IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LIFESTYLE FURNISHINGS AND AMERICAN HOME ASSURANCE COMPANY — **APPELLANT/ EMPLOYER & CARRIER**

V.

CAUSE NO: 2006-SC-01993

JUDY TOLLISON — **APPELLEE/CLAIMANT**

BRIEF OF THE APPELLEE, JUDY TOLLISON

Prepared By:

Don O. Gleason, Jr.
MSB#: [redacted]
Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Phone: 662-690-9824
Fax: 662-690-9825

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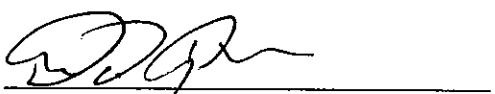
CERTIFICATE OF INTERESTED PERSONS

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 The Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

JUDY TOLLISON	CLAIMANT/APPELLANT
LIFESTYLE FURNISHINGS	EMPLOYER/APPELLEE
AMERICAN HOME ASSURANCE COMPANY	CARRIER/APPELLEE
LORI JORDAN GRAHAM	ATTORNEY FOR APPELLANT
DON O. GLEASON, JR.	ATTORNEY FOR APPELLEES



DON O. GLEASON, JR.

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Don O. Gleason, Jr.
MSB#: [redacted]
Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Phone: 662-690-9824
Fax: 662-690-9825

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STATEMENT OF THE ISSUES

ISSUE 1: The Circuit Court properly reversed the Mississippi Workers' Compensation Commission as the Full Commission Order was clearly erroneous, arbitrary and capricious.

ISSUE 2: The Circuit Court properly reversed the Mississippi Workers' Compensation Commission as the Full Commission's finding the Claimant's job search unreasonable was clearly erroneous, arbitrary and capricious.

STATEMENT OF THE CASE

This is a workers' compensation case appealed by the employer and carrier following the Order and Opinion of the Lee County Circuit Court reversing the Order of the Full Commission of the Mississippi Workers' Compensation Commission and reinstating the Order of the Administrative Judge which ruled the Claimant was permanently and totally disabled.

The Claimant, Judy Tollison, was 38 years old at the time of the accident and is now 44 years old. It is undisputed that the Claimant suffered a compensable injury to her left shoulder on April 2, 2001, while in the employ of Lifestyle Furnishings, formerly Berkline Industries.

It is undisputed that the Claimant was working on an assembly line as an "arm-builder" at the time of the injury, and that the Claimant had an average weekly wage of $516.60.

It is undisputed that the Claimant could not return to her former position following maximum medical improvement on March 3, 2003, and that the employer never offered any other employment whatsoever.

There are medical records from three providers in the record: Dr. Kim Stimpson, an orthopedic surgeon, Dr. Cooper Terry, also an orthopedic surgeon, and Dr. George Hammitt, with whom she still treats for pain management.

Dr. Stimpson, her treating physician, issued an MMI (maximum medical improvement) date of March 10, 2003, and issued an impairment rating of 50% to the left extremity, 30% to the body as a whole. Dr Stimpson further permanently restricted her to *no use* of the left arm following a functional capacity examination. Dr. Stimpson had

previously performed an arthroscopic subacromial decompression with mini open rotator cuff repair on the Claimant.

Dr. Cooper Terry saw the Claimant one time, for purposes of an IME, and essentially concurred with Dr. Stimpson. Dr. Terry agreed with the MMI date of March 10, 2003, issued a 45% rating to the extremity, and restricted the Claimant to sedentary work with no lifting, pushing or pulling with the left arm.

Dr. George Hammitt, a pain management specialist, has treated the Claimant since October 2002, for her debilitating pain. Dr. Hammitt has diagnosed Complex Regional Pain Syndrome I, formerly known as RSD, which he states is related to her work-related injury. He treats her with a combination of facet injections and medications which further inhibit the Claimant from gainful employment.

After a Hearing on the Merits on February 6, 2004, where the administrative judge, Hon. Homer Best (an experienced workers' compensation administrative judge and licensed attorney) had the opportunity to listen to the testimony and personally examine the Claimant, found Ms. Tollison to have suffered a permanent and total injury and awarded benefits accordingly.

