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

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CIRCUIT COURT
OF FORREST COUNTY, MISSISSIPPI
CAUSE NO. CI06-0158

BRIEF OF APPELLANT

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VS.	**CAUSE NO. 2006-WC-01985**
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AND	
GREAT AMERICAN ASSURANCE COMPANY	**CARRIER**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications, or recusal:

Marvin Chestnut	Appellant
J. Andrew Hughes, Esq.	Attorney for Appellant
Michael Adelman, Esq.	Attorney for Appellee

Respectfully submitted, this the 27 day of March, A.D. 2007.

MICHAEL ADELMAN, ESQ.

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J. Andrew Hughes, Esq.	Attorney for Appellant
Michael Adelman, Esq.	Attorney for Appellee

Respectfully submitted, this the _____ day of _____, A.D. 2007.

_____
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BRIEF OF APPELLANT

STATEMENT OF THE ISSUES

1. Whether the evidence supports a finding that Appellant reached maximum medical recovery and is no longer entitled to temporary total disability benefits.
2. Whether Appellant's failure to conduct an extensive job search should have disqualified him from reinstatement of workers' compensation benefits.

IN THE SUPREME COURT OF MISSISSIPPI

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BRIEF OF APPELLANT

STATEMENT OF THE CASE[1]

I. Proceedings

The Petition to Controvert was filed in this case on March 3, 2004 and alleged an injury on November 4, 2002 (WC.1). Claimant alleged that he tripped on a wheelchair ramp and was paid temporary total disability benefits from November 2, 2002 to February 9, 2004 at the rate of Three Hundred Seventeen Dollars ($317.00) per week (WC.1). A hearing was held on July 25, 2005 and the parties stipulated that the claimant sustained a work-related injury to his back on November 4, 2002; that his average weekly wage was Five Hundred Twenty-Eight Dollars and forty cents ($528.40); that he had been paid temporary disability benefits of Ten Thousand

[1]References are to the transcript (T-), designated exhibits, and the one (1) volume of pleadings and other miscellaneous documents of the Mississippi Workers' Compensation Commission (WC-) and the one (1) volume of pleadings and other miscellaneous documents of the Forrest County Circuit Clerk (CP.).

Three Hundred Seventy-Eight Dollars and ninety-three cents ($10,378.93); that he had been paid permanent disability benefits of Seven Thousand Nine Hundred Sixty-Three Dollars and eighty-seven cents ($7,963.87) and had been provided medical services (WC.67-68). The issues before the Administrative Judge were identified as follows:

1. The extent of temporary disability attributable to the injury;

2. The date of maximum medical improvement; and

3. The extent of permanent disability attributable to the injury. (WC.68).

After the hearing, the Administrative Judge issue his opinion finding that the claimant was temporarily disabled from November 2, 2002 through August 13, 2003 (WC.80). The Administrative Judge further found that Mr. Chestnut is not entitled to any permanent disability benefits (WC.80) and ordered that the employer/carrier should continue to provide reasonable and necessary medical supplies and services (WC.80).

Claimant appealed to the Full Commission and in an Order dated June 15, 2006, the Commission affirmed the Order of the Administrative Judge dated November 30, 2005 (WC.83). Claimant then appealed to the Forrest County Circuit Court (WC. 84), which affirmed the Full Commission (RE-80). Thereafter, Claimant filed a timely appeal with this Honorable Court (RE 81-82).

II. Facts

The claimant, Marvin Chestnut, was born on May 30, 1955 (T.9), making him fifty (50) years old at the time of the hearing in this case (T.9). While he testified that he completed the seventh grade (T.9), he also testified that he has little if any ability to read and can only write his name (T.9).

Mr. Chestnut was injured on November 4, 2002 (T.9). At that time he was employed by Dairy Fresh dumping unused milk (T.23). This job involved stacking pallets by hand which weighed anywhere from thirty to sixty pounds (T.24), operating a forklift (T.24), manually lifting one-half gallon and one-gallon cartons of milk and other liquid products (T.25-26), dumping one-half gallon and one-gallon cartons of milk and other products (T.25-26), unloading a trailer filled with the milk and other company products (T.28), manually operating a dolly loaded with six trays of the cartons, usually with four cartons on each tray (T.29-30), using his arms to keep the products from falling off the dolly (T.30), and climbing up onto a container truck to observe whether or not it was filled with the unused milk and other products (T.31).

