

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
CAUSE NO. 2006-WC-02101

HURDLE & SON AND  
MISSISSIPPI CASUALTY INSURANCE COMPANY

APPELLANTS

VS.

MICHAEL A. HOLLOWAY

APPELLEE

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**BRIEF OF APPELLEE**

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**CERTIFICATE OF INTERESTED PERSONS**

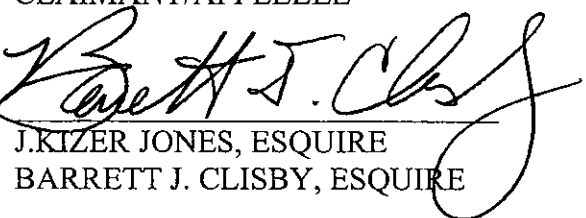
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge may evaluate possible disqualifications or recusals.

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Respectfully Submitted,

MICHAEL HOLLOWAY,  
CLAIMANT/APPELLEE

BY:

  
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### **STATEMENT OF THE ISSUES**

- A. Whether the Marshall County Circuit Court properly reversed the Mississippi Worker's Compensation Commission's finding that Michael Holloway's parents were not entitled to compensation for 24 hour-a-day nursing care when the Commission's finding was erroneous and contrary to the overwhelming weight of the evidence.
  
- B. Whether alleged procedural errors before the Administrative Judge affected the Marshall County Circuit Court's authority to rule on the issue at bar or affect this Court's authority to affirm the circuit court's decision.

## STATEMENT OF THE CASE

Michael Holloway was left a quadriplegic due to a motor vehicle accident on February 20, 1996. (R. at 319-320). On January 28, 1998, an Administrative Judge found Mr. Holloway's injury deserved compensation and awarded him workers' compensation benefits accordingly. (R. at 320). Hurdle & Son/Mississippi Casualty Insurance Company (Employer/Carrier) petitioned the Mississippi Workers' Compensation Commission for review of this Order, and on June 5, 1998, the Full Commission affirmed the order of the Administrative Judge. (R. at 320).

Thereafter, the Employer/Carrier filed a notice of appeal to the Marshall County Circuit Court. (R. at 320). By opinion and order dated August 27, 1998, the Marshall County Circuit Court affirmed the Full Commission's order entered June 5, 1998. (R. at 320). Within thirty days thereafter, the Employer/Carrier filed its notice of appeal to the Mississippi Supreme Court. (R. at 320). On October 5, 1999, the Court of Appeals for the State of Mississippi issued its opinion affirming the judgment of the Marshall County Circuit Court. (R. at 320). The mandate of the Court of Appeals issued on October 26, 1999, signified the conclusion of what would be the first phase of this litigation. (R. at 320).

The current litigation before the Court involves one of two motions filed by Mr. Holloway on August 2, 2002. (R. at 335 and 347). The motion in question requested a determination of amounts owed for nursing care provided by Michael Holloway's parents and also requested a court appointed Life Care Plan Administrator. (R. at 333). On June 26, 2003, the Administrative Judge denied said motion. (R. at 384). The decision of the Administrative Judge was appealed to the Mississippi Workers' Compensation Commission, and on May 7, 2004, the Full Commission affirmed the Administrative Judge's decision. (R. at 393). Michael Holloway respectfully submitted his Notice of Appeal to the Marshall County Circuit Court on May 26, 2004.

On September 13, 2006, the Marshall County Circuit Court reversed the full Commission's denial of compensation for twenty-four hour nursing care provided by Claimant's mother and step-father. On October 6, 2006, Employer/Carrier perfected their appeal of the circuit court's reversal. The claimant filed no cross-appeal as to the other issues.

**A. Statement of Facts**

On February 20, 1996, Michael Holloway was involved in an automobile accident which rendered him a complete C-6 quadriplegic. (R. at 338). After the wreck, Mr. Holloway was admitted to the Holly Springs Hospital, transferred to the Regional Medical Center (The Med) in Memphis, and subsequently transferred to the North Mississippi Medical Center (NMMC) in Tupelo. (R. at 339). He was released from the NMMC on May 1, 1996, and has been in the care of his parents ever since. *Id.* It is undisputed that Mr. Holloway is paralyzed from the chin down and is totally reliant on nursing care. (R. at 350).

