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Appellee Brief  
2006-WX-02065-COA

## II. Table of Authorities

### Statutes

None

### Cases

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### III. Statement of the Issue

The sole issue before this Court today is whether there was a substantial basis for the decision of the Full Commission of the Mississippi Worker's Compensation Commission.

### IV. Statement of the Case

This matter began as an admittedly compensable worker's compensation claim involving an injury to the Claimant's low back on September 14, 2001. The claim was heard by the honorable administrative judge on July 7, 2005. Full Commission Record at page 27. Thereafter, on October 17, 2005, the administrative judge entered an order stating, among other things, that the Claimant: had reached MMI on January 8, 2002; was not entitled to additional temporary total disability benefits; had exercised his choice of physician; was not entitled to permanent disability benefits and had no loss of earning capacity; and the Employer and Carrier had paid for all reasonable and necessary medical benefits. Full Commission Record at pages 39-40; Appellee's Record Excerpts at page 12. The Claimant timely petitioned for Full Commission review. Full Commission Record at page 41. The Full Commission affirmed the opinion of the administrative judge on January 25, 2006. Full Commission Record at page 44; Appellee's Record Excerpts at page 14. The Claimant then timely filed his notice of appeal to the Circuit Court on February 23, 2005. Full Commission Record at page 45-46. Although the Claimant's Brief was due on April 22, 2006, it was not filed until May 30, 2006, the last possible day pursuant to the Circuit Clerk's May 15, 2006, notice of deficiency and to show cause why the appeal should not be dismissed. The Claimant's Brief did not conform to the requirements of MISS. R. APP. P. 28 as required by UCCCR 5.06. On November 6, 2006, the Lee County Circuit Court entered an order affirming the decision of the Full Commission.

Appellee's Record Excerpts at page 15. The Claimant then timely perfected this appeal on December 4, 2006. Appellee's Record Excerpts at page 16.

V. Statement of the Facts

Simply put, the Claimant was injured and fully recovered. He then took several jobs making more money than at SAIA and at one such job volunteered for a very physically demanding position which required lifting of 100-150 pounds. Despite having been evaluated by one physiatrist (Dr. Victor Gray), three neurosurgeons (Drs. Thomas McDonald, John Brophy and Craig Clark) and one orthopaedic surgeon (Dr. Ernest Lowe), the Claimant continued to complain he received inadequate medical treatment and that he had not exercised his choice of physician. The Claimant also maintained he was entitled to temporary and permanent indemnity benefits.

To avoid prolixity, the Appellees adopt and incorporate herein by reference the "Summary of Relevant Evidence" and "Medical Testimony" found in the Opinion of the Administrative Judge. See Full Commission Record at pages 31-38.

VI. Summary of the Argument

The Full Commission's "Commission Order" dated January 25, 2006, is supported by more than sufficient evidence. Therefore, the "Commission Order" should and must be affirmed. The Claimant has not demonstrated any reason why the "Commission Order" is clearly erroneous and instead devotes his brief primarily to an argument that he should have had a myelogram - a test never recommended by any of the Claimant's treating physicians and in fact, only an issue because the Claimant's attorney asked a hypothetical question of Dr. Lowe who had not seen the Claimant in almost three years and who had previously advised the Claimant simply to "wait and see." The

uncontradicted medical evidence establishes the Claimant reached MMI on January 8, 2002, does not have any permanent impairment as a result of this accident, does not need additional medical treatment and has no work restrictions. The “Commission Order” should be affirmed.