The Employer and Carrier then appealed the matter to the Full Commission of the Workers' Compensation Commission, who issued an Order of the Full Commission on March 14, 2005, reversing the Administrative Judge and limited compensation to the two hundred weeks of the scheduled member. As this Honorable Court is aware, there is no requirement of a law degree or experience in workers' compensation to be appointed to the Full Commission. In fact, the only attorney of the three members of the Full

Commission at the time of review was not present and, therefore, did not participate in Oral Arguments or in the subsequent Full Commission Order.

The Claimant then appealed to the Lee County Circuit Court. Following submission of briefs by both parties and Oral Argument, Lee County Circuit Judge, Sharion Aycock, finding the Full Commission Order clearly erroneous, arbitrary and capricious, reversed the Full Commission and reinstated the Order of the Administrative Judge, awarding permanent and total benefits.

STANDARD OF REVIEW

The standard of review in workers' compensation cases is limited. The substantial evidence test is used. Walker Mfg. Co. v. Cantrell, 577 So. 2d 1243, 1245 (Miss. 1991). Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." Delta CMI v. Speck, 586 So. 2d 768, 773 (Miss. 1991). Stated differently, this court will reverse the Commission if it finds that Order clearly erroneous and contrary to the overwhelming weight of the evidence. Miles v. Rockwell International, 445 So. 2d 528, 536 (Miss. 1983). However, this Court has held that this deferential standard is, *"...not to say the Court will merely "rubber stamp" the Commission's actions. Where no evidence or only a scintilla of evidence supports a Workers' Compensation Commission decision, this Court does not hesitate to reverse."* Universal Manufacturing Co. v. Barlow, 260 So. 2d 827 (Miss. 1972).

SUMMARY OF THE ARGUMENT

The Claimant, Judy Tollison, suffered an injury to her left upper extremity that rendered her totally occupationally disabled. This conclusion was reached by both the Administrative Judge and the Circuit Court Judge.

Compensation for an injury to a scheduled member is only properly limited to the schedule when a Claimant *has not* sustained a permanent and total occupational disability. MISS CODE ANN. Sec. 71-13-17 (a), McDonald v. I. C. Isaccs Newton Co. and Liberty Mutual Ins. Co., 879 So. 2d 486 (Miss. 2004).

The Claimant established by overwhelming evidence that she is permanently and totally occupationally disabled as a result of her admitted injury. The Order of the Full Commission limiting the Claimant to the scheduled member was in error of law, and contrary to the overwhelming weight of the evidence, and, was, therefore, properly reversed by the Circuit Court.

The Court has established a two-prong test for a Claimant to make a prima facie case for total disability. The Claimant must demonstrate (a) inability to resume former work, and (b) that reasonable but unsuccessful efforts to find other gainful employment were made. Once a prima facie case is established, the burden shifts to the employer and carrier to ***prove*** a less than total loss of wage earning capacity. Hale v. Ruleville Health Care Center, 687 So. 2d 1221, 1226-27 (Miss. 1997); Jordan v. Hercules, Inc., 600 So. 2d 179, 183 (Miss. 1992); Thompson v. Wells-Lamont Corp., 362 So. 2d 638, 640 (Miss. 1978).

It is uncontroverted that the employer did not provide a position for the Claimant following maximum medical improvement, therefore prong (a) is met. The Claimant

applied to over thirty-seven (37) different employers seeking employment and was unsuccessful. Clearly, prong (b) is also established.

The Claimant was able to prove, by overwhelming evidence, that she met the two-prong test and, therefore, successfully established a prima facie case of being permanently and totally disabled. The employer and carrier failed to meet their burden of ***proving*** the claimant was not totally occupationally disabled. Therefore, again, the Circuit Court properly reversed the Full Commission as their Order was in error of law and contrary to overwhelming weight of the evidence.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY REVERSED THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AS THE FULL COMMISSION ORDER WAS CLEARLY ERRONEOUS, ARBITRARY AND CAPRICIOUS

The Employer and Carrier would have this Court believe that the Circuit Court supplanted the Full Commission as the rightful fact finder and substituted its judgment for that of the Full Commission. Curiously, the Employer and Carrier in support of this assertion, restate the Standard of Review for a page and a half and spend one paragraph attempting to demonstrate how their theory of how the Circuit Court actually erred in the case at bar. In the paragraph of Argument (I) that is relevant to the employer and carrier's argument, counsel is essentially arguing the Claimant's case.