Since Michael Holloway's discharge from the North Mississippi Medical Center, he has been in the constant care of his mother and stepfather, James and Nettie Wiseman. (R. at 334). By the good fortune of Employer/Carrier, Mr. and Mrs. Wiseman have both devoted their lives to Mr. Holloway. *Id.* As a result of their exemplary care and dedication, Mr. Holloway has experienced very few of the complications normally experienced by quadriplegics. *Id.* Mr. and Mrs. Wiseman fix Mr. Holloway's meals, feed him, dress him, wash his face, treat his bedsores, take him to church, drive him around, prepare him for bed, and supply him with water during the night. (T. at 112-115). Since his discharge from the hospital on May 1, 1996, Mr. Holloway has been dependent on Mr. and Mrs. Wiseman twenty-four hours a day. (T. at 122).

Up to this date the Carrier has only compensated Mr. and Mrs. Wiseman for sixteen hours a day of nursing care at seven dollars per hour. *Id.* The claimant and his parents assert that Mr. Holloway has received and has always required 24 hour a day nursing care, and the Carrier

should compensate the Wisemans accordingly. *Id.* This contention was also supported by Mrs. Jackie Moore, R.N., B.S.N, C.R.R.N, C.D.M.S., C.C.M., C.L.C.P. (R. at 335). Mrs. Moore has been a registered nurse for over twenty-five years and worked in Methodist Rehabilitation Center's brain and spinal injury unit for six years. (T. at 126). Mrs. Moore has extensive experience working with spinal cord injury patients and handling their ongoing life care needs. *Id.* She also has extensive experience working with employers, carriers, third-party administrators, and attorneys in this setting, and has been working in the private sector for well over a decade as a life care planner. *Id.*

### **SUMMARY OF THE ARGUMENT**

Employer/Carrier is currently compensating James and Nettie Wiseman for sixteen hours a day of nursing care at seven dollars per hour. The overwhelming weight of the evidence, however, supports compensation for twenty-four hour nursing care. Mr. Holloway, James and Nettie Wiseman, as well as Jackie Moore all provided the Administrative Judge with ample evidence that twenty-four hour care is needed by Mr. Holloway and is being provided by the Wisemans. Employer/Carrier has argued that much of the care provided by the Wisemans constitute general household duties and do not qualify for compensation. However, no services provided to Mr. Holloway by the Wiseman's can be considered normal household duties. Mr. Holloway is a forty-five year old man living with his mother and step-father. Had Mr. Holloway not been paralyzed, he would be living independently in a residence separate and apart from his parents. These facts alone distinguish his case from every case cited by the appellants, which all concern care provided by a spouse.

The Worker's Compensation Commission is the trier of facts, but all questions of law and fact are reviewable by a circuit judge. All questions of fact are reviewed on a substantial evidence standard and should be reversed if they are clearly erroneous and contrary to the



overwhelming weight of the evidence. On appeal, the circuit court found the Workers' Compensation Commission's decision to be erroneous and against the overwhelming weight of the evidence, and upon such finding, it was the court's duty to enter such judgment as the commission should have entered.

Additionally, any alleged procedural error regarding the hearing before the Administrative Judge in no way prevented the Marshall County Circuit Court from reversing the Commission's decision. If the Administrative Judge felt that the Employer/Carrier was prejudiced by the hearing, then she had a duty to reschedule the hearing until such time as the Employer/Carrier was properly prepared. Furthermore, pursuant to the Rules of the Mississippi Workers Compensation Commission, Employer/Carrier had an opportunity to supplement the record before the Administrative Judge's ruling was reviewed by the full Commission. Therefore, Employer/Carrier had an opportunity in 2003 to remedy any and all alleged deficiencies in the record but failed to do so. By failing to supplement the record, Employer/Carrier's acts and/or omissions constituted a waiver of all complaints relating thereto. Now, approximately four years into the appellate process, it would be contrary to all notions of judicial economy and fairness to the Appellee to remand this issue back to an Administrative Judge when it can be properly decided by this Honorable Court.

