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

BRIEF OF APPELLANT

PREPARED AND SUBMITTED BY:

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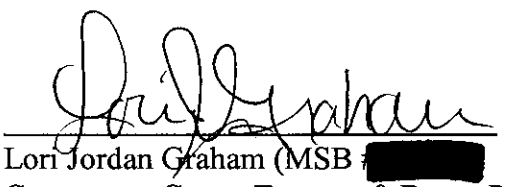
CERTIFICATE OF INTERESTED PERSONS

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 disqualification or recusal.

1. Lifestyle Furnishings a/k/a Berkline/Benchcraft
2. American Home Assurance Company
3. Judy Tollison
4. Lori Jordan Graham, Esq.
5. Don O. Gleason, Jr., Esq.



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STATEMENT OF THE ISSUES

I. Did the Circuit Court err in reversing the findings of facts of the Mississippi Workers' Compensation Commission, and instead acting as a trier of fact and substituting its own findings for that of the Commission?

II. Did the Circuit Court err in finding that the Workers' Compensation Commission did not have substantial evidence upon which to base its decision 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)?

III. Did the Circuit Court err in its finding that Claimant conducted a reasonable job search and in its finding that the Employer and Carrier failed to present evidence that Claimant did not sustain a permanent and total disability as a result of her work injury?

STATEMENT OF THE CASE

This is a workers' compensation case on appeal from the October 17, 2006, Order and Opinion of the Lee Circuit Court reversing the Order of the Mississippi Workers' Compensation Full Commission. The Commission found the Claimant is entitled to two hundred (200) weeks of permanent partial disability benefits for the total loss of use of her left upper extremity. The Full Commission reversed the finding of the Administrative Judge who initially awarded Claimant permanent and total disability benefits. Considering the evidence as a whole the Full Commission held that Claimant is capable of securing and maintaining gainful employment and that Claimant had not made reasonable efforts to find suitable post-injury employment.

Judy Tollison was hired by Lifestyle Furnishings, Inc. (a/k/a Berkline, Inc.) as an upholsterer on or about November 11, 1996. Ms. Tollison filed a petition to controvert on March 18, 2002, alleging that on or about April 2, 2001, she sustained an injury to her left shoulder while in the course and scope of her employment. The Employer and Carrier admitted compensability of the claim and temporary total disability benefits were paid beginning on April 18, 2001, the date Claimant's disability began.

Claimant initially treated with Dr. Sharon Mitchell at Baldwyn Family Medical Clinic and Dr. Walter Eckman at Aurora Spine Center. On April 12, 2001, she underwent an MRI at North Mississippi Medical Center which revealed a tear involving the anterior aspect of the supraspinatus tendon of her left shoulder and was referred, by Dr. Eckman, to Dr. Kim Stimpson at North Mississippi Sports Medicine and Orthopedic Clinic for orthopedic evaluation. On May 14, 2001, Dr. Stimpson recommended surgery to repair her torn rotator

cuff. On June 14, 2001, Dr. Stimpson performed arthroscopic subacromial decompression with mini open rotator cuff repair.

On May 31, 2002, Dr. Stimpson, opined that Ms. Tollison had reached maximum medical improvement for her injury. Dr. Stimpson did not address permanent impairment or restrictions at that time, but recommended claimant undergo a functional capacity evaluation prior to giving her a disability rating. An FCE was obtained and Dr. Stimpson subsequently opined that Claimant had sustained a 50% loss of use of her left upper extremity and assigned permanent restrictions of no use of her left arm and no overhead use of the left arm. Dr. Stimpson also referred Claimant to Dr. George Hammitt for pain management related to her sympathetic dystrophy pain.

A hearing on the merits was held at the Mississippi Workers' Compensation Commission in Jackson, Mississippi on February 6, 2004. At the hearing, the parties presented a single issue for consideration, Claimant's amount of industrial loss of use of her left upper extremity resulting from her April 2, 2001 injury. The parties stipulated to the amount of Claimant's average weekly wage at the time of the injury and stipulated that Claimant reached maximum medical improvement on May 31, 2002, as indicated by her treating physician, Dr. Kim Stimpson.