Counsel for the employer and carrier correctly quotes case law stating that a circuit court may not tamper with the (Full Commission's) finding of fact, where the findings are supported by a sufficient weight of the evidence. Natchez Equip. Co. v. Gibbs, 623 So. 2d 270, 274 (Miss 1993). The employer and carrier then offers several quotes from the Order of the Full Commission but offers no foundation of how those quotes by the Full Commission are supported by "sufficient weight of the evidence." (Appellant's Brief Page 7). Counsel makes the assumption that the findings are supported by any credible evidence, much less, sufficient weight of the evidence.

Conversely, the Claimant can demonstrate how the quotes from the Full Commission Order contained in the Appellant's Brief are not supported by substantial evidence and are arbitrary and capricious.

> ***"efforts did not begin in earnest until more than seven months after she reached maximum medical improvement."***

> ***"a quick unsustained effort made in the weeks leading up to the Hearing..."*** (Brief of the Appellant p. 7).

The Full Commission in addressing the Claimant's job search efforts simply ignored all testimony from the Hearing on the Merits concerning this point. These statements of the Full Commission are particularly troubling as even a brief review of the record of the Hearing on the Merits plainly explains why the job search was "delayed."

Ms. Tollison was never told by the employer that she was not going to be rehired by the employer. (Record p. 66). She testified that she liked working for them and *had hoped to return.* Upon questioning by the Administrative Judge himself, she explained that she thought she was still employed by the employer. In fact, the Claimant was still receiving a Thanksgiving turkey every year, just like all the other employees. (Record p. 140). This testimony was uncontradicted.

The Employer and carrier's vocational expert, Bruce Brawner, and sole witness at the Hearing on the Merits, did not provide his first list of jobs for the Claimant to apply to until October 2003, *the same month the Claimant began looking for work away from Lifestyle Furnishings*[1]. (Record, General Exhibit 4 and Claimant's Exhibit 5). For the Full Commission to hold this against the Claimant, and not the employer and carrier, when it is ***uncontroverted*** in the record that the Claimant was never told her she would not be rehired is blatantly arbitrary and capricious.

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[1] On page 10 of the Appellant's brief, it is represented to this Court that the Claimant began her job search, "...on or about November 2003..." In fact, Claimant's Exhibit 5 from the Record clearly places the date of the first application as October 21, 2003, the same month as Mr. Brawner began providing potential new employers.

As Ms. Tollison had a job, so she thought, that she enjoyed and desired returning to, it can not properly be held against her that she did not begin looking for another until the employer's intentions became obvious with the arrival of a list of prospective new employers.

Further, as the Hearing on the Merits occurred *less than a year* following MMI, stating that it was done in the weeks prior to the Hearing is illogical. Obviously, at least some of the search would have to occur shortly before the Hearing in such a tight time frame. Again, as Mr. Brawner's search coincided almost exactly with the Claimant's, to use the tight time frame against the Claimant and not against the employer and carrier is arbitrary and capricious and required the reversal of the Full Commission.

There is ample other examples contained in the Order of the Full Commission that demonstrates their acting in an arbitrary and capricious manner.

Inexplicably, a footnote on page 4 of the Full Commission Order reads, "*The fact that Ms. Tollison's former employer had no suitable employment available for her does not necessarily raise any presumption that she is permanently disabled, or even permanently and totally disabled. Unfortunately, the only work they had available was the same work she performed pre-injury, which she could no longer perform, and no suitable sedentary work was available.*"

This analysis is simply incorrect and The Full Commission clearly assumed facts that were not in the record. The Full Commission can only have assumed that there exists *any* position with the employer that could be performed within the Claimant's restrictions as there is *no testimony in the record* to support this position.