Mr. Chestnut's job injury is not contested (T.4; 10). Nevertheless, during the hearing he described his injury (T.10). He stated that on the date in question it was raining real hard (T.10). He punched his time card inside of a trailer and was walking back down a wheelchair ramp when his feet slipped out from under him and he fell directly onto his tail bone (T.10).

Mr. Chestnut testified that he went to the emergency room at Forrest General Hospital on the date of the accident (T.11). He was initially placed on light duty and continued to work for approximately two weeks (T.11).

The parties stipulated at to Mr. Chestnut's average weekly wage, Five Hundred Twenty-Eight Dollars and forty-seven cents ($540.47), that the Employer/Carrier paid Mr. Chestnut temporary disability benefits of Ten Thousand Three Hundred Seventy-Eight Dollars and ninety-three cents ($10,378.93), that the Employer/Carrier paid Mr. Chestnut permanent disability benefits of Seven Thousand Nine Hundred Sixty-Three Dollars and eighty-seven cents ($7,963.87) and that the Employer/Carrier provided medical services to Mr. Chestnut. The

record reflects that Mr. Chestnut was last paid workers' compensation benefits in February, 2004 (T.12).

After the emergency room visit at Forrest General Hospital, Mr. Chestnut next consulted a chiropractor, Dr. Gary Lett (T.12), and Dr. Lett referred Mr. Chestnut to Michael Patterson, M.D., a specialist in orthopedic surgery (Cl. Exhibit No. 1, page 4).

In his report dated May 19, 2003, Dr. Patterson stated as follows:

> "He has EMG proven radiculopathy of the L5 nerve roots, moderate compression of the L5 nerve roots based on the parasagittal and sagittal CT scan reconstructions in the subarticular zone of the neural foramen on both sides. Lastly, he is unremitting low back pain. I am going to be recommending surgery to decompress the L5 nerve root. The question is whether or not the back pain can be treated with surgery. Currently the back pain is the majority of his complaint. Therefore, discograms are indicated to help fine-tune the surgery to an appropriate type of surgery that will give him the best shot at being able to return to the workforce and be improved to a maximal amount." (Cl. Exhibit No. 1).

Despite this recommendation by Dr. Patterson, the workers' compensation carrier persistently denied the discogram, and on May 21, 2003, Dr. Patterson wrote a letter to Irene Powers, Claimant's Medical Case Manager, advocating for both the surgery which he had recommended and the discogram which had he recommended (Cl. Exhibit No. 1). Frustrated by the carrier's refusal to allow the discogram and recommended surgery, Dr. Patterson ordered a Function Capacity Evaluation for Mr. Chestnut and the Function Capacity Evaluation was performed on August 7 - 8, 2003 (Cl. Exhibit No. 1). Based on the Function Capacity Evaluation which was performed on those dates, Dr. Patterson on August 18, 2003 found Mr. Chestnut was at maximum medical improvement, assigned him a whole body impairment rating of ten percent (10%) and released Mr. Chestnut to return to work with the restrictions contained

in the evaluation (Cl. Exhibit No. 1).

On November 19, 2003, Mr. Chestnut consulted with James A. Antinnes, M.D., another expert in orthopedic surgery (E/C. Exhibit No. 2), and a discogram was in fact performed on March 30, 2004 (Cl. Exhibit No. 1). In fact, the discogram showed an annular tear at L4-5, a finding which Dr. Patterson considered to be an objective finding (Cl. Exhibit No. 1, page 16).

It is significant that after the discogram, both Dr. Patterson and Dr. Antinnes recommended a fusion at the L4-L5 level. In his report dated April 2, 2004, Dr. Patterson stated as follows:

> "If Dr. Antinnes feels that surgery is indicated in this case, this is the one situation in which surgery may be successful. That is, a single level painful disc problem from a posterior annular tear. If he had multiple levels that were painful or multiple degenerative levels, I do not think that surgery would be indicated. A single level painful degenerative disc is treated with fusion surgery." (Cl. Exhibit No. 1).

