

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

**JOHNSON ELECTRIC AUTOMOTIVE
AND ZURICH AMERICAN
INSURANCE COMPANY**

APPELLANTS

VS.

CIVIL ACTION NO. 2007-WC-00448

BETTY COLEBROOK

APPELLEE

BRIEF OF THE APPELLANTS

(On Appeal from the Order of the Circuit Court of Lowndes County, Mississippi)

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CERTIFICATE OF INTERESTED PARTIES

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

1. Betty Colebrook, claimant/appellee;
2. Johnson Electric Company, formerly United Technologies, employer/appellant;
3. Zurich American Insurance Company, carrier/appellant;
4. Robert H. Faulks, Esquire, attorney for the claimant/appellee; and
5. Joseph T. Wilkins, III, Esquire., attorney for the employer-carrier/appellants.

THIS the 19th day of June, 2007.

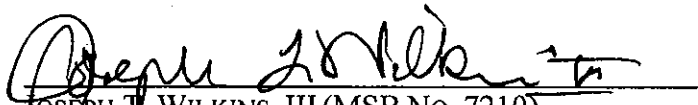

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TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. STATEMENT OF ISSUES	1
II. STATEMENT OF THE CASE	3
A. PROCEDURAL HISTORY	3
B. STATEMENT OF THE FACTS	4
C. MEDICAL PROOF, LAY WITNESS ANALYSIS.....	6
III. ARGUMENT	12
A. STANDARD OF REVIEW	12
B. MS. COLEBROOK DID NOT SUFFER A NEW INJURY AT WORK IN APRIL OR JULY 2000	13
C. THE MEDICAL PROOF IS INADEQUATE TO JUSTIFY THE AWARD BY THE FULL COMMISSION	18
D. THE FULL COMMISSION AWARD OF 50% TO APPELLEE'S LEFT UPPER EXTREMITY AND 100% TO THE RIGHT UPPER EXTREMITY IS NOT BASED UPON SUBSTANTIAL EVIDENCE AND CALLS FOR REVERSAL	21
IV. CONCLUSION	29
CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

Page

CASES

<i>Barber Seafood, Inc. v. Smith</i> , 911 So. 2d 454, 461 (¶27) (Miss. 2005)	19
<i>Davis v. Scotch Plywood Co. of Mississippi</i> , 505 So. 2d 1193 (Miss. 1987)	11
<i>Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings</i> , 419 So. 2d 211 (Miss. 1982)	12
<i>Dixie Contractors, Inc. v. Ashmore</i> , 349 So. 2d 532, 534 (Miss. 1977)	22
<i>Georgia Pacific Corp. v. Taplin</i> , 586 So. 2d 823 (Miss. 1991)	12
<i>Hardaway Co. v. Bradley</i> , 887 so. 2d 793, 795 (Miss. 2004)	19
<i>Hardin's Bakeries v. Dependent of Harrell</i> , 566 So. 2d 1264 (Miss. 1990)	12
<i>Harper v. North Mississippi Medical Center</i> , 601 So. 2d 395 (Miss. 1992)	12
<i>Hedge v. Leggett & Platt, Inc.</i> , 641 So. 2d 9 (Miss. 1994)	21
<i>Howell v. Time Warner/Capitol Cablevision</i> , 856 So. 2d 503, 511 (Miss. Ct. App. 2003)	22
<i>O'Neal v. Multi-Purpose Mfg. Co.</i> , 140 So. 2d 860 (Miss. 1962)	10
<i>Olen Burrage Trucking Co. v. Chandler</i> , 475 So. 2d 437 (Miss. 1985)	12
<i>South Miss. Elec. Power Ass'n. v. Graham</i> , 587 So. 2d 291 (Miss. 1991)	13

STATUTES

MISS. CODE ANN. § 71-3-7	27
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MISCELLANEOUS

<i>Richardson v. Johnson Electric</i> , Civil Action No. 2006-WC-01598	23, 24
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I. STATEMENT OF ISSUES

Betty Colebrook alleges the same injuries to her hands, wrists, elbow, arms, shoulder, chest and neck on four separate injury dates. Did the Administrative Judge err in finding that Ms. Colebrook's complaints were a result of her prior injuries of 1997 and 1998 from which she never recovered and not the result of any activity at work during the year 2000? The Full Commission reversed the decision of the Administrative Judge and ordered benefits paid for loss of use of her right arm, 100%, and her left arm, 50%, for the two alleged injuries occurring in April and July 2000. The Commission disregarded the opinions of four medical specialists, Dr. Buckley, Dr. Zeiger, Dr. Kirschberg, and Dr. Katz, who found no evidence of C5 cervical disc or upper extremity injury, the alleged cause of her condition.

The Full Commission, in reversing the Administrative Judge, disregarded the claimant/appellee's own testimony that she was never pain free, never off medication, or working without restriction and found that "new" injuries had occurred.

The Full Commission failed to recognize that the April 6 injury fell in the AIG coverage period and that the AIG claim had been settled prematurely.

The Administrative Judge denied benefits in the latter two claims, for injuries in the year 2000, finding that Ms. Colebrook never recovered from her prior injuries. The Full Commission reversed the Administrative Judge. Appeal is made from that decision averring that it is not based upon substantial evidence and goes against the overwhelming weight of the evidence.

Appellants, Johnson Electric Automotive and Zurich American Insurance Company, should not bear the responsibility for AIG's ongoing injuries of 1997 and 1998. Ms. Colebrook's prior workers' compensation case was prematurely settled with AIG inasmuch as the April 6, 2000 period occurred during AIG's coverage period for benefits and treatment. There is no documented cervical C5 injury which affected her neck and either shoulder. No treatment has been administered for this diagnosis other than by Dr. Hillman, who, only he maintains that Ms. Colebrook had a cervical lesion.

From this reversal, Appellants appeal showing error, calling for reversal of the Commission and Circuit Court which affirmed.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

An appeal was made by the appellee, Betty Colebrook, from the decision of the Administrative Judge dated March 4, 2005 denying benefits for any injury alleged to have occurred on April 6, 2000 and in the month of July 2000 while Appellee was employed for Johnson Electric Automotive.