## VII. Argument

### a. *Standard of Review*

This Court, acting as intermediate court of appeals, is limited to those issues raised before the Full Commission. *Cives Steel Co. Port of Rosedale v. Williams*, 2004 Miss. App. LEXIS 505 (Miss. Ct. App., 2004); *Westmoreland v. Landmark Furniture, Inc.*, 752 So. 2d 444 (Miss. Ct. App. 1999). This Court should review the opinion of the Full Commission to determine whether or not there was a substantial basis for that decision, even if this Court when acting as the trier of fact would have been convinced otherwise. *Green v. Glen Oaks Nursing Center*, 722 So. 2d 147 (Miss. Ct. App. 1998). However, if this Court is left with the firm conviction that a mistake was made or that the decision of the Full Commission was clearly erroneous, it may overturn the Full Commission decision. *Raytheon Aerospace Support Services v. Miller*, 850 So. 2d 1159 (Miss. Ct. App. 2002).

### b. *The Commission's Determination that the Claimant Reached MMI on January 8, 2002, is Supported by Substantial Evidence*

The Full Commission affirmed the administrative judge's determination that the Claimant reached MMI on January 8, 2002, as opined by Dr. John Brophy, a neurosurgeon. Full Commission Record at page 39, #5; Appellee's Record Excerpts at page 12. Dr. Brophy evaluated Mr. Leslie on January 7, 2002, at the request of Mr. Leslie. Full Commission Record at page 32; Hearing Transcript at page 29, lines 19-28 and page 30, lines 2-11. On that date, Dr. Brophy stated Mr. Leslie would be at MMI the following day and there was no objective reason he could not return to

work at full duty on January 8, 2002. Dr. Brophy also stated the Claimant had a 0% permanent partial impairment rating as a result of this injury. Full Commission Record at page 37; Full Commission General Exhibit 4, contained within Exhibits Volume I.

The Claimant was put at MMI by other physicians as well. Dr. Victor Gray, a physiatrist, stated he reached MMI on December 20, 2001. Full Commission Record at page 36; Full Commission General Exhibit 2, contained in Exhibits Volume I. Dr. Gray also noted the Claimant was poorly motivated, his problems were “secondary to the pre-existing degenerative changes in his cervical and lumbosacral spine,” he was exaggerating his symptoms and that he could return to work at full duty without restrictions. *Id.* Dr. Gray assigned a 0% impairment rating to the Claimant. *Id.* Dr. Craig Clark, a neurosurgeon, who saw the Claimant on June 10, 2002, stated the Claimant had reached MMI as of that visit and had no permanent impairment or work restrictions. Full Commission Record at page 37. There is ample evidence supporting the Full Commission’s determination that the Claimant reached MMI on January 8, 2002, and none to the contrary.

c. *The Claimant Received Adequate Medical Care*

As the Full Commission determined, the Claimant received all the reasonable and necessary care required for his injury. Full Commission Record at page 39, # 8, 10; Appellee’s Record Excerpts at page 12. Although he complains to the contrary, the Claimant never produced one iota of evidence which would indicate that the three neurosurgeons, one orthopaedic surgeon, one physiatrist, one general practitioner and numerous ER doctors failed to order any tests they, in their professional judgment, felt necessary.

It is admitted the Claimant never had a myelogram. That is simply because no physician ever felt the same necessary. The supposed need for a myelogram is purely the invention of the Claimant and/or his counsel. While the Claimant argues Dr. Lowe *might* have ordered the Claimant have a

myelogram, a full reading of the pertinent line of questioning shows the selected quotation to be misleading. As opposing counsel made abundantly clear at the time, the question asked of Dr. Lowe was simply hypothetical and assumed, *inter alia*, the Claimant's pain was the same and there had been no intervening injury. Even if those matters were proven, which apparently the Full Commission did not think they were, Dr. Lowe would not have performed the myelogram but would instead have referred the Claimant to a neurosurgeon. See Deposition of Dr. Ernest Lowe, Full Commission General Exhibit 8, contained within Exhibits Volume II, at pages 7-8. What Dr. Lowe did not know, and the Full Commission did, is that the Claimant saw Dr. Thomas McDonald, a neurosurgeon, after this evaluation and Dr. McDonald did not feel the same was necessary. See Full Commission Record at page 38; Full Commission General Exhibit 6, contained within Exhibits Volume I. The two prior neurosurgeons who had seen the Claimant did not order a myelogram either, although several MRI's were obtained at their request. Full Commission Record at pages 37-38. All these MRI's were negative. Full Commission Record at page 39, #8; Appellee's Record Excerpts at page 12.