Likewise, when Dr. Antinnes examined Mr. Chestnut in April 29, 2004, based on that examination, and based on the findings from the discogram, Dr. Antinnes also recommended a one-level fusion (E/C. Exhibit No. 2).

Although Mr. Chestnut would readily submit to the surgery recommended by both Dr. Patterson and Dr. Antinnes, he has been denied that surgery because of a surveillance videotape of Mr. Chestnut's activities on March 30, April 1, and April 29, 2004 (E/C. Exhibit No. 3). After viewing the videotape, Dr. Antinnes reached the conclusion that he no longer felt that surgery was indicated for Mr. Chestnut (E/C. Exhibit No. 2). Likewise, in a letter dated August 12, 2004 to Mr. Chestnut's attorney, Dr. Patterson also stated that he would no longer recommend surgery in Mr. Chestnut's case (Cl. Exhibit No. 1).

On October 19, 2004, after a second Function Capacity Evaluation, Dr. Patterson once again gave Mr. Chestnut a ten percent (10%) whole body impairment rating and released him to work at the light level with what appeared to be the same restrictions as set forth in the earlier Functional Capacity Evaluation (Cl. Exhibit No. 1).

At the hearing before the Administrative Judge, Mr. Chestnut testified that he has not performed any substantial work since leaving Dairy Fresh (34) and that he continues to experience pain as a result of the November 4, 2003 accident (T.32). He testified regarding the pain as follows:

> "Ever since I had this accident, its just been pain down my low back down through my legs, sometimes through my private area and they just constantly hurt. Basically - - especially at night, I have to put a pillow between my legs or either ball up in knot and all. Its just been painful, very painful." (T.32).

☆☆☆

Q. (Adelman) "When you say pain, are you saying the pain is where?
A. Right - - you know, the low back.
Q. The low back?
A. Its just like its pinching, pinching, and like a toothache. Like it be throbbing or something like that.
Q. And is the pain limited to the back area or does it go any place else?
A. Yes, it goes down both legs. And like I say, sometimes it goes down to my private areas, you know, and down in my toes." (T.37)

SUMMARY OF THE ARGUMENT

Marvin Chestnut had not reached maximum medical recovery at the time of the hearing before the Administrative Judge. Both Dr. Antinnes and Dr. Patterson recommended surgery after reviewing the results of Mr. Chestnut's discogram. The videotape should not be allowed

to erase the clear recommendation by both doctors, based on objective radiological findings, that surgery was medically reasonable.

Since Mr. Chestnut had not reached maximum medical recovery by the time of the hearing before the Administrative Judge, the failure to conduct an extensive job search should not disqualify him from reinstatement of workers' compensation benefits.

ARGUMENT

Standard of Review

The findings in order of the Mississippi Workers' Compensation Commission must be supported by substantial evidence. *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988). The appellate courts are empowered to reverse an Order of the Mississippi Workers' Compensation Commission where the Order is clearly erroneous and contrary to the overwhelming weight of the evidence. *Fought,* at 317. In addition, appellate courts are empowered to review matters of law *de novo, KLLM, Inc., v. Fowler,* 589 So. 2d 670, 675 (Miss. 1991).

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

The decision of the Administrative Judge in this case, as affirmed by the Commission and the Circuit Court, violates the "humanitarian purposes" of the Mississippi Workers' Compensation Act. See *White v. Hattiesburg Cable Co.,* 590 So. 2d 867, 870 (Miss. 1991). Marvin Chestnut had not reached maximum medical recovery at the time of the hearing before the Administrative Judge.

In this case, both Dr. Antinnes and Dr. Patterson recommended surgery after reviewing

the results of Mr. Chestnut's discogram. In fact., Dr. Patterson opined in his report dated April 2, 2004, that Mr. Chestnut presented "the one situation in which surgery may be successful." (Cl. Exhibit No. 1). He stated: "A single level painful degenerative disc is treated with fusion surgery." (Emphasis supplied) (Cl. Exhibit No. 1). Obviously, the video conducted by undercover investigators tainted the opinions of both Dr. Antinnes and Dr. Patterson. However, Dr. Patterson also admitted during his deposition that the discogram finding as to Mr. Chestnut's injuries are objective findings (differentiated from the claimant's subjective level of pain response) (Cl. Exhibit No. 1, p.16). Claimant submits that the videotape in this case should not be allowed to erase the clear recommendation by both doctors, based on objective radiological findings, that surgery was medically reasonable.