#### **ARGUMENT**

- A. The Marshall County Circuit Court properly reversed the Mississippi Worker's Compensation Commission's finding that Michael Holloway's parents were not entitled to compensation for 24 hour-a-day nursing care as such a finding was contrary to the overwhelming weight of the evidence.**

The Worker's Compensation Commission is the trier of facts, but all questions of law and fact in a worker's compensation case are subject to circuit court review, and the court is required to look at all the evidence on both sides. Miss. Code Ann. § 71-3-51 (2000). *See also, e.g., Roberts v. Junior Food Mart*, 308 So. 2d 232 at 235 (Miss. 1975). The Workers' Compensation

Commission's findings of fact are reviewed on a substantial evidence standard and should be reversed if they are clearly erroneous and contrary to the overwhelming weight of the evidence. *Dillon v. Roadway Exp., Inc.*, 823 So. 2d 588 at 590 (Miss. Ct. App. 2002). The substantial evidence rule permits the appellate court to examine the record as a whole, check for errors, and ascertain whether the beneficent purposes of the Workmen's Compensation Act have been carried out. *Universal Mfg. Co. v. Barlow*, 260 So. 2d 827 at 831 (Miss. 1972); *Kroger Co. v. Orr*, 230 So. 2d 798 at 801 (Miss. 1971). When the compensation commission's judgment is clearly erroneous and prejudicial on a question of law or fact, the circuit court, on appeal, possesses the authority to enter such judgment as the commission should have entered. *Scott v. Brookhaven Well Serv.*, 150 So. 2d 508 at 511 (Miss. 1963). A finding is clearly erroneous when, although there is some slight evidence to support it, when reviewing the entire body of evidence, the court is left with a definite and firm conviction that mistakes have been made by the Commission in its findings of fact and in its application of workers' compensation law. *T.P.I. Restaurants, Inc. v. Stephens*, 822 So. 2d 1018 at 1020 (Miss. Ct. App. 2002). The standard of review of the Marshall County Circuit Court was limited, but the court did not abuse its discretion in overturning the decision of the Worker's Compensation Commission. Upon a finding that the Commission's decision was clearly erroneous, the Circuit Court had a duty to enter such judgment as the Commission should have entered.

In Mr. Holloway's case, the overwhelming weight of the evidence supports compensation for twenty-four hour a day nursing care, and as such, the Marshall County Circuit Court correctly reversed the Commission's decision denying Michael Holloway's parents compensation for twenty-four hour care they have been and are currently providing. The Mississippi Supreme Court stated in *Graham v. City of Kosciusko* that "each case must be considered on its own merits; there is no standard solution for every case regardless of the facts." 339 So. 2d 60 at 65

(Miss. 1976). Therefore, the Commission's decision should have been based primarily on the evidence in this particular case.

Mr. Holloway is a forty-five year old man who has been living with his parents ever since a car accident rendered him a C-6 quadriplegic. Mr. Holloway is paralyzed from the chin down and is dependant upon his mother and step-father for absolutely everything whether day or night. Had he not been paralyzed, Mr. Holloway's mother and step-father would not be involved in any of the day-to-day needs of their forty-five year old son. These facts alone distinguish Mr. Holloway's case from every case cited in the appellant's brief, which all concern care provided by a spouse. There are many household duties that spouses share or perform for one another. However, nothing Mr. and Mrs. Wiseman do for their son can be considered a "normal" household duty. All the household duties Mr. and Mrs. Wiseman perform for their son are notably abnormal. If not for Michael Holloway's injury, he would not be living with his parents or factor into their household duties. Therefore, the acts of cleaning Mr. Holloway's room, cleaning his bathroom, washing his clothes, washing his sheets, and cooking for him cannot be considered general household duties for the Wisemans. Had Mr. Holloway not been paralyzed, he would be living independently in a residence separate and apart from the residence of his parents, and Mr. and Mrs. Wiseman would not be responsible for any of these duties. None of Mr. Holloway's day-to-day needs should be considered "normal" household duties for James and Nettie Wiseman, and they should be compensated accordingly for seeing to those needs.

The fact that Mr. Holloway and his parents both sleep at night also weighed into the Commission's decision to deny compensation for 24 hour care. Michael Holloway and the Wisemans testified that Mr. Holloway often requires assistance during the night, and they have even placed a baby monitor in Mr. Holloway's room allowing them to hear his call if they are asleep. Simply because Mr. Holloway sleeps at times during the night does not mean his parents

are not providing care. Care is not merely physical aid. Care is also the willingness and ability to render that aid. There are a multitude of dangers associated with quadriplegia that make it necessary for the Wisemans to be available at all times. They must be available during the night to turn Mr. Holloway in his bed, guard against asphyxiation, adjust the temperature of his room, give him water, provide incontinent care, and/or remove him from the house in the event of a fire. This Court should make no mistake that the Wisemans are “on call” every night and have been so for over a decade.

