

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

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

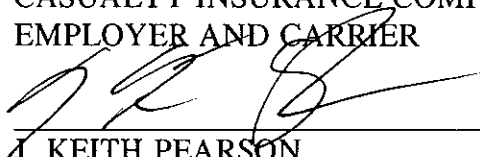
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge may evaluate possible disqualifications or refusals.

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Claimant/Appellee
2. Barrett J. Clisby, Esquire
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3. Hurdle & Son
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4. Mississippi Casualty Insurance Company
Carrier
5. J. Keith Pearson, Esquire
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Counsel for Employer and Carrier/Appellants

Respectfully submitted,

HURDLE & SON AND MISSISSIPPI
CASUALTY INSURANCE COMPANY,
EMPLOYER AND CARRIER

BY:


J. KEITH PEARSON

DANIEL COKER HORTON AND BELL, P.A.

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STATEMENT OF THE ISSUES

1. Whether the circuit court improperly reweighed the evidence and overturned a ruling of the full Commission, when the ruling was supported by substantial evidence.
2. Whether the circuit court had the authority to reverse and render on the issue of adequate provision of nursing care, given the full Commission's finding that Claimant failed to follow correct Commission procedure in raising this matter at the Commission level.

I. Statement of the Case

A. Nature of the Case and the Course of the Proceedings and its Disposition in the Court Below.

The workers' compensation claim has previously been addressed by an administrative judge and the full Commission and has gone through appeals to the Marshall County Circuit Court and Mississippi Court of Appeals. During this initial round of litigation, Employer and Carrier did not contest the fact that Claimant was involved in an accident and did not contest the serious extent of the Claimant's injuries. Instead, Employer and Carrier defended this case based on an argument that Claimant was not in the course of scope for his employment at the time of his injury or alternatively that Claimant was barred from recovery by certain affirmative defenses. On October 5, 1999, this Court rendered their opinion affirming the full Commissions' determination that Claimant was in the course and scope of his employment at the time of his injury and was not otherwise barred from receiving workers' compensation benefits. *Hurdle v. Holloway*, 749 So. 2d 342 (Miss. App. 1999). Employer and Carrier did not appeal the Court of Appeals decision and have, since the time of that decision, complied with the affirmed Commission Order.

On March 13, 2000, Claimant filed a Motion for Sum Certain Judgment with the Commission, and one of the issues raised in this motion was the provision of home nursing services by Claimant's mother and step-father for twenty-four hours per day. The full Commission held that a full hearing was required on the issue and therefore denied Claimant's motion as presented. On August 5, 2002, Claimant filed a second motion requesting that Employer and Carrier be required to pay for a life care planner and that Claimant's mother and step-father be compensated for twenty-four hour a day nursing care. On August 14, 2002, Claimant filed a motion requesting that Claimant's counsel receive lump-sum