In *Spann v. Wal-Mart Stores, Inc.*, 700 So. 2d 308 (Miss. 1997), the Mississippi Supreme Court reversed the Mississippi Court of Appeals as well as the Circuit Court and the Commission and found as follows:

> "There is no substantial evidence in this record that Spann has achieved maximum medical recovery; or put in the alternative, there is substantial evidence that if maximum medical recovery has been achieved, there exists some temporary or permanent partial disability. It cannot be said that this claimant has been restored to a state of health existing prior to injury. There is no dispute that the injury occurred during the course and scope of employment (P. 23).
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> On this issue we remand to the Commission for a determination whether or not maximum medical improvement has been achieved, and if so, whether there exists some temporary or permanent partial disability." (P. 24).
>
> ☆☆☆

> "The record reflects that this case presents a worker who was injured during the course and scope of his employment doing heavy work for Wal-Mart, who had no pre-existing condition or previous injuries and who now is in extreme pain, unable to perform even light duties well. The injury is admitted, Spann's inability to do the work, even light work, is undisputed by Wal-Mart and the carrier and all medical evidence concludes that Spann has a bulging disc as a result of his work related injury." (P.35)

Certainly, the record in this case, reflects that Mr. Chestnut was injured during the course and scope of his employment doing heavy work for Dairy Fresh. The employer has not contended that Mr. Chestnut suffers from a pre-existing condition or previous injuries which are responsible, in whole or in part, for his present disability. Mr. Chestnut testified that he continues to be in extreme pain. The objective medical evidence establishes that Mr. Chestnut has an annulus tear at L4-5.

As to Mr. Chestnut's present ability to perform his work dumping unused milk, despite leading questions and despite suggestions by counsel for the Employer/Carrier, the Employer/Carrier's witness, Mr. Durwood Dees, never could state that a job was available for Mr. Chestnut, given Mr. Chestnut's restrictions and given Mr. Chestnut's testimony. As the record reflects, Mr. Chestnut's primary job was loading and unloading cartons of milk and other dairy products, as well as disposing of the contents. The suggestions made by counsel as to the manner in which Mr. Chestnut might perform his job, were, as noted by the Administrative Judge, inaccurate and inconsistent with the record in this case (T. 66).

Appellant submits that he was entitled to a finding that he remains temporarily totally disabled, that he has not reached maximum medical recovery and that the Commission should have designated an independent, qualified physician to make a determination, based on the

discogram, without reference to the videotape, as to whether or not Mr. Chestnut is in need of surgery. Temporary total disability benefits should be reinstated effective February 2004, such benefits should continue until Mr. Chestnut has reached maximum medical recovery and the Employer/Carrier should be required to authorize and provide any surgery which is recommended by an independent, qualified physician.

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

As noted *supra,* evidence fails to establish that Marvin Chestnut has reached maximum medical recovery, and, thus, his temporary total disability benefits should not have been suspended. The requirement that the claimant make a prima facie showing that he 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. *Jordan v. Hercules,* 600 So. 2d 179, 183 (Miss. 1992). See also *McNeese v. Cooper Tire and Rubber Co.,* 627 So. 2d 321 (Miss. 1993). Decisions subsequent to *Jordan v. Hercules*, such as *Dulaney v. National Pizza Co.,* 733 So. 2d 301 (1998 Miss. App.) and *Lane Furniture Industries, Inc. v. Essary,* 919 So.2d 153 (Miss. App.), do not extend the so-called "job search" requirement beyond the context of a permanent disability.