The Administrative Judge noted Appellee's prior claims were for the exact same injuries which were controverted in a consolidated separate claim, MWCC Nos. 9814793-H-0250-B and 0102216-H-0690-B. These injuries were administered by the third party administrator, AIG. These two claims were settled prior to the hearing of this matter at bar. The first two injuries settlement, which was approved by the Commission on April 20, 2004, (AIG) acknowledged surgery and treatment by Dr. Savoie for a right shoulder rotator cuff and right carpal tunnel syndrome. Dr. Savoie found that Appellee had reached maximum medical improvement for her condition and testified that Appellee had a 22% impairment to her right upper extremity as a result of her two surgical procedures. **See settlement documents attached hereto as Record Excerpts Exhibit "1".**

Appellee was released to return to work by Dr. Savoie and Ms. Colebrook returned to work for the employer/appellant herein, light duty, restricted duty, during which time Ms. Colebrook testified that she was never pain free and continued to take her medication.

Appellee alleges an injury on April 6, 2000 and in July 2000, but no First Report was ever prepared by Johnson Electric, the employer/appellant, for the reason that no injury was

ever reported by Ms. Colebrook to the employer/appellant herein. Ms. Colebrook was receiving treatment paid by AIG, the third-party administrator during this period of time for the same complaints alleged in her prior two alleged injuries.

Appellee's local physician, Dr. Hillman, attributed her complaints to a new injury, her C5 cervical disc. Numerous other physicians examined the appellee and performed diagnostic studies. Appellants paid temporary total disability benefits in excess of \$21,000 through November 17, 2003 based upon Dr. Savoie's testimony that a new injury occurred in April 2000. The benefits were terminated after receipt of subsequent medical reports of Dr. Evan Zeiger, Dr. Gordon Kirschberg, and Dr. Robert Buckley who found that the appellee did not suffer any new injury or surgical lesion, nor any compression to her nerve. These findings were further confirmed by Dr. Howard Katz who had reviewed records and determined that the appellee had not suffered a work-related injury in April or July 2000, but suffered with diabetic neuropathy and from her other pre-existing conditions.

From the decision denying benefits to Ms. Colebrook, the appellee has appealed to the Full Commission. The Commission reversed the decision of the Administrative Judge relying on the opinion of Dr. Hillman, and from that decision, the appellants have appealed.

B. STATEMENT OF THE FACTS.

The claimant/appellee, Betty Colebrook, was 50 years of age at the time of the hearing in May 2004. (R. Vol. 5, p.169). She began working at Johnson Electric, formerly United Technologies, in February 1973 as a punch press operator, but during the course of her career, worked most of the jobs in the facility. (R. Vol. 5, p.172).

In 1997, when the appellee suffered her initial injury, she was working on heavy trolling motors, windshield wiper motors, door lock motors in an assembly line setting. (R. Vol. 5, p.173). Ms. Colebrook attempted to keep a trolling motor from falling which she testified weighed approximately 12 pounds and in the process, injured her shoulder. She ultimately saw Dr. Savoie who performed surgery on her right shoulder, her right wrist for carpal tunnel syndrome and the palm of her right hand but allowed her to return to work, limited duty in July 1999. (R. Vol. 5, pp.175-176).

Appellee was performing restricted duty when she returned to work and Ms. Colebrook acknowledged that she was never pain free following her injury and surgeries. (R. Vol. 5, p.178). It is disputed as to whether or not the appellee was actually working another job outside her restrictions when she alleges to have suffered another injury in April 2000 while packing motors which weighed two pounds. (R. Vol. 5, pp.183-184). Ms. Colebrook was working in soldering when she ceased work on October 4, 2000. (R. Vol. 5, p.192). The plant operations closed on October 31, 2001.

Ms. Colebrook acknowledged that she sought work at various locations in the Columbus area, Payless Shoes, Butler Shoe Store, and MARS Rehabilitation in Memphis, Tennessee at the request of her attorney prior to this hearing on the merits. However, she also acknowledged to Social Security that she was unable to work because of her diabetic condition, high blood pressure and surgery to her shoulder, wrists, neck as well as suffering with a stroke. (R. Vol. 5, pp.197-199). She began receiving Social Security benefits prior to the hearing on the merits. (R. Vol. 5, pp.194-196).

Ms. Colebrook also admitted that she had suffered a prior injury at Lowe's when she was struck in the head by a flower pot and experienced head and neck pain for 18 months. She settled her case for \$25,000. (R. Vol. 5, p.86).

Ms. Colebrook admitted that she was never pain free following her surgery by Dr. Savoie as well as admitting neck complaints to Dr. Savoie in March 2000, prior to her alleged injury in April 2000. (R. Vol. 5, pp.209-210). Ms. Colebrook also admitted that when she returned to work following her surgery in 1999, she was performing light duty and continued to work with restriction even though she was not pain free. (R. Vol. 5, p.216). She never ceased taking medication following her injury in 1997 and continued to take medication through 2001. Dr. Hillman had the appellee seen by Dr. Evan Zeiger and Dr. Housley, a neurosurgeon and rheumatologist, respectively. Neither found any surgical lesion or any evidence of an ongoing injury to Appellee's cervical C5 nerve. Dr. Hillman, however, found Ms. Colebrook to be disabled from any work (R. Vol. 4, p.59) and gave her a 33% loss of use rating to her left upper extremity and a 33% rating to her right upper extremity as well as a 6% rating to her body as a whole for her cervical complaints. (R. Vol. 4, pp.56-57).

C. MEDICAL PROOF, LAY WITNESS ANALYSIS.

The time sequence of events in the medical studies contradict Dr. Hillman's position that Ms. Colebrook sustained injuries on April 6 and July 2000. Dr. Hillman utilized an EMG study performed by Dr. Marshall Handleman in November 2000 which showed right-sided C5 radiculopathy. (Ex. Vol. 3, Gen. Ex. 9). What Dr. Handleman stated in his final impression was:

Right sided C5 radiculopathy

The needle abnormalities lie in the muscle domain of the upper trunk and the C5 root. the most likely explanation is of a C5 radiculopathy. This also fits the patient's complaints of neck pain, biceps region tightness, and throbbing pain along the dorsal lateral aspect of her right forearm. The radiculopathy is mild in degree electrically. I have ordered an MRI of the cervical spine to evaluate and assess any discogenetic or structural abnormalities.

BILATERAL MEDIAN NEUROPATHIES

The above are further characterized as demyelinating in nature involving the sensory nerve fibers, located at or distal to the wrist (e.g. carpal tunnel syndrome), and mild in degree electrically.

