her from finally returning to full time work, and did not result in "occupational disability" as required by the Stuarts' v. Brown case.

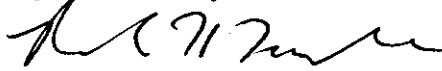
Finally, it is not disputed that Mrs. Colebrook is no longer employable and that she has a total disability. It logically follows that she should have been awarded compensation for 450 weeks due to total disability resulting from either a whole body injury to the neck or scheduled member injuries to her extremities.

THIS the 25<sup>th</sup> day of December, 2007.

Respectfully submitted,

MRS. BETTY A. COLEBROOK, APPELLEE

By Her Attorney:



Robert H. Faulks

MSB No [REDACTED]

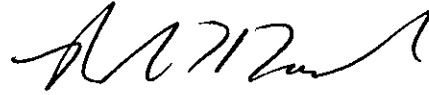
Robert H. Faulks  
Attorney at Law  
Post Office Drawer 866  
408 Hwy 145 North  
Aberdeen, MS 39730  
Telephone: (662) 369-8099  
Telefax: (662) 369-6075  
E-mail: rfaulks@bellsouth.net

CERTIFICATE OF SERVICE

I, Robert H. Faulks, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to: Mr. Joseph T. Wilkins, III, Esq., attorney for Johnson Electric Automotive and Zurich American Insurance Company, at his usual post office and mailing address of Post Office Box 13429, Jackson, MS 39236-3429; and to Circuit Court Judge Lee J. Howard, at his usual post office and mailing address

of Post Office Box 1344, Starkville, MS 39760.

THIS the 25 day of December, 2007.

A handwritten signature in black ink, appearing to read "R. H. Faulks", written over a horizontal line.

Robert H. Faulks