Contrary to the Claimant's assertion, there is also ample evidence to question whether or not the Claimant had a subsequent injury. Although this was apparently not crucial to the Full Commission's findings, the Claimant finds a certain statement from the administrative judge on this issue "irrelevant and troubling." In response, the Employer and Carrier would show that on June 16, 2003, the Claimant presented to North Mississippi Medical Center with an increase in pain over the last week or so (Full Commission General Exhibit 7, contained in Exhibits Volume II); on October 6, 2003, the Claimant complained to Dr. McDonald that his pain had increased since July, 2003 (Full Commission Record at page 38; Full Commission General Exhibit 6, contained in Exhibits Volume

I); and after leaving SAIA, Mr. Leslie had several physically demanding jobs, both of which were before or concurrent with the reports of increased pain (Full Commission Record at page 34).

d. *The Claimant Had His Choice of Physician*

The Full Commission determined the Claimant exercised his choice of physician. Full Commission Record at page 39, #7. This finding is supported by substantial evidence, including but not limited to, the Claimant's admission he requested he be allowed to treat with Dr. Brophy (Full Commission Record at page 32; Hearing Transcript at pages 28-30) and the sworn affidavit of Susan Baggett (Full Commission Record Employer/Carrier Exhibit 11, contained in Exhibits Volume II). The Claimant also self-referred to Dr. Craig Clark (Full Commission General Exhibit 5, contained in Exhibits Volume I); Dr. Ernest Lowe (Full Commission General Exhibit 8, exhibits thereto, contained in Exhibits Volume II); North Mississippi Medical Center (Full Commission General Exhibit 7, contained in Exhibits Volume II); and Dr. Thomas McDonald (Full Commission General Exhibit 6, contained in Exhibits Volume I). As noted by the administrative judge, the Claimant saw one physiatrist, three neurosurgeons and one orthopaedic surgeon. Full Commission Record at page 39, #7; Appellee's Record Excerpts at page 12. There is substantial evidence to support the Commission's determination that the Claimant received appropriate medical care of his choosing.

e. *A Determination of (No) Permanent Disability At The Time of Hearing Was Appropriate*

As noted above, the Claimant has reached MMI and has been released to return to work by every doctor addressing the issue. Full Commission Record at page 39, #8; Appellee's Record Excerpts at page 12; *see also supra*. Consequently all the evidence indicates he has reached a period medical stability sufficient to make a determination as to the presence, or absence, of permanent disability.



VIII. Conclusion

The Claimant was treated for and recovered from his work injury. Per the opinions of three competent medical doctors, he has reached MMI and suffers no permanent disability or work restrictions from the work injury. Since his injury, the Claimant has taken two jobs as an over-the-road truck driver and even volunteered for a position more demanding than that of the average driver. The Claimant saw numerous competent medical providers and received adequate care per their universal expert opinions. The "Commission Order" is supported by substantial evidence and is not clearly erroneous. Therefore, the "Commission Order" must be affirmed.

WHEREFORE, PREMISES CONSIDERED, the Employer and Carrier pray that this Court affirm the ruling of Mississippi Worker's Compensation Commission.

Respectfully submitted,

SAIA MOTOR FREIGHT and  
FIDELITY & GUARANTY INS. CO.

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CERTIFICATE OF SERVICE

I, M. Reed Martz, attorney for employer and carrier, do hereby certify that I have this mailed, postage pre-paid, a true and correct copy of the above and foregoing BRIEF OF APPELLEE to Don O. Gleason, Jr. Esq., Gleason & McHenry, P. O. Box 7316, Tupelo, Mississippi 38802-7316.

This the 7 day of March, 2007.

  
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M. REED MARTZ