See Dr. Handleman's report attached hereto as Record Excerpts Exhibit "2".

Appellants submit that there is no definite hard evidence of nerve root compression. Dr. Handleman characterizes the radiculopathy as mild in degree electrically. Interestingly, the MRI scan performed on November 1, 2001 was negative for any disc herniation or cord compression. (Ex. Vol. 3, Gen. Ex. 9).

Dr. Hillman sought confirmation of cervical involvement and made arrangements for the appellee to be seen by Dr. Evan Zeiger, neurosurgeon, in Birmingham, Alabama. Dr. Zeiger saw the appellee on two occasions, the first on March 12, 2002, at which time Dr. Zeiger noted normal diagnostic studies and the only explanation of Mr. Colebrook's subjective complaints was that of possible "C5 nerve damage". Dr. Zeiger found no nerve compression and reported that Ms. Colebrook was not a surgical candidate. He did recommend a cervical myelogram and CT scan. The myelogram was performed on March 29, 2002 and was interpreted as normal as was the CT scan. (Ex. Vol. 1, Gen. Ex. 2).

Dr. Zeiger's follow-up visit on June 12, 2003 was an evaluation for nerve root compression syndrome. Dr. Zeiger reported that the diagnostic studies ruled out any compression nerve root syndrome, but he did feel that the appellee had a diabetic neuropathy as evidenced by Ms. Colebrook's diminished reflexes, though no clear cut evidence of any acute injury to the cervical spine. Therefore, he recommended the follow-up EMG nerve conduction studies. **(Record Excerpts Exhibit "5")**.

Dr. Gordon Kirschberg performed these studies on July 23, 2003. Dr. Kirschberg noted a history by Ms. Colebrook of pain, numbness and tingling in both arms for a period of 10 years. The EMG study revealed evidence of very mild right carpal tunnel syndrome but no evidence of radiculopathy, neuropathy or other entrapment phenomenon. It appears that Dr. Zeiger penned a handwritten note that there was no evidence of any pinched nerve in the neck; no diabetic neuropathy and only mild carpal tunnel syndrome. There was no indication for surgery. **See Record Excerpts Exhibit "5" attached hereto.**

Accordingly, there is conflicting testimony as to whether or not Ms. Colebrook even suffered a new injury with the more recent studies by Dr. Zeiger and Dr. Kirschberg during the year 2002 showing no evidence of injury. Dr. Hillman's testimony was contradicted by these physicians as well as Dr. Katz. Ms. Colebrook was open throughout her testimony by deposition and at the hearing that she was never pain free from her first injury and never stopped taking medication for her pain and discomfort. (Ex. Vol. 2, Gen. Ex. 8, pp.41-42). These other physicians and Appellee's own testimony effectively impeaches the testimony of Dr. Hillman that a new injury occurred on April 6, 2000 or July 2000.

More telling of no injury on April 6, 2000 are the medical records of Dr. Hillman. On April 6, 2000, Ms. Colebrook had lab work performed as well being examined by Dr. Hillman's nurse practitioner. No history of an injury at work on April 6, 2000 was ever reported in Dr. Hillman's office records nor do the records of Johnson Electric reflect an injury. **See lab report and office notes attached hereto as Record Excerpts Exhibit "3"**.

Continuing complaints persisted by Ms. Colebrook from the day she returned to work in 1999 culminating in complaints to Dr. Hillman in July 2000 which were no different. Johnson Electric's HR person, Ms. Hutcheson, testified that no new injury was reported to her by Ms. Colebrook. (R. Vol. 5, pp.251-252). Rather, the appellee continued to miss time from work during the period because of her diabetic condition. (R.Vol. 5, p.228).

The Administrative Law Judge weighed the evidence that Ms. Colebrook never recovered from her prior injuries which were the subject of her settlement through AIG and the prior carrier. The greater preponderance of the evidence shows Ms. Colebrook's continued complaints were due to her pre-existing condition for which she never recovered and her other physical conditions to include diabetes, hypothyroidism, hypertension, menopause, degenerative arthritis, and her stroke, not to mention the difficulty in using her hands due to bilateral carpal tunnel syndrome. Ms. Colebrook's disability is acknowledged in her prior settlement. **(See Record Excerpts Exhibit "1")**. More importantly, AIG and Ms. Colebrook, acknowledge that AIG was responsible for her injuries and treatment through April 20, 2000. Therein, the April 6, 2000 claim for injury was AIG's responsibility and was concluded by settlement on April 20, 2000. Appellants submit that this admission effectively

estops any claim for benefits in her claim at bar. No additional disability occurred during the period that she performed light duty at Johnson Electric when she returned to work in 1999 until she left in October 2000. No additional surgical procedure has even been performed or even recommended. Dr. Hillman insists that an injury occurred sometime in July 2000 but alleges the same complaints as he did for the April 6, 2000 injury.

Appellants submit that Ms. Colebrook's disability is related to her prior injuries or the result of her numerous other physical conditions recognized by the Social Security Administration in awarding benefits. Ms. Colebrook's prior claims for the 1997 and 1998 injuries (MWCC Nos. 98142793-H-0250-B and 0102216-H-0690-B) were prematurely settled. Her ongoing complaints should be AIG's responsibility. (Ex. Vol. 4, Gen. Ex. 19).

Moreover, the medical opinions of Dr. Katz, Dr. Zeiger, Dr. Buckley, and Dr. Kirschberg provide strong, clear and convincing evidence that no new injury occurred. (Ex. Vol. 3, Ex. 10; Ex. Vol. 1, Ex. 1, 2). These opinions and their studies should negate Dr. Hillman's opinion based upon Dr. Handleman's earlier diagnostic study of C5 involvement. The more recent evaluations of no cervical abnormality should prevail. *O'Neal v. Multi-Purpose Mfg. Co.*, 140 So. 2d 860 (Miss. 1962).

There should be no inference of causal connection to a new injury during the year 2000 when medical specialists disagreed with the opinion of the family practitioner. Appellee testified to ongoing problems from her initial injuries and surgery in 1997-98. Ms. Colebrook did not present new evidence disputing Dr. Zeiger, Dr. Kirschberg or Dr. Katz and their

opinions of no relationship to her alleged work injury. See *Davis v. Scotch Plywood Co. of Mississippi*, 505 So. 2d 1193 (Miss. 1987).