Extensive case law clearly states that once the Claimant demonstrates a reasonable job search and that the employer did not provide a position, the employer and carrier must then prove the disability suffered was less then permanent and total. Hale v. Ruleville Health Care Center, 687 So. 2d 1221, 1226-27 (Miss. 1997); Jordan v. Hercules, Inc., 600 So. 2d 179, 183 (Miss. 1992); Thompson v. Wells-Lamont Corp., 362 So. 2d 638, 640 (Miss. 1978). By relying on assumed facts to, apparently, avoid shifting the burden back to the employer and carrier to prove the Claimant is not permanent and total is clearly erroneous and required reversal.

In the same footnote on page 4, the Full Commission Order states, *"Her employer did not refuse to re-hire her, and in fact put her back to work"*

The language in Jordan explains that a prima facie case is established for total disability upon employer refusing *to rehire **or reinstate***. Jordan, 600 So. 2d at 183. Further, the Claimant was never "put back to work" *following* MMI, her attempt to return was several months prior to MMI in the winter of 2003. Again, this is a misstatement of the facts and the law and required reversal.

Nowhere in the Commission's analysis do they state that the prima facie case is met by Ms. Tollison, and that the burden should then properly shift back to the employer consistent with Jordan and Thompson. In fact, the mere *possibility* or basic criteria of a prima facie case are not discussed. Unfortunately, this indicates the Commission was possibly not aware of the applicable case law.

This failure to acknowledge and follow established case law makes it clear, in and of itself, that the Order of the Full Commission is erroneous and contrary to the overwhelming weight of the evidence on its face, and that this court should properly

reverse and reinstate the Order of the Administrative Law Judge of permanent and total disability benefits.

Page 3 of the Full Commission Order reads, "...in fact, Ms. Tollison drove herself from her home in Guntown to Jackson for (today's) Hearing..."

Again, the Full Commission simply made an erroneous assumption. Ms. Tollison in fact was driven from Guntown by her daughter the night before, and merely drove herself to the Hearing from her hotel a few miles away.

The Circuit Court had numerous examples to choose from to determine that the Full Commission acted in an erroneous manner and contrary to the overwhelming evidence in the record and contrary to existing case law. The Circuit Court simply had no logical option other than reversal after a proper legal analysis of the Full Commission Order.

II. DID THE CIRCUIT COURT PROPERLY FIND THAT THE CLAIMANT'S JOB SEARCH WAS INDEED REASONABLE?

The employer may present evidence (if any) showing that the claimant's efforts to obtain other employment was a mere sham, or less than reasonable, or without proper diligence. Hale v. Ruleville Health Care Center and the Travellers Insurance Company, 687 So. 2d 1221, 1228 (Miss. 1997).

The Commission stated on page 6 of their Order that they have, "...reservations concerning the efforts employed by Ms. Tollison to find suitable work." These "reservations" are completely unfounded in reliable testimony or proof and are further indications that this Order is erroneous and arbitrary and capricious.

The Claimant testified, and the Commission's Order acknowledges that Ms. Tollison applied to at least thirty-seven (37) different employers seeking a position. *Unfortunately, Ms. Tollison was not offered a job by anyone, including none of the prospective employers offered by the defense's sole witness, Mr. Bruce Brawner, a vocational expert.*

The Commission seemed to base their "reservations" on several factors in their analysis of the job search.

- *The job search did not start for several months following maximum medical improvement.*
- *The job search was made in the weeks leading up to the hearing before the ALJ.*
- *Some of the employers directly disputed her claim of having applied for employment.*
- *The Claimant applied for some jobs that were not suitable for her restrictions.*
- *The testimony of vocational expert. Bruce Brawner.*

Had the Commission more fully read the record of the Hearing on the Merits before the Administrative Law Judge, it would have been clear that none of their relied upon points listed above were accurate, let alone sufficient to prove that the Claimant's disability was less then permanent and total.