The Administrative Judge entered his Order on August 12, 2004, and awarded Claimant permanent total disability benefits. The Employer and Carrier appealed the Administrative Judge's decision and oral arguments were held before the Full Commission. On March 17, 2005, the Full Commission issued its Order reversing the Administrative Judge's Order and awarding Claimant permanent partial disability benefits for total loss of

use of the left upper extremity, the maximum amount of benefits allowed for a scheduled member injury as prescribed by MISS. CODE ANN. § 71-3-17(c)) (Supp. 2002). The Claimant appealed to the Lee Circuit Court. On October 17, 2006, Lee Circuit Judge, Sharion Aycock, entered an Order reversing the findings of the Full Commission and reinstating the Order of the Administrative Judge and awarding permanent and total disability benefits. The Employer and Carrier appeal the Circuit Court's Order.

STANDARD OF REVIEW

Findings of the Mississippi Workers' Compensation Commission are subject to normal, deferential standards upon review. *Natchez Equip. Co. v. Gibbs,* 623 So.2d 270, 273 (Miss. 1993); *Olen Burrage Trucking Co. v. Chandler,* 475 So.2d 437, 439 (Miss. 1985). The Commission is the ultimate fact finder. *Hardin's Bakeries v. Dependent of Harrell,* 566 So.2d 1261, 1264 (Miss. 1990). The Commission may accept or reject an administrative judge's findings. *Id.* at 1264. Appellate review is limited to a determination of whether the decision of the Commission is supported by substantial evidence and the appellate court may only reverse the Commission's rulings where findings of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision was arbitrary and capricious. *Westmoreland v. Landmark Furniture, Inc.,* 752 So.2d 444, 447 (¶7) (Miss. Ct. App. 1999).

SUMMARY OF THE ARGUMENT

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.

ARGUMENT

I. 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.

In workers' compensation claims it is not the role of the appellate courts to determine where the preponderance of the evidence lies when the evidence is conflicting. *Metal Trims Industries, Inc. v. Stovall,* 562 So.2d 1293, 1297 (Miss.1990). It is presumed that the Commission, as trier of fact, has previously determined which evidence is credible and which is not. *Id.* at 1297.

This highly deferential standard of review essentially means that the circuit courts, and the Court of Appeals will not overturn a Commission decision unless said decision was arbitrary and capricious. *Georgia Pacific Corp. v. Taplin,* 586 So.2d 823 (Miss.1991). Case law from this Court has repeatedly held that only in rather extraordinary cases may a circuit court reverse the findings of the Commission. The Mississippi Supreme Court has noted that:

> [W]e have held repeatedly that the circuit courts must defer in their review to the findings of the Commission. (citations omitted). In a very real sense, all of this is nothing other than a workers' compensation variant on accepted limitations upon the scope of judicial review of administrative agency decisions, i.e., that the courts may interfere only where the agency action is seen [as] arbitrary or capricious.
>
> In light of this highly deferential standard of review, this Court must conclude that [expert] testimony . . . although disputed . . . was a sufficient basis for the ruling of the Commission and that said ruling should be affirmed.

Hale v. Ruleville Health Care Center, 687 So.2d 1221, 1225 (Miss. 1997); *Walker Mfg. Co. v. Cantrell,* 577 So.2d 1243, 1247 (Miss.1991).

When the decision of the Commission is before the circuit court on intermediate appeal, that circuit court may not tamper with the findings of fact, where the findings are supported by s sufficient weight of the evidence. *Natchez Equip. Co. v. Gibbs,* 623 So.2d 270, 274 (Miss. 1993). When the circuit court reverses the Commission by simply supplanting its judgment for that of the Commission, without regard to whether the Commission's findings were substantiated by the weight of the evidence, the circuit court commits error. *Id.* at 274.

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 evidence showed that Ms. Tollison's "efforts did not begin in earnest until more than seven months after she reached maximum medical improvement." In addition, her job search was "a quick, unsustained effort made in the weeks leading up to the hearing; . . . at least seven of the employers where [she] allegedly sought employment had not record of contact with [her];" and she had admitted that of the job prospects she allegedly explored on her own, she made no attempt to determine whether any of these jobs were truly 'suitable' forms of employment." 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. The Commission is the ultimate trier of fact.