Appellee did not reconcile the differences in opinion between the medical specialist and Dr. Hillman.

III. ARGUMENT

A. STANDARD OF REVIEW.

The Mississippi Workers' Compensation Commission is the ultimate trier of fact in the workers' compensation cases. *Harper v. North Mississippi Medical Center*, 601 So. 2d 395 (Miss. 1992); *Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings*, 419 So. 2d 211 (Miss. 1982). As long as the Commission decision follows substantial evidence, it should be binding upon the appellate court. *Cummings*, 419 So. 2d, 213.

Appellants submit that the Full Commission deviated from the standard of review and that its reversal of the Administrative Judge was not based upon substantial evidence. The Appellants herein submit that the criteria for an award, as stated in *Olen Burrage Trucking Co. v. Chandler*, 475 So. 2d 437, 439 (Miss. 1985), was not followed. The Court has stated it will reverse the Commission's Order if it finds the Order clearly erroneous and contrary to the overwhelming weight of the evidence and if the decision is found to be arbitrary and capricious. *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991).

This decision of the Full Commission is not based upon substantial evidence and should be reversed and the Order of the Administrative Judge reinstated.

Consideration must be given to whether or not Betty Colebrook satisfied the burden of proof that she suffered injuries on April 6, 2000 and in July 2000. There must be substantial evidence to show the cause and effect connection between the accident and injury. *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1264 (Miss. 1990). The burden is

upon Ms. Colebrook to establish conclusively each and every element of her claim. *South Miss. Elec. Power Ass'n. v. Graham*, 587 So. 2d 291, 294-295 (Miss. 1991).

B. MS. COLEBROOK DID NOT SUFFER A NEW INJURY AT WORK IN APRIL OR JULY 2000.

The Administrative Judge's finding that the appellee suffered her precipitating injury in 1997 and 1998 from which she never recovered and that continued complaints and treatment required therefor were a result of the prior injuries. (R. Vol. 2, pp.78-79). These injuries were identified in the prior two cases, H-0250-B and H-0690-B, administered by AIG (Ex. Vol. 4, Ex. 17); and as such, were not new injuries for which Johnson Electric and Zurich Insurance Company should be responsible.

Ms. Colebrook alleged the exact same complaints in all her Petitions to Controvert filed with the Commission. **See Petitions to Controvert attached hereto as Record Excerpts Exhibit "4"**. She alleges injuries to her hands, wrists, elbow, arm, shoulder, neck, and body as a whole in the first two claims occurring in 1997 and 1998. These two matters were settled on April 20, 2004 immediately prior to the hearing of the last two claims. (Ex. Vol. 4, Gen. Ex. 17). Moreover, a Medicare set aside was provided for future medical benefits. The appellants submit that this set aside for future medical treatment confirms ongoing problems by Ms. Colebrook when these cases were settled in the year 2004.

As a result of the injuries received in 1997 and 1998, Dr. Savoie, orthopaedic surgeon of Jackson, performed right shoulder rotator cuff surgery and a right carpal tunnel release on April 1, 1999. He found Ms. Colebrook to be at maximum medical improvement on

April 20, 2000 and gave her a 22% permanent partial impairment rating to her right upper extremity. Ms. Colebrook settled this case for \$14,000 but acknowledged receiving additional permanent partial disability benefits paid of \$11,909.48 as well as other benefits paid. **See Record Excerpts Exhibit "1" attached hereto.**

Ms. Colebrook testified by deposition that she never fully recovered from her initial injuries at Johnson Electric; that she was never pain free, involving her shoulder, elbow and hands. (Ex. Vol. 2, Gen. Ex. 8, p.41). Further, she testified that she never recovered after 1998 and even acknowledged having neck pain in 1997. (Ex. Vol. 2, p.88).

More importantly, Ms. Colebrook acknowledged that her neck began bothering her after she returned to work while engaged in reduced hours and not working a full eight hour shift. Her testimony was that her neck problems began while working six hours per day. (Ex. Vol. 2, Gen. Ex. 8, p.41). This developed when she was receiving temporary partial disability as a result of her prior injuries following surgery by Dr. Savoie and obviously on limited duty and therefor, prior to her alleged onset of the April 6, 2000 injury. Further, Ms. Colebrook admitted that she continued to take her medication as a result of her two prior injuries and surgeries after she returned to work in August 1999. (Ex. Vol. 2, Ex. 8, p.54).

Ms. Colebrook alleges an injury on April 6, 2000. Yet, records reveal no injury was ever reported to the employer/appellant herein, more especially to Martha Hutcheson, the HR person at the plant in Columbus who worked extensively with Ms. Colebrook in having her return to work with accommodations and reduced hours initially. (R. Vol.5, pp31-32).

In August 1999 when the appellee had returned to work, Ms. Colebrook was well versed in how to report a workers' compensation injury and was still receiving medication paid by her prior carrier for continued complaints of pain. No report of a new injury was made for April 6, 2000. Actually, part of the day was spent having lab work performed. **See Record Excerpts Exhibit "3" attached hereto.** Even Ms. Colebrook could not remember an injury. (R. Vol. 5, p.234).

Ms. Colebrook could not remember if she returned to work following these studies. Dr. Hillman could not explain why his office did not note new trauma or even an injury at work in his notes of April 6, 2000. (R. Vol. 4, pp.93-94; **see also office note same date, attached as Record Excerpts Exhibit "3"**). Yet, Dr. Hillman was insistent that an injury had occurred. (Ex. Vol. 2, Ex. 6, p.51).

Ms. Colebrook testified that she stopped work on October 4, 2000. (R. Vol. 5, p. 68). Dr. Hillman had referred Ms. Colebrook to see Dr. Housley, rheumatologist on August 30, 2000, who recorded a history of swelling in her joints, stiffness, soreness, and fluid in her legs for two years and that she complained of right shoulder soreness as well as frequent headaches in her neck which started last year (1999). (Ex. Vol. 2, Ex. 5). This history to Dr. Housley clearly places the onset of neck/headaches during the year 1999 and therefore, prior to the alleged April 2000 new injury date.

Even Dr. Hillman, in his deposition given in December 2001, points toward the initial injury as the precipitating cause for Ms. Colebrook's problems where he notes that her neck

popped, her shoulder popped, and her wrist popped on September 30, 1997 and her continued work aggravated her condition. (Ex. Vol. 2, Ex. 6, pp.22-23).