- *The job search did not start for several months following maximum medical improvement.*
- *The job search was made in the weeks leading up to the hearing before the ALJ.*

These two points have been adequately addressed in this Brief and in the interest of brevity, the Claimant's analysis will not be restated here.

- *Some of the employers directly disputed her claim of having applied for employment.*
- *The testimony of vocational expert. Bruce Brawner.*

The Commission stated that some of the employers disputed the fact that Ms. Tollison had even applied for employment. Again, this is demonstrative of the fact that Commission did not properly examine the Record of the Hearing on the Merits.

The employer's expert, Mr. Bruce Brawner testified that after he followed up with all of the potential employers (37) he found only several that did not have a record of her applying, or did not remember specifically. As none of these potential employers were made available at the Hearing for cross-examination, this testimony *is extremely unreliable and potentially misleading.*

Mr. Brawner attempted to have the administrative judge believe that Ms. Tollison did not contact some of the employers she claimed. This testimony was refuted, and Mr. Brawner's assertions rejected by the administrative judge, because the Claimant introduced into evidence several certified receipts where an application had been sent *to the very* employers Mr. Brawner claimed were not contacted. (Record, Claimant's Exhibit 5).

Mr. Brawner admitted that he could not testify that Ms. Tollison did not apply only that there was no record of the application, or that the manager did not remember. Specifically, Mr. Brawner was asked, "And again, that doesn't necessarily mean that she did not apply; is that right?" and he responded, "It means just what I said, no application on file, and I don't have any other information." (Record, page 37).

Clearly to rely on this is without further clarification is arbitrary and capricious, and simply bad public policy. The employer and carrier took advantage of the fact that the Rules of Evidence are relaxed in compensation hearings and presented hearsay testimony, over objection. The Claimant was, therefore, not able to inquire of the potential employer whether or not they was working that particular day, if they kept applications on file or if they threw them away, were there others that may have been there when the Claimant applied, etc.

Without further clarification that cross-examination would have provided, reliance on Mr. Brawner's testimony (that seven of thirty-seven applications were disputed) to find the job search, as a whole, unreasonable is clearly erroneous.

- *The Claimant applied for some jobs that were not suitable for her restrictions.*

Mr. Brawner explained in his testimony that in small towns you do not have the benefit of multiple job listings like you would have in Jackson. He states, "... you have to go out and just basically make cold calls to these employers." (Record p. 29).

Despite this testimony from the Employer and Carrier's vocational expert that you have to make "cold calls" in smaller towns, the Full Commission took exception to the fact that Ms. Tollison applied to many jobs without specifically knowing if the jobs were within her restrictions. As Ms. Tollison lives in a relatively small community and does not have any specialized training, she had no choice but to apply to all kinds of employers. It is important to note that she did not apply to any positions obviously out of her grasp, (i.e. nurse, engineer, over the road driver, etc.) All of the positions she applied for on her own were within her educational range and skills, only her injury made the jobs impossible for her.

For the Full Commission to hold cold calling potential employers against the Claimant *even though they were the same practices of an expert in the field* is erroneous, arbitrary and capricious, and patently unfair.

Further, Mr. Brawner testified that he agreed with the statement that some of the jobs he listed as possibilities could have aspects that Ms. Tollison could not complete, and he could not determine that without meeting with the employers face to face. (Record, page 45).

Finally, the Commission seemed to give great weight to Mr. Brawner's *other* testimony despite ignoring his testimony as exemplified above.

Although Mr. Brawner stated he strongly believed Ms. Tollison was employable hypothetically, *he was only able to identify twenty suitable positions,* this despite many months of searching. Ms. Tollison applied to those twenty and nearly that many again on her own but was ultimately unsuccessful.

Mr. Brawner met with the Claimant and subsequently provided her with numerous positions he claimed the Claimant was capable of performing. The Claimant testified that she contacted ***all*** of the proposed employers provided by Mr. Brawner, and was not offered employment of any type. The Claimant contacted many of Mr. Brawner's proposed employers only to find out that they in fact *did not* have any positions available that could be performed with only one arm, despite Mr. Brawner's representations. The Claimant further testified that she was not offered employment, of any type, by any of the numerous employers that she sought out on her own initiative.

It is important to note that not one of the positions proposed by Mr. Brawner were with the Claimant's employer, Lifestyle Furnishings, be they sedentary or otherwise. It is

also important to note that Mr. Brawner, on cross-examination, admitted that he was not aware of the Claimant being offered any positions whatsoever by the employer. (Record p. 49)

A "reasonable job search" varies from case to case but has been defined as follows:

> *In determining whether one made a reasonable effort to obtain employment in the same or other occupation, several factors may be relevant, including: the economic and industrial aspects of the local community, the jobs available in the community and surrounding area, the claimant's general educational background, including work skills, and the particular nature of the disability for which compensation is sought. Considering the present record, we cannot say that either litigant introduced an abundance of meaningful evidence regarding these factors.* Thompson v. Wells-Lamont Corp., 362 So.2d 638, 641 (Miss. 1978).

In the case at hand, the Claimant testified she applied to every position claimed by the vocational expert to be within her restrictions and many more of her own initiative. Her education is essentially limited to high school, and she possesses no work experience or job skills that can completed with only one arm.

In the recent decision of Merit Dist. Services, Inc. v. Hudson, 883 So.2d 134 (Miss. 2004), the Court of Appeals found that the Claimant had completed a reasonable job search by applying to five potential employers. Ms. Tollison applied to thirty-seven, over seven times what the Court found to be reasonable.

Even if it is assumed that the Claimant did not apply to the employers that Mr. Brawner would have had the court believe, it can not be disputed that Ms. Tollison made thirty inquiries for employment and was not offered a job. It cannot be disputed that a job was never offered to the Claimant by the defendant.

Clearly, Ms. Tollison went above and beyond the threshold established by the courts to complete a "reasonable" job search and was unsuccessful. Therefore, it is equally as clear that the Employer and Carrier failed to rebut the presumption that Ms. Tollison is

totally occupationally disabled as a result of her admitted injury. Obviously, the Commission's Order is contrary to the overwhelming weight of the evidence.

CONCLUSION

It is clear the Claimant has sustained a permanent and total injury. The fact that her injury was to a single scheduled member is irrelevant as the functional impairment has resulted in the Claimant being unable to continue working.

The Claimant has demonstrated that she made not only a reasonable job search, but ***an aggressive*** job search. The Claimant would like nothing more than to have the ability to return to her former position with her former employer. Unfortunately, she will never be able to do that. Every doctor involved has given her, at best, severe restrictions on her left arm. Her treating physicians state that she simply cannot use her left arm in employment. Her work history revolves largely around various assembly lines. She has never had any job or any training for a job that does not involve the use of both arms.

The Administrative Judge recognized all of this and wrote an excellent Order correctly integrating the law with the current facts. He found that Ms. Tollison was a credible witness and that she made a reasonable job search, but was unsuccessful. He found that the employer and carrier did not rebut the legal presumption that the Claimant was totally occupationally disabled. Therefore, the administrative judge came to the only reasonable conclusion available to him, that the schedule did not adequately provide for the Claimant's functional disability and she clearly established by a preponderance of the evidence that she was permanently and totally disabled. The Circuit Court agreed with the Administrative Judge.

The Claimant would therefore respectfully suggest that Full Commission Order was erroneous, contrary to the overwhelming weight of the evidence, and arbitrary and

capricious and was properly reversed by the Circuit Court, and the Order of the Administrative Judge reinstated.

Respectfully Submitted this the 12th day of June, 2007.

Don O. Gleason, Jr.
Attorney for Claimant, Judy Tollison

Don O. Gleason, Jr.
Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802-7316
662.690.9824 Telephone
662.690.9826 Facsimile

CERTIFICATE OF SERVICE

I, Don O. Gleason, Jr. do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees to:

Lori J. Graham, Esq.
Copeland Cook Taylor & Bush
P.O. Box 6020
Ridgeland, MS 39158

Attorney for Appellant/Employer and Carrier

This the 12th day of June, 2007.

DON O. GLEASON, JR.