

COPY

IN THE

Supreme Court of Mississippi

NO. 2006-WC-01985

MARVIN CHESTNUT, *Appellant*

VERSUS

DAIRY FRESH CORPORATION,

and

GREAT AMERICAN ASSURANCE COMPANY, *Appellees*

FILED

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SUPREME COURT
COURT OF APPEALS

On Appeal from the Circuit Court
of Forrest County, Mississippi

REPLY BRIEF OF APPELLANT

MICHAEL ADELMAN, ESQUIRE
MS State Bar No. [REDACTED]
ADELMAN & STEEN, L.L.P.
Post Office Box 368
Hattiesburg, MS 39403-0368
601/544-8291; 601/544-1421 (FAX)

COUNSEL FOR APPELLANT
MARVIN CHESTNUT

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IN THE SUPREME COURT OF MISSISSIPPI

MARVIN CHESTNUT

APPELLANT/CLAIMANT

VS.

CAUSE NO. 2006-WC-01985

DAIRY FRESH CORP.

APPELLEES/EMPLOYER

AND

GREAT AMERICAN ASSURANCE COMPANY

CARRIER

REPLY BRIEF OF APPELLANT

ARGUMENT

- I. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT CLAIMANT REACHED MAXIMUM MEDICAL RECOVERY AND IS NO LONGER ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.

In their Brief, Appellees make the statement that “Dr. Patterson placed the claimant at MMI on August 18, 2003, and no substantive treatment was performed thereafter.” (Appellee’s Brief, page 16).

This statement is not correct. First, it is absolutely apparent from the record that Dr. Patterson only found that the claimant had reach maximum medical recovery on August 18, 2003 out of his frustration by the carrier’s refusal to allow the diskogram and the surgery which Dr. Patterson recommended. He later found that Mr. Chestnut reached maximum medical recovery in October, 2004, and that was after he recommended surgery in April, 2004, surgery which was never performed.

Second, Mr. Chestnut consulted with Dr. Antinnes on November 19, 2003 and the

diskogram was in fact performed on March 30, 2004 (CL. Exhibit No. 1).

Third, Mr. Chestnut has been willing to submit to the surgery recommended by both Dr. Patterson and Dr. Antinnes since they both recommended that surgery back in April, 2004 (CL. Exhibit No. 1). The fact that Dr. Patterson and Dr. Antinnes reneged on their own recommendations which were based on objective medical criteria, is outside of the control of Mr. Chestnut. Certainly, Appellees cannot expect that Mr. Chestnut, who has a 7th grade education and is functionally illiterate, can afford to obtain surgery by another doctor.

Yes, Mr. Chestnut performed activities on the videotape which he should not have been performing. However, neither Dr. Patterson nor Dr. Antinnes, nor Appellees, can point to any medical event which occurred after the recommendation of surgery which would have eradicated the need for surgery. As noted in Appellant's opening Brief, there is also evidence on the videotape of extremely guarded movement on the part of Mr. Chestnut, including Mr. Chestnut's frequent use of a cane.

Dr. Antinnes and Dr. Patterson should not have the power to throw Mr. Chestnut onto the dung heap of humanity. They opined that he needed surgery. Mr. Chestnut is willing to undergo the surgery they themselves have recommended. Claimant has submitted to the Commission that the reasonable solution to this dilemma is to refer Mr. Chestnut's case to an independent, qualified physician to make a determination based on the diskogram, without reference to the videotape, as to whether or not Mr. Chestnut is in need of surgery. This solution is consistent with the humanitarian purpose of the Mississippi Workers' Compensation Act as well as the substantive decisions of the Mississippi Supreme Court. See *White v. Hattiesburg Cable Co.*,

590 So. 2d 867, 870 (Miss. 1991); *Spann v. WalMart Stores, Inc.*, 700 So. 2d 308 (Miss. 1997).

II. APPELLANT'S FAILURE TO CONDUCT AN EXTENSIVE JOB SEARCH SHOULD NOT HAVE DISQUALIFIED HIM FROM REINSTATEMENT OF WORKERS' COMPENSATION BENEFITS

Appellees' argument that claimant failed to establish a loss of wage earning capacity, because he failed to conduct a proper job search, is essentially irrelevant. As noted in Appellant's opening Brief, a showing that claimant has sought and has been unable to find work "in the same or other employment" only applies where there is a finding of permanent partial disability. See *Jordan v. Hercules*, 600 So. 2d 179, 183 (Miss. 1992). Here, the claimant never reached maximum medical recovery and, thus, there can be no finding of permanent partial disability. Claimant remains temporarily totally disabled. He should be receiving benefits for temporary total disability, not permanent partial disability.

Here is a situation where two doctors recommended surgery in April, 2004, claimant never received the surgery, and yet the Commission is able to find that the claimant reached maximum medical recovery in August, 2003, eight or nine months prior to the date on which surgery was recommended by Dr. Patterson and Dr. Antinnes. According to Appellees, at that point, claimant was expected to turn on a dime, forget surgery and start searching for a job. Such a position, is not only inconsistent with the objective findings regarding claimant's injury, but also claimant's mental expectation that the surgery would improve his condition.

CONCLUSION

For the reasons set forth in this Brief, claimant again submits that he was entitled to a finding that he remains temporarily totally disabled and that he has not reached maximum medical recovery. This case should be remanded to the Commission which should be required

to designate an independent, qualified physician to make a determination based on the diskogram, without reference to the videotape, as to whether or not Mr. Chestnut is in need of the very surgery recommended by his former treating physicians. This Court should further order that temporary total disability benefits be reinstated effective February, 2004, that such benefits continue until Mr. Chestnut has reached maximum medical recovery and that the employer/carrier authorize and provide any surgery which is recommended by the independent, qualified physician appointed to review Mr. Chestnut's case.

Respectfully submitted,

MARVIN CHESTNUT

BY:


MICHAEL ADELMAN

MICHAEL ADELMAN, ESQ.
ADELMAN & STEEN, L.L.P.
POST OFFICE BOX 368
HATTIESBURG, MS 39403-0368
PHONE: 601/544-8291
FAX: 601/544-1421
MS BAR NO. [REDACTED]

CERTIFICATE OF SERVICE

I, Michael Adelman, undersigned counsel for the Appellant, MARVIN CHESTNUT, do hereby certify that I have this day served by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

J. Andrew Hughes, Esq.
Post Office Box 7188
Tupelo, MS 38802-7188

Honorable Bob Helfrich
Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403-0309

THIS the 25th day of April, A.D., 2007.



MICHAEL ADELMAN