Similarly, Dr. Savoie noted tendonitis and ulnar neuropathy in Appellee's neck in his report of March 31, 2000 which Ms. Colebrook did explain, stating that she had neck pain in March but it was not excruciating neck pain. (R. Vol. 5, pp.207-208).

Dr. Hillman also referred the appellee to see Dr. Evan Zeiger, neurosurgeon in Birmingham, who Dr. Hillman described as one of the best neurosurgeons in the Southeast. (Ex. Vol. 6, p.44). This referral was made after Dr. Savoie had released Ms. Colebrook. Dr. Zeiger's evaluations are noted in this Brief. **See attached Record Excerpts Exhibit "5"**.

Dr. Zeiger's opinion notwithstanding, Dr. Hillman testified that Dr. Zeiger was in error, that Ms. Colebrook did have diabetic neuropathy. (Ex. Vol. 6, Ex. 6, Hillman Depo. p.83). This is significant in that Dr. Hillman had acknowledged that the appellee suffered with non-insulin dependent diabetes, hyperthyroidism, menopause, hypertension, and degenerative arthritis. (R. Vol. 4, pp.70-71). He also noted that Appellee had been taking medication for various complaints and conditions not work related. *Id.*

Not only did Dr. Hillman disagree with Dr. Zeiger, he characterized Dr. Howard Katz as a pompous doctor. (R. Vol. 4, p.113). Dr. Katz had reviewed all of the medical records since October 1997 and opined that Ms. Colebrook had diabetes, a repetitive stress injury to her right arm, bilateral carpal tunnel syndrome, and probable C5 radiculopathy. This report was amended after Dr. Katz reviewed the more recent diagnostic studies. Dr. Katz found that the appellee had no radiculopathy and stated that her current problems were not related to her

work by Johnson Electric. (Ex. Vol. 1, Gen. Ex. 1, Dr. Katz's Medical Records Affidavit).

See attached Record Excerpts Exhibit "5".

It should also be noted that Dr. Robert Buckley, orthopaedic surgeon in Tupelo specializing in hand conditions, saw the appellee on July 10, 2001, and stated his opinion in his Medical Records Affidavit that her complaints were related to her long history of repetitive motion activity. (Ex. Vol. 3, Gen. Ex. 10).

Ms. Colebrook admitted in her deposition that Johnson Electric had accommodated her when she returned to work and that she was assigned to light-duty work and never removed from light duty. (Ex. Vol. 2, Gen. Ex. 8, Colebrook Depo. p.94).

Also, it is important to note the difference in statements given by Dr. Hillman to the Social Security Administration analyzing Appellee's application for disability benefits. On April 26, 2002, Dr. Hillman corresponded to the Social Security Administration that Appellee's disability was due primarily to her hand problems as well as her inability to stand and walk. **See Dr. Hillman's letter attached hereto as Record Excerpts Exhibit "6".**

Dr. Hillman testified at the hearing as well as by deposition that he was the company physician for Johnson Electric in 1993. (R. Vol. 4, pp.68-69). Dr. Hillman characterized himself as their plant doctor (R. Vol. 4, pp.84, 97), and that he had actually gone into the plant and observed employees engaged in the operation of their various jobs (R. Vol. 4, p.90) where he noted Ms. Colebrook's job to be a production-type operation which she performed eight hours a day. (R. Vol. 4, p.90). Dr. Hillman further testified that he observed inside the plant three times during the year 2000 and actually went to that facility one day each week.

(R. Vol. 4, p.103). On direct testimony, Dr. Hillman reported that he was the plant doctor in October 1999 as well as being considered the medical director. (R. Vol. 4, pp.10, 27).

Later, Dr. Hillman described himself as a Plant MRO/company doctor as early as 1993 until the plant closed in October 2001. (R. Vol. 4, p.68). He worked with Martha Hutcheson in scheduling appointments, examining and treating patients. (R. Vol. 4, p.69).

This is not the case according to Ms. Hutcheson who was called by the employer-carrier/appellants at the hearing in this matter. Ms. Hutcheson worked as an HR assistant in December 1997. (R. Vol. 5, p.30). She arranged various jobs for the appellee to perform in order to meet restrictions (R. Vol. 5, p.32) and testified that Ms. Colebrook did not perform production work due to her restrictions as well as continued complaints of pain upon her return to work in 1999. (R. Vol. 5, p.33). Ms. Hutcheson denied that Johnson Electric ever had a company doctor during the year 1997 through 2000 and that Dr. Hillman never toured the plant facility observing various job functions of employees. (R. Vol. 5, pp.34-35). She further denied that he had operated a clinic on the premises one day each week.

C. THE MEDICAL PROOF IS NOT SUFFICIENT TO JUSTIFY THE AWARD BY THE FULL COMMISSION.

The standard of review has been stated thusly:

This Court is bound by the decision of the Mississippi Workers' Compensation Commission if the Commission's findings of fact are supported by substantial evidence . . . Stated differently, this Court will reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence. A finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with definite and firm

conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act.

Barber Seafood, Inc. v. Smith, 911 So. 2d 454, 461 (¶27) (Miss. 2005) (quoting *Hardaway Co. v. Bradley*, 887 so. 2d 793, 795 (Miss. 2004) (citations omitted)).

The Full Commission ignored the testimony of the other physicians, notably, Dr. Buckley, Dr. Zeiger, Dr. Kirschberg, and Dr. Katz. Greater weight was given to Dr. Hillman, Appellee's treating physician, but no effort was made to reconcile the conflict with Dr. Hillman and the other physicians' opinions that no new injuries occurred. The Commission totally ignored the fact that AIG continued to pay for benefits for Ms. Colebrook through April 20, 2000, the cut-off date noted in the settlement petition submitted in April prior to the hearing of this case in May. (**Record Excerpts Exhibit "1"**). The records of Dr. Hillman on April 6, 2000 and shortly thereafter clearly point to September 30, 1997 as the onset date for the complaints he observed. (**Record Excerpts Exhibit "3"**). Further, these records do not report any new work injury. Therein, the appellants submit that the saddling of liability for any alleged injury occurring on April 6, 2000 on Zurich Insurance Company rather than AIG is clearly erroneous based upon the settlement documentation and Dr. Hillman's own records. That the April 6, 2000 injury was covered by AIG as agreed upon the parties in the settlement petition should be sufficient to call for reversal. **See Record Excerpts Exhibit "1" attached.** The prior settlement was untimely and prematurely made with AIG. Ms. Colebrook would have been better served to have not settled her claim with AIG.

Appellants submit that the examinations after Dr. Handleman's EMG/ nerve conduction study indicates the appellee had no abnormality in her MRI scan, CT scan, myelogram, or more recent EMG/nerve conduction study. (**See Record Excerpts Exhibit "5"**). As such, there is no objective evidence of any new injury and therein, no justification of an additional award. These studies refute the "mild findings" by Dr. Handleman, the basis for Dr. Savoie's opinion of a new injury.

Ms. Colebrook's injuries and residuals therefrom all emanated from the precipitating injuries of 1997 and 1998 from which she never recovered. Her own testimony in this case and before the Social Security Administration should be binding on her. (Ex. Vol. 1, Gen. Ex. "3").

Ms. Colebrook in her own handwritten Disability Report showed that she was limited in working due to diabetes, high blood pressure, had surgery on right shoulder, carthage [sic], rotator cuff, wrist, tendonitis elbow, nerve trap in 5 vertical [sic] in neck, had stroke; that all conditions limited her movement and required her to work fewer hours, change her job duties and make job changes.

The appellants submit that Ms. Colebrook has never been diagnosed with nerve entrapment in her C5 vertebrae.

Further, it should be noted that Dr. Hillman stated to the Social Security Administration that Ms. Coleman was totally disabled due to her hands and vibration of cervical vertebrae to the extent she could not handle a sheet of paper. (**See Record Excerpts**

Exhibit “6”). Yet, Ms. Colebrook penned her own application for benefits. (Ex. Vol. 1, Gen. Ex. 3, “Disability Report Adult”).

The Court has noted that it will reverse Commission rulings where issues of fact are unsupported by substantial evidence and matters of law are erroneous. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). Clearly, the overwhelming weight of the evidence favors the Appellants by virtue of the fact that Dr. Buckley, Dr. Zeiger, Dr. Kirschberg, and Dr. Katz all testified that Ms. Colebrook had no evidence of injury in April and July 2000.

Appellants submit that Ms. Colebrook’s condition was ongoing and progressive as Dr. Buckley had previously noted in his report that there was no third or fourth injury suffered by Ms. Colebrook as evidenced by the fact that she never recovered from her first injury and was on light duty when she returned to work in June 1999. (Ex. Vol. 3, Ex. 10).

The evidence clearly shows that the initial injuries in 1997 and 1998 were the continuing cause of Ms. Colebrook’s complaints and there was no second injury or aggravation as alleged which worsened her condition. Ms. Colebrook was premature in settling her case with AIG. (See Record Excerpts Exhibit “1” attached).

D. THE FULL COMMISSION AWARD OF 50% TO APPELLEE’S LEFT UPPER EXTREMITY AND 100% TO THE RIGHT UPPER EXTREMITY IS NOT BASED UPON SUBSTANTIAL EVIDENCE AND CALLS FOR REVERSAL.

The Commission’s haste to reverse totally the Order of the Administrative Judge, ignored the prior injuries of Ms. Colebrook and the fact that Ms. Colebrook worked in pain and was never pain free or even stopped taking her medication during the crucial period of

time, April 2000 through July 2000. Substantial evidence does not support causal connection between these alleged “new” injuries. Has the disability for these scheduled members been proven by competent medical proof based upon a degree of medical probability? *Howell v. Time Warner/Capitol Cablevision*, 856 So. 2d 503, 511 (Miss. Ct. App. 2003).

The record reflects that documented injuries to Ms. Colebrook’s right shoulder and right wrist required that she miss work for an extended period of time. (**Record Excerpts Exhibit “1”**). Dr. Hillman’s opinion was the basis of the award to both Appellee’s right and left arms; that Ms. Colebrook suffered “cumulative left shoulder trauma and re-injury of the right shoulder, along with a right wrist cyst and right-sided C5 radiculopathy without bulge or herniation and bilateral median neuropathy in both wrists”. (Order of the Commission, p.3; R. Vol. 2, pp.102-109). The basis of this finding by Dr. Hillman was the EMG/nerve conduction study which revealed mild C5 radiculopathy which was performed by Dr. Handleman in November 2000. *Supra*. In making this award, the Commission totally disregarded the subsequent diagnoses that Ms. Colebrook suffered no C5 radiculopathy. This was based upon Dr. Hirschberg’s more recent study performed in July 2003. The appellants herein submit that the opinion of the medical specialists and the more recent diagnostic studies should have been regarded as overwhelming substantial evidence favorable to the appellants. Dr. Hillman’s opinion has been proven in error by more recent medical evaluations and objective studies. What is the real substance concerning causal connection? *Dixie Contractors, Inc. v. Ashmore*, 349 So. 2d 532, 534 (Miss. 1977).

The only objective finding was the mild EMG study performed in November 2000 by Dr. Handleman and noted previously. The MRI scan performed in November 2001 was negative for any disc herniation or compression. This crucial study was ignored by the Commission as was Dr. Kirschberg's negative EMG/nerve conduction study.

Ms. Colebrook's complaints for alleged injuries occurring in April and July 2000 are the exact same complaints she alleges that she suffered during the year 1997 and 1998 from which she never recovered. Is the testimony of Dr. Hillman more probative than the other specialists? The Administrative Judge who heard testimony from Dr. Hillman in the companion case of *Richardson v. Johnson Electric*, Civil Action No. 2006-WC-01598, did not find his testimony to be believable. The judge disregarded Dr. Hillman's testimony by noting in his Order the following:

It is not necessary to lay out a chronological summary of Dr. Hillman's treatment of the claimant, because a combined reading of his deposition and his records reveals such a confusing array of discrepancies, contradictions and misstatements that the evidence is effectively unusable in attempting to arrive at a rational disposition of this case. For example: He testified that the claimant injured her cervical spine in the subject accident and that this prompted him to recommend a cervical MRI, but he had recommended a cervical MRI for the claimant on January 13, 2000, 13 days prior to the subject accident; he first testified that Ms. Richardson injured her cervical spine in the subject accident by reaching out to catch herself with her right arm as she fell (CI Ex. 1, depo. p. 30), but then a few pages later he stated that she is injured her neck when she reached out to catch herself with her left arm (Id. at p. 38); each of the preceding statements is at odds with the history the claimant gave to Dr. Hillman on January 26, 2000 that she was unable to catch herself as she fell because each of her arms was in a splint at the time, and the only time in the record the claimant ever mentions trying to reach out and catch herself as she fell is in regard to the reported fall down the steps in June of 2001; Dr. Hillman testified that on both September 7, 2000 (Id. at p. 11) and April 18, 2001 (Id. at p. 17) the claimant exhibited left hand

symptoms compatible with radiculopathy from the eighth cervical (C-8) nerve, yet his own office note of April 18, 2001 mentions right hand pain and right-sided C-8 radiculopathy, and then a cervical MRI performed on April 25, 2001 revealed left-sided bulges and foraminal stenosis at the C4-5 and C5-6 levels, from which levels any nerve root irritation would have become manifest in the left shoulder or left upper arm, not in either of the hands; and, Dr. Hillman stated unequivocally that a complaint of left hip pain is the same thing as a complaint of lumbo-sacral pain (Id. pp. 30&32), a pronouncement contrary to even the limited amount of medical knowledge the undersigned has been able to accumulate during seven years in this job. There are yet more contradictions, but the point is made. Dr. Hillman's explanation for Ms. Richardson's failure to seek any medical treatment between February and September of 2000 was that he was away from his office during that time and she probably didn't like being treated by the nurse practitioner, and he conceded that a lumbar MRI performed on March 27, 2001 revealed degenerative changes but no pinched nerves (Id. at p. 16).

Order of the Administrative Judge dated April 18, 2005, pp. 8-9. (**See Records Excerpt "7" attached hereto**).

Appellants herein submit that substantial evidence does not support the decision of the Commission which reversed the Administrative Judge and awarded benefits to Ms. Colebrook. The Commission finding of compensability is erroneous; the records reveal no injury occurring on April 6, 2000; Johnson Electric reported no injury occurring on that date. Moreover, any injury or complaint occurring on April 6, 2000 was during the AIG coverage period for the injuries Appellee suffered in 1997 and 1998. This is a clearly reversible error.

The Administrative Judge noted in *Richardson, supra*, a comment that left hip pain was the same as lumbo-sacral pain. Similarly, in the case at bar, Dr. Hillman testified that no trauma in his office notes means "that she didn't fall". (R. Vol. 4, p.94). This is further evidence that Dr. Hillman's opinion should not be followed.

Addressing the July 2000 allegation of injury, there is no record at Johnson Electric of any injury reported. Ms. Colebrook continued to perform light duty during this period of time, yet Dr. Hillman insists she suffered a new injury some time during the month of July 2000. This injury was C5 involvement. Yet, subsequent objective studies reveal no C5 injury.

Appellants submit that there is no basis for an award of permanent disability benefits by the Commission. The Commission totally ignored the fact that Ms. Colebrook was never pain free; that she was never able to return to work at her regular job following her surgeries during the year 1999; that when she did return to work it was on restricted duty. (Ex. Vol. 2, Gen. Ex. 8, pp.41, 88).

The Commission in reversing the Administrative Judge found that Ms. Colebrook was unable to perform her former job or perform employment comparable to her former job at Johnson Electric. Appellants submit that this was true when she returned to work in 1999 and never moved to her regular duties in spite of Dr. Hillman's testimony. The Court must believe Ms. Colebrook when she stated under oath that she always was performing light duty up until the time she left Johnson Electric.

Ms. Colebrook stopped work in the year 2000. No additional surgeries or procedures of any nature were performed at that time or have been performed. Based on the Commission Order, Ms. Colebrook was entitled to benefits, permanent benefits in the year 1999. Since Ms. Colebrook never returned to her former job following her surgery, some benefits were paid by AIG, but she was entitled to a higher award in the year 1999 when she did return to work, restricted duty and certainly when she settled her case with AIG. **(See Record**

Excerpts Exhibit "1"). There is no medical evidence supporting an award of 100%, only the 22% impairment given by Dr. Savoie for the 1997 and 1998 injuries and surgery. Did the restricted work in 1999-2000 cause Ms. Colebrook to be 100% disabled involving her right arm? Only Dr. Hillman testifies to right neck/cervical involvement. No medical testimony is presented that the appellee has suffered an additional injury to her right upper extremity to justify a greater award. The 100% award to Appellee's right upper extremity is based solely upon Dr. Hillman's insistence that the appellee needed cervical disc surgery by Dr. Zeiger. However, the proof shows that the appellee does not have a surgical lesion and does not need surgery and that her cervical and upper extremity conditions are due to her diabetic neuropathy. (Ex. Vol. 1, Gen. Ex. 2). The basis of the 100% award, cervical C5 radiculopathy, has been effectively refuted by the appellants. That award must be reversed.

What is the basis for the 50% loss of use award to Ms. Colebrook's left upper extremity given by the Commission? Dr. Hillman came up with 33 1/3% based solely due to her sensory and power. (R. Vol. 4, p.65). Ms. Colebrook never had surgery to her left arm nor was she ever evaluated by any specialist involving her left arm because no left arm complaints were presented. There is no medical proof of an aggravation or new injury to Ms. Colebrook's left upper extremity to support any award. Any cervical C5 nerve involvement has been refuted by medical specialists. What other medical findings are available to justify the 50% impairment award? Even Dr. Hillman admitted that the 33 1/3% rating was not correct since her condition had stabilized in her arm. (R. Vol. 4, pp.56, 65, 66).

The Commission in its Order made an award of 50% loss of use to Ms. Colebrook's left upper extremity based upon his testimony that sensory and power loss justified a 33 1/3% impairment rating. Dr. Hillman admitted that this was in error but the error was never corrected regarding what permanent disability rating she had, if any. That notwithstanding, the Full Commission made an award of 50% loss of use.

Other evidence of error by the Full Commission calling for reversal involves the 22% apportionment granted to Zurich American Insurance Company as a result of the 22% impairment rating given by Dr. Savoie. Section 71-3-7 provides for apportionment for a pre-existing condition shown to be a material contributing factor and the results following injury. The Commission granted only 22% apportionment in spite of Appellee's multitude of complaints and conditions which have affected her overall ability to work which would include her allegations to the Social Security Administration and Dr. Hillman's statements to the Social Security Administration that Ms. Colebrook was unemployable. That notwithstanding, the Full Commission granted only a 22% apportionment.