II. The Circuit Court erred in finding that the Workers' Compensation Commission did not have substantial evidence upon which to base its decision 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).

There is no question that Ms. Tollison's permanent disability and restrictions rendered her unable to continue in the position she held at that time of her injury. Likewise, Lifestyle Furnishings could not provide another job for her within her restrictions. Her employer did not refuse to rehire her, but simply could not provide employment to her within the restrictions given by her treating physician. (R.101). Claimant herself testified at the hearing that her employer called her back to work after her injury, but that she was unable to perform the work and did not return thereafter. (R.101). These circumstances alone do not establish a case of total occupational disability. As the Workers' Compensation Act and relevant case law demonstrates, a much more in depth analysis is required in order to determine whether an employee having sustained and injury to a scheduled member can be considered permanently and totally disabled.

The Employer's inability to return Claimant to work after her injury created a prima facie case of a total inability to use that scheduled member for wage earning purposes. *Walker v. Delta Steel Buildings*, 878 So.2d 113, 117 (¶8, 9) (Miss. App. 2003). This alone however does not compel a finding of permanent and total disability. For Claimant to be deemed permanently and totally disabled as a result of her scheduled member injury she must show that she not only has no industrial use of her left arm, but that she is completely unable to obtain or maintain any form of gainful employment. *Id.* at 117 (¶12). Only upon proof of complete inability to earn wages may Claimant be entitled to benefits for permanent and total

disability, unlimited by the MISS. CODE ANN. § 71-3-17(c) schedule. In this regard, the burden of proof lies with the claimant to demonstrate that she has, in fact, suffered a disability within the meaning of the workers' compensation statutes. *Entergy Mississippi, Inc. v. Robinson*, 777 So.2d 53, 55 (¶6) (Miss. Ct. App. 2000). Case law has long held that, in order to meet this burden, it is an integral part of the claimant's proof that [s]he show (a) inability to resume [her] former work, and (b) the effort [s]he has made to seek employment in another or different trade for which [s]he might be suited. *Thompson v. Wells-Lamont Corp.*, 362 So.2d 638, 641 (Miss. 1978); *Sardis Luggage Co. v. Wilson,* 374 So.2d 826, 828 (Miss. 1979).

Although the medical evidence indicates that Claimant has little industrial use of her left arm, it does not suggest that she is totally disabled from any and all types of employment. The fact that the Employer had no suitable employment available for Claimant after her injury does not necessarily raise any presumption that she is permanently disabled, or even permanently and totally disabled. Lifestyle Furnishings did not refuse to rehire her, and in fact put her back to work. (R.101). Unfortunately, the only work they had available was the same work she performed before her injury, which she could no longer perform, and no other suitable work was available. (R.101). Claimant had the burden of proving her efforts to obtain other suitable employment. *Hale v. Ruleville Health Care Ctr.*, 687 So.2d 1221, 1228 (Miss. 1997). As the Commission properly held, Claimant failed to carry her burden and failed to show that she was entitled benefits above those allowed by the schedule.

III. The Circuit Court erred in its finding that Claimant conducted a reasonable job search and in its finding that the Employer and Carrier failed to present evidence that Claimant did not sustain a permanent and total disability as a result of her work injury.

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). As the Administrative Judge noted on the record at the time of the hearing of this claim, 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). Claimant submitted certified letters to the Employers she had identified, *after* the Employer and Carrier began making attempts to verify Claimant's applications with the employers identified. (R.125). Claimant admitted at the hearing that of the job prospects she allegedly explored on her own, she made no attempt to determine whether any of these jobs were truly suitable forms of employment. (R.116-17).

Bruce Brawner, vocational rehabilitation specialist, testified at the hearing that he had been retained to evaluate Ms. Tollison from a vocational standpoint and assist her in her job search efforts. Mr. Brawner testified that he had interviewed Claimant and reviewed her

medical records which indicated permanent medical restrictions of no use, specifically no overhead use, of her *nondominant* left arm. (R.55). Claimant's medical records made no mention of restrictions related to her medications and no other physical restrictions. (R.55). Mr. Brawner opined that there were a number of jobs in and around Claimant's geographic area which Claimant would be capable of performing. (R.159).