While Dr. Patterson found Mr. Chestnut to have reached maximum medical recovery on two separate occasions, first on August 18, 2003 and on October 19, 2004, those findings were based on non-objective factors. It is apparent that Dr. Patterson's initially found Mr. Chestnut to have reached maximum medical recovery on August 18, 2003 out of his frustration due to the carrier's refusal to allow the discogram and surgery which he had recommended. On May 19,

2003, Dr. Patterson recommended a discogram and surgery to decompress the L-5 nerve root. No medical event occurred between May 21, 2003 and August 18, 2003 which would justify or otherwise explain the finding by Dr. Patterson that Mr. Chestnut had reached maximum medical recovery on August 18, 2003. Mr. Chestnut had not received either the discogram or the recommended surgery. The only explanation for this abrupt turn-about by Dr. Patterson is his reluctant conclusion that the insurance carrier was not going to allow the discogram. In his treatment note of July 23, 2003, Dr. Patterson states as much:

> "Marvin's discogram has been denied. This leaves us the (sic) end point of treatment." (Cl. Exhibit No. 1).

Dr. Patterson may have been frustrated but his finding that Mr. Chestnut had reached maximum medical recovery on August 18, 2003 is totally and absolutely inconsistent with his recommendation on May 21, 2003 that Mr. Chestnut undergo a discogram and subsequent surgery.

Likewise, Dr. Patterson's finding that Mr. Chestnut had reached maximum medical recovery on October 19, 2004 is inconsistent with the objective findings on the discogram as well as the L4-5 fusion which both he and Dr. Antinnes recommended after reviewing the discogram results. Neither Dr. Patterson nor the Administrative Judge, who found Mr. Chestnut to have only been temporarily disabled through August 13, 2003, are able to explain how Mr. Chestnut reached maximum medical recovery on August 13, 2003 and then again reached maximum medical recovery on October 19, 2004, more than a year after Dr. Patterson first found Mr. Chestnut to have reached maximum medical recovery and six months after both Dr. Patterson and Dr. Antinnes recommended the L4-5 fusion. Obviously, there is no medical or

logical explanation which, in fact, can explain these inconsistencies.

Dr. Antinnes' turnabout in this case is no less inconsistent with the objective evidence than Dr. Patterson's.[2] In his report dated November 19, 2003, Dr. Antinnes, like Dr. Patterson, recommends a discogram. Fortunately, after this recommendation by Dr. Antinnes, the workers' compensation insurance carrier relented and Mr. Chestnut was allowed to undergo a discogram on March 30, 2004. After reviewing the discogram, and after examining Mr. Chestnut on April 29, 2004, in his report of that same date, Dr. Antinnes recommended an L4-5 fusion with TLIF (transforaminal lumbar interbody fusion). See E/C Exhibit No. 2, page 23. However, after reviewing the videotape of Mr. Chestnut's activities, Dr. Antinnes reversed his original opinion and as of the date of his deposition, June 28, 2004, he no longer would recommend surgery. But, once again, no medical event occurred between the time of Mr. Chestnut's discogram, which was the basis for Dr. Antinnes' original recommendation for surgery, and the date of Dr. Antinnes' deposition, June 28, 2004.

Apparently, Dr. Patterson and Dr. Antinnes became disenchanted with Mr. Chestnut because of the videotape. But, the Commission, given the "humanitarian purposes" of the Act, should not have allowed an undercover surveillance video to override both objective medical findings and Mr. Chestnut's continued complaints of pain and discomfort. In fact, while Mr. Chestnut does perform physical activity on the videotape, the videotape also shows that his movements are guarded and that he often uses a cane. In considering the videotape, the Commission should have also considered the life experiences of Mr. Chestnut, who has at most

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[2]E/C Exhibit No. 2 filed in this case is incomplete. However, the exhibits to Dr. Antinnes' deposition may be found at WC.51-87.

a seventh grade education and is functionally illiterate.

In summary, Marvin Chestnut had not reached maximum medical recovery at the time of the hearing in this case, he remains temporarily disabled and the requirement of a job search does not apply in his case.

CONCLUSION

For the reasons set forth in this Brief, claimant submits that he was entitled to a finding that he remains temporarily totally disabled and that he has not reached maximum medical recovery. The Commission should be required to designate an independent, qualified physician to make a determination based on the discogram, without reference to the videotape, as to whether or not Mr. Chestnut is in need of surgery. 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

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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 Brief of Appellant to:

J. Andrew Hughes, Esq.
Post Office Box 7188
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Honorable Bob Helfrich
Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403-0309

THIS the 23 day of March, A.D., 2007.

MICHAEL ADELMAN