Had the Commission reviewed the settlement papers with AIG (**Record Excerpts Exhibit "1"**), they would have noted that the insurance carrier, AIG had already paid the 22% impairment rating, \$11,909.48. In addition thereto, in order to settle this case and to relieve itself of future liability, AIG paid an additional \$14,000.00 plus \$1,000.00 Medicare Set Aside funds for future medical treatment. Appellants submit that the \$15,000.00 settlement should have been considered in addition to the \$11,909.48 paid representing the 22% pre-existing disability. The Appellants aver and would show that had Appellee lost

total use of her right arm, she would have been awarded \$54,134.00. The \$15,000.00 paid to settle the case represents a 27.7% impairment. This settlement figure together with the 22% disability noted by Dr. Savoie, would total the equivalent of 49.7% disability. Accordingly, the Commission totally ignored the settlement made with AIG and the fact that AIG recognized the appellee had ongoing and legitimate complaints which exceeded the disability rating given by Dr. Savoie to the extent that it more than doubled the impairment rating of Dr. Savoie (22%). Therein, even if the Court found that the Commission had grounds to reverse the Order of the Administrative Judge, error does exist in the amount of apportionment based upon the settlement documents.

This history of error by the Commission; its disregard of facts; its disregard of Ms. Colebrook's own testimony regarding ongoing complaints, working light duty since 1999; its error in associating the April 6, 2000 injury with Zurich American Insurance Company rather than AIG; and the Commission awarding benefits to Appellee's left upper extremity for a phantom condition never diagnosed by any specialist nor even examined by any specialist requires reversal.

IV. CONCLUSION

The Commission erred in reversing the Administrative Judge which reveals the Commission to be arbitrary and capricious or determining not to follow the substantial, overwhelming evidence of other medical witnesses. The Commission chose to follow the testimony of Dr. Joe Hillman, a local doctor, rather than consider the objective findings and more recent studies of four medical specialists found no cervical C5 disc involvement. Dr. Hillman's testimony had been previously disregarded in a companion workers' compensation case, *Richardson v. Johnson Electric*; yet, this decision to disregard the findings by the Administrative Judge and follow Dr. Hillman shows no regard to their prior rulings.

Error was committed by the Commission in finding that Appellee suffered an injury at work on April 6, 2000 for which Zurich American Insurance Company should be responsible. The settlement records of AIG, the third-party carrier, shown as Exhibit 1 in the Record Excerpts Brief, clearly reflect that April 6, 2000 falls within the AIG period of coverage responsibility wherein AIG acknowledges liability for injuries and treatment. Dr. Hillman is positive that Appellee suffered an injury on April 6, 2000. If this is the case, error has been committed in holding Zurich responsible and calls for reversal.

Further error is committed in following the opinion of Dr. Hillman when careful study reveals that his deposition testimony of 2000 differs from his hearing testimony of 2003. Dr. Hillman admits that Appellee's problems are due to the September 30, 1997 injury when her neck popped, her shoulder popped, and wrist popped, and her continuing to work aggravated her condition. (Ex. Vol. 2, Ex. 6, pp.22-23). Then, at the hearing in 2003,

Dr. Hillman was absolutely 100% certain that problems manifested on April 6, 2000 when Ms. Colebrook resumed "full duty work". (R. Vol. 4, pp.29, 31). Dr. Hillman presents an aggravation of Ms. Colebrook's shoulder in his deposition on page 50 (Ex. Vol. 2, Ex. 6) and a new injury at his testimony at the hearing. Later he says that the neck was injured on January 8, 1998. (Ex. Vol. 2, Ex. 6, p.67); that Ms. Colebrook had neck problems from and after September 30, 1997 which never resolved and that he suspected a neck problem in February 2000. (Ex. Vol. 2, Ex. 6, p.74). The hearing testimony was that of a new injury on April 6, 2000. (Ex. Vol. 2, Ex. 6, p.29). The testimony was disregarded of Dr. Zieger, Dr. Buckley, Dr. Kirschberg, and Dr. Katz that the appellee had no cervical disc involvement. Appellants submit that substantial evidence favors the Appellants regarding medical proof.

The award of 100% to the right arm with a 22% apportionment has been shown to be in error based upon the settlement papers presented wherein settlement reflected a 49.9% disability rather than a 22% disability making it incumbent upon the Commission to apportion the award by at least 49.7% rather than 22% should they find for the Appellee. There is absolutely no basis for the 50% loss of use award of the left arm.

Appellants submit that this not "a doubtful case" with "even questions" that the Commission asserts in its Order, a sympathetic effort to reverse the Administrative Judge. The legal standard regarding medical proof was not followed and Dr. Hillman's testimony arbitrarily accepted over other medical testimony which was substantial and overwhelming. Dr. Hillman's "functional impairment" is without basis and is not supported by the record and calls for reversal.

This decision to award benefits to Ms. Colebrook should be reversed and the Order of the Administrative Judge reinstated. Alternatively, the case should be remanded to the Commission to deny benefits for the appellee's left upper extremity and to properly apportion appellee's right upper extremity.

Respectfully submitted, this the 19th day of June, 2007.

JOHNSON ELECTRIC COMPANY AND ZURICH
AMERICAN INSURANCE COMPANY,
APPELLANTS

BY: WILKINS, STEPHENS & TIPTON, P.A.

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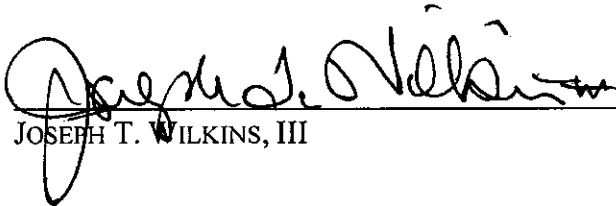
CERTIFICATE OF SERVICE

I, JOSEPH T. WILKINS, III, attorney for the appellants, do hereby certify that I have this day served via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLANTS** to:

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Attorney at Law
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The Honorable Lee Howard
Circuit Court Judge
Post Office Box 1344
Starkville, Mississippi 39760

THIS, the 19th day of June, 2007.



JOSEPH T. WILKINS, III