The question of a carrier compensating for time “actually performing services” versus time “on call” has not been specifically ruled upon in Mississippi. Other jurisdictions have, however, considered this question and ruled that relatives of an injured party can be compensated for time spent on call and not just for time performing actual nursing care. In *Shadbolt v. Schneider, Inc.*, Mr. Shadbolt, the claimant, was rendered a quadriplegic due to a work related stroke. 710 P.2d 738 at 739 (N.M. Ct. App. 1985). Every day Mr. Shadbolt’s spouse cooked for, fed, shaved, bathed, and dressed her husband. In addition, throughout the day, she exercised him, moved him from the bed to the couch and back again, administered physical therapy and breathing treatments, took care of his bladder and bowel functions, and shifted his position to prevent pressure sores from forming. *Id* at 742-43. During the night, she awakened every three hours to turn him. *Id* at 743. Schneider, Inc., the employer, argued that Mrs. Shadbolt should only be compensated for the time she performed actual work. *Id* at 742. The Court disagreed with this defense stating that if Mrs. Shadbolt were not available to care for Mr. Shadbolt, he would require a professional attendant for twenty-four hours a day who would be compensated at an hourly rate irrespective of how much care Mr. Shadbolt required during that time. *Id* at 742, 743.

Similarly, the Texas Court of Appeals, in *Texas Employers Ins. Ass'n v. Choate*, rejected the employer's contention that a claimant's wife should only be compensated for the time she actually spent doing things for her husband and not for the time she was simply available to help him. 644 S.W.2d 112 (Tex. App. 1982). Mr. Choate was rendered totally and permanently disabled when he came in contact with a live wire while working on electric lines damaged in an ice storm. *Id* at 114. The Association argued that Mrs. Choate should only be compensated for the time she actually spent doing things for her husband and not for the time she was simply available to help him. *Id* at 116. This argument was rejected since a third person hired to do what Mrs. Choate does would be paid for the time he or she was available, not just the time spent actually helping Mr. Choate. *Id*. The court also rejected this argument since Mrs. Choate must be available to meet her husband's needs at all times and cannot set aside specific times during the day to assist her husband and then do other things. *Id*.

According to Jackie Moore, if Michael Holloway were in a nursing home, Employer/Carrier would be forced to pay for twenty-four hour nursing care at a much higher rate than the seven dollars per hour currently being paid to the Wiseman's. However, James and Nettie Wiseman have chosen to care for Mr. Holloway themselves. They take care of Mr. Holloway's every need, with the exception of minimal help from home care aids. Mr. Holloway has an aid that bathes him once a day, and a nurse that checks his vital signs once a week. Other than that, his parents provide all other assistance at a discounted rate to the Employer/Carrier. Mr. and Mrs. Wiseman wash Mr. Holloway's face, dress him, feed him his meals, supply him with water, move him from his bed to his chair, change the channel on the TV, and answer to any other requests Mr. Holloway has throughout the day and night. Mr. and Mrs. Wiseman have been providing a high level of care to Michael Holloway twenty-four hours a day, seven days a week for ten years and they should be compensated accordingly. The overwhelming weight of

the evidence supports compensation for twenty-four hour nursing care, and the Marshall County Circuit Court was correct in reversing the Commission's denial of said compensation. As such, the circuit court's reversal should be affirmed.

**B. Any alleged procedural errors before the Administrative Judge did not affect the Marshall County Circuit Court's authority to rule on the issue at bar, nor does it affect this Court's authority to affirm the circuit court's decision.**

On August 2, 2002, Michael Holloway filed two motions, one of which requested a determination of amounts owed for nursing care provided by James and Nettie Wiseman. The Administrative Judge heard the Claimant's motions, which were supported by testimony from Mr. Holloway, testimony from the Wisemans, and testimony from Jackie Moore. Despite Employer/Carrier's objection to the presentation of said testimony, the Administrative Judge heard the evidence and subsequently denied Mr. Holloway's motions. The decision of the Administrative Judge was appealed to the Mississippi Workers' Compensation Commission, and on May 7, 2004, the Full Commission affirmed the Administrative Judge's decision.