Mr. Brawner opined that several factors such as Ms. Tollison's relatively young age of forty-one years, her education level as a high school graduate with one year of college education, and her broad array of work experience, made her a good candidate for job search efforts. (R.159). Mr. Brawner identified a total of twenty (20) jobs available in and around Ms. Tollison's area of residence and tendered information regarding each of those positions to claimant via her attorney. (R.162). These jobs were tendered to claimant over a several month period between August of 2003 and January of 2004.

As pointed out by Mr. Brawner, Claimant has a varied work history in both industry and retail with various transferable work skills. (R.153). In addition to her work in the furniture manufacturing industry, Claimant has worked as a waitress, customer service manager and cashier. (R.153). She possesses numerous work skills which are not affected by her physical limitations, including an ability to deal with people and to supervise and schedule others. (R.153) In addition to her customer service and managerial experience, she has demonstrated computer and cash register skills. (R.153). The majority of Claimant's past work experience is considered light work, from a vocational standpoint. (R.154). Available jobs identified within Claimant's vocational profile included customer service representatives and inside sales representatives for various companies; insurance clerk;

inventory management associate; mail clerk; office facilitator; sales management trainee; and numerous finance and loan company positions, including assistant manager and cashier. Despite Mr. Brawner's tender of numerous job availabilities, and Ms. Tollison's testimony that she had applied for additional positions outside of Mr. Brawner's recommendations for a total of thirty-seven (37) jobs, Claimant did not receive a single job offer. (R.79). The overwhelming weight of the evidence presented at the hearing shows that Claimant's efforts at securing employment did not involve reasonable diligence.

In *Thompson v. Wells-Lamont Corp.*, 362 So.2d 638 (Miss. 1978), the Mississippi Supreme Court explained what constitutes a reasonable effort to obtain employment as required by MISS. CODE ANN. § 71-3-3(i). The Court noted that the rule requiring claimant to conduct a job search should encourage employers to assist their disabled employees in finding other employment, and at the same time require reasonable affirmative action by claimants to become gainfully employed. *Thompson,* 362 So.2d at 641. The claimant has the burden of proof to make out a prima facie case for disability, after which the burden of proof shifts to the employer to rebut or refute the claimant's evidence. *Id.* at 641. After the burden shifts, evidence indicating that suitable employment was available to claimant becomes relevant and admissible. *Id.* In the case at issue, the employer presented overwhelming evidence showing that the claimant's efforts to obtain employment were unreasonable and without proper diligence and the Employer clearly refuted Ms. Tollison's claim of permanent disability.

In the case of *Hale v. Ruleville Health Care Center,* 687 So.2d 1221 (Miss. 1997), the Mississippi Supreme Court recognized that when a claimant having presented a prima

facie showing of permanent and total disability and the employer rebuts that presumption with evidence that claimant failed to make reasonable efforts to secure new employment, the claimant will not be considered permanently and totally disabled. *Hale,* 684 So.2d at 1228. Evidence presented by the employer/carrier at Hale's hearing raised more than mere skepticism as to claimant's job search attempts. *Id.* In the case *sub judice,* the Full Commission acknowledged the overwhelming weight of the evidence which showed Claimant had not been reasonably diligent in her job search efforts, but instead conducted a *"job search"* for purposes of evidence to be presented at the hearing.

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 affirmed.

Respectfully submitted, this the 22nd day of March, 2007.

LIFESTYLE FURNISHINGS and
AMERICAN HOME ASSURANCE
COMPANY, APPELLANT

By: _____
Lori Jordan Graham

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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 **BRIEF OF APPELLANTS** to the following:

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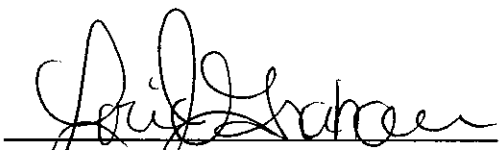
ATTORNEY FOR APPELLEE/CLAIMANT

THIS the 22nd day of March, 2007.



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