

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**LIFESTYLE FURNISHINGS AND
AMERICAN HOME ASSURANCE COMPANY**

**APPELLANT/
EMPLOYER & CARRIER**

VS.

NO. 2006-WC-01993

JUDY TOLLISON

APPELLEE/CLAIMANT

**APPEAL FROM THE MISSISSIPPI
WORKERS' COMPENSATION COMMISSION**

REPLY BRIEF OF APPELLANT

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Judy Tollison sustained a work related injury to her left upper extremity, a scheduled member as defined by MISS. CODE ANN. § 71-3-17(c) (Supp. 2002). Having failed to present sufficient evidence of permanent total disability she is limited to recovery of permanent impairment benefits not to exceed two hundred (200) weeks, the maximum recovery allowed for an injury to the upper extremity. The Employer and Carrier submitted sufficient evidence at the hearing to establish that Claimant remains employable and has not sustained permanent total occupational disability as a result of her work injury. The overwhelming weight of the evidence shows that despite her injury, Claimant remains employable in a number of areas and possesses an ability to earn wages despite her work injury. The Circuit Court erred in reversing the findings of facts of the Mississippi Workers' Compensation Commission, and erroneously acted as a trier of fact and substituted its own findings for that of the Commission.

The Appellee's response brief fails to specifically address two of the particular issues stated by the Appellant - (I) whether the Claimant is limited to the amount of compensation allowed for an injury to a scheduled member as prescribed by Miss. Code Ann. § 71-3-17(c) (Supp.2002) and (II) whether the Circuit Court erroneously acted as a trier of fact and substituted its own findings for that of the Commission. Rather the Appellee's argument is arranged into two similar statements of the issue on whether the Circuit Court's finding with regard to the reasonableness of Claimant's job search was clearly erroneous, arbitrary and capricious. Appellee's failure to rebut, or failure to even acknowledge the existence of the first issue of this appeal, is tantamount to a concession that Claimant is limited to the amount of compensation allowed for an injury to a scheduled member as prescribed by Miss. Code Ann. § 71-3-17(c) (Supp. 2002). In addition, Appellee's only attempt to address the issue

of whether the Circuit Court erroneously acted as the trier of fact is to reiterate the Appellee's argument and supporting authorities stating that the Circuit Court shall not tamper with the Commission's finding of fact, where the findings are supported by substantial evidence. Due to Appellee's failure to cite any supporting authority to support her assertions this argument is without merit.

Although not a part of the brief, in the statement of the case the Appellee does allude to a contention that the Full Commission's findings were somehow unsubstantiated due to the fact that there is no requirement of a law degree or experience in workers' compensation to be appointed to the Full Commission and states the only attorney of the three member Full Commission at the time of the review of this case was not present and did not participate in the oral argument on appeal. Miss. Code Ann. § 71-3-85 (Supp.2002) and case law interpreting this section clearly define the statutory requirement governing the make up of the Commission. There is absolutely not authority to support the Appellee's contention and it has not been properly raised as an issue in this appeal and therefor will not be discussed further in this brief.

The Appellee's response brief generally attempts to reargue the merits of the case as presented at the Commission level, specifically citing to examples where the fact finder *clearly* acted arbitrary and capriciously. The Appellant will not attempt to further debate the merits of the case below, but will specifically address some of the Appellee's arguments.

The Workers' Compensation Commission, acting as the trier of fact, recognized that Claimant's efforts to seek employment after her injury were far less than reasonable. The Commission did not accept Claimant's proposed evidence of a reasonable job search as

required under the law. The Circuit Court can not reevaluate the evidence and substitute its findings for that of the Commission as this Court has consistently held that the Commission is the ultimate trier of fact.

The Appellee attempts to explain away the delay in Claimant's commencement of a job search by confusing her date of maximum medical improvement with her release to return to work. Appellee correctly refers to the date of maximum medical improvement as March 10, 2003, however, a review of Dr. Stimpson's complete medical notes contained in the Record reflects that Dr. Stimpson released Claimant from his care as early as July 2002, and was simply waiting for the results of a functional capacity evaluation for an official determination of an impairment rating. Therefor Appellee's contention that Claimant only had a matter of a few months in which to perform her job search is unfounded. Likewise, the Administrative Judge properly acknowledge on the Record that Claimant's case was originally scheduled for hearing on December 5, 2003. (R.122) That hearing was continued when Claimant submitted initial job search information indicating that she began her job search on or about November 2003, a matter of a couple of weeks before her workers' compensation hearing. (R.122). As the Employer and Carrier demonstrated with overwhelming evidence, that Claimant conducted a "job search" solely for the purpose of satisfying the requirements of her workers' compensation claim and that her attempts to return to work were less than diligent.

In more than one instance the Appellee states that "Ms. Tollison applied to at least thirty-seven (37) different employers." This statement is not supported by the evidence introduced at the hearing and plainly misrepresents the evidence on the very issue in dispute.

Although Claimant testified that she claimed to have made applications at this number of employers, this was the very issue being contested at the hearing on the merits. As stated and restated in all of the findings below, the Employer and Carrier presented overwhelming evidence that although Claimant represented that she had applied with thirty seven (37) employers, this number consisted largely of places where (1) her application could not be verified, or was specifically indicated as not received, (2) she applied for jobs that were unsuitable for her restrictions, and (3) the Employer and Carrier specifically proved that her application or resume was received days or weeks after Claimant testified she had applied and *after* specific information had been received from the employers indicating she had not applied with them. The Commission relied on these inconsistencies in properly discounting Claimant's testimony regarding her job search.

In an additional attempt to explain the overwhelming evidence presented to dispute the genuineness of Claimant's job search, Appellee takes issue with the rebuttal evidence presented by the Employer and Carrier at the hearing, stating the evidence should have been considered hearsay. This is another issue which is not properly before this Court on appeal and will not be addressed at length here, other than to cite to the Mississippi Workers' Compensation Commission, General Rule 8, which specifically states that "the general rules of evidence shall be relaxed so as to permit the introduction of any relevant and competent evidence." It is the role of the Administrative Judge to determine which evidence will be helpful for a finding of fact. The Appellee's argument on this issue is also without merit.

The Employer and Carrier proved by overwhelming evidence that despite the physical restrictions to her *nondominate* upper extremity, Claimant remains employable in a number

of positions and that many job openings exist within Claimant's relevant labor market. The Employer and Carrier also proved by overwhelming evidence that Claimant's job search efforts, which began only a few weeks prior to a scheduled hearing on the merits of her claim, were not reasonable and were not conducted with proper diligence. *Georgia Pacific Corp. v. Taplin*, 586 So.2d 823, 827 (Miss. 1991).

The Employer and Carrier presented overwhelming evidence that numerous jobs existed in Ms. Tollison's relevant job market and Claimant failed to make a legitimate effort to pursue post injury employment. The Commission, sitting as judge of the credibility of the witnesses, has the authority to accept or reject testimony depending on the circumstances which demonstrates the degree of trustworthiness or credibility accompanying the testimony at issue. *Westmoreland v. Landmark Furniture, Inc.*, 752 So.2d 444, 449 (¶15) (Miss. Ct. App. 1999); *White v. Superior Prod. Inc.*, 515 So.2d 924, 927 (Miss. 1987).

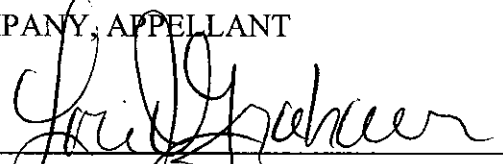
CONCLUSION

The Full Commission was correct in its finding that Claimant is capable of securing and maintaining gainful employment and therefore is not permanently and totally disabled, but is limited to benefits in accordance with the provisions of MISS. CODE ANN. § 71-3-17(c) (Supp. 2002) as appropriate for her scheduled member injury. The Full Commission was correct in its findings of law and fact. The opinion of the Lee Circuit Court should be reversed and the opinion of the Mississippi Workers' Compensation Full Commission Order should be reinstated.

Respectfully submitted, this the 30th day of July, 2007.

LIFESTYLE FURNISHINGS and
AMERICAN HOME ASSURANCE
COMPANY, APPELLANT

By: _____


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CERTIFICATE OF SERVICE

I, Lori Jordan Graham, one of the attorneys of record for Appellant in the above referenced action, do hereby certify that I have this day caused to be delivered, via United States Postal Service, first class, postage prepaid, a true and correct copy of the above and **REPLY BRIEF OF APPELLANTS** to the following:

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THIS the 30th day of July, 2007.


LORI JORDAN GRAHAM