Any alleged procedural error regarding the hearing before the Administrative Judge did not preclude the Marshall County Circuit Court from properly reversing the Commission's decision nor does its affect this Court's authority to affirm the circuit court's decision. If the Administrative Judge felt that the Employer/Carrier was prejudiced by the hearing, then she had a duty to reschedule the hearing until such time as the Employer/Carrier was properly prepared. Furthermore, pursuant to Procedural Rule 9 of the Rules of the Mississippi Workers' Compensation Commission, Employer/Carrier had the opportunity to supplement the record before the Administrative Judge's ruling was reviewed by the full Commission. MISSISSIPPI WORKERS' COMPENSATION COMMISSION PROCEDURAL RULE 9 states in relevant part:

“Where additional evidence is offered on the review before the Full Commission, it shall be admitted in the discretion of the Commission. A motion for the introduction of additional evidence must be made in writing at least five

(5) days prior to the date of the hearing of the review by the Full Commission. Such shall state with particularity the nature of such evidence, the necessity therefore, and the reason it was not introduced at the evidentiary hearing. If additional evidence is admitted, it shall be stenographically reported or recorded and become a part of the record.”

Employer/Carrier had an opportunity in 2003 to remedy any and all alleged deficiencies in the record but failed to do so. By failing to supplement the record, Employer/Carrier’s acts and/or omissions constituted a waiver of all complaints relating thereto. Now, approximately four years into the appellate process, it would be contrary to all notions of judicial economy as well as fairness to the claimant to remand this issue back to an Administrative Judge when it can be properly decided by this Honorable Court.

### **CONCLUSION**

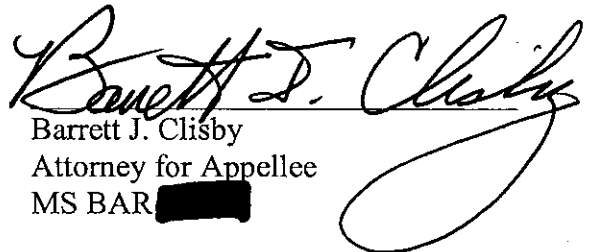
The decision of the Marshall County Circuit Court to grant James and Nettie Wiseman compensation for 24-hour nursing care should be affirmed. Mr. Holloway, James and Nettie Wiseman, as well as Jackie Moore all testified that Mr. Holloway requires twenty-four hour care, and his mother and step-father are always there to provide that care. James and Nettie Wiseman are on call twenty-four hours a day and they should be compensated for twenty-four hours of service. The circuit court reviewed the specific facts relevant to Mr. Holloway’s claim using the substantial evidence standard, and upon review, the circuit court found the Worker’s Compensation Commission’s findings of fact to be erroneous and contrary to the overwhelming weight of the evidence. Upon such a finding, it was the court’s duty reverse the Commission’s decision and enter such judgment as the Commission should have entered.

Furthermore, any alleged procedural error regarding the hearing before the Administrative Judge did not preclude the Marshall County Circuit Court from properly reversing the Commission’s decision nor does its affect this Court’s authority to affirm the circuit court’s decision. Employer/Carrier had an opportunity to supplement the record in 2003

but chose not to do so. By failing to supplement the record, Employer/Carrier's acts and/or omissions constituted a waiver of all complaints relating thereto. Now, approximately four years into the appellate process, it would be contrary to all notions of judicial economy as well as fairness to the claimant to remand this issue back to an Administrative Judge when it can be properly decided by this Honorable Court.

Whereby Michael Holloway, claimant/appellee herein, respectfully requests that this Court affirm the Marshall County Circuit Court's reversal of the Mississippi Workers' Compensation Commission's decision to deny James and Nettie Wiseman compensation for 24 hour nursing care they currently provide.

RESPECTFULLY SUBMITTED, this the 28<sup>th</sup> day of June 2007.

  
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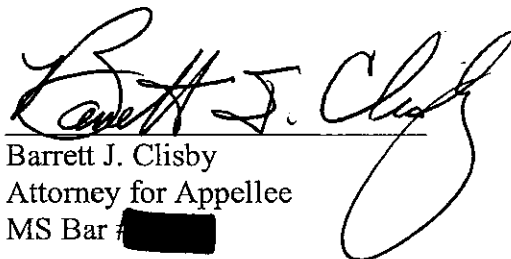
CERTIFICATE OF SERVICE

I, Barrett J. Clisby, attorney for claimant/appellee, MICHAEL HOLLOWAY, certify that I have provided this day, a true and correct copy of the foregoing appellate brief via U.S. Mail postage prepaid and hand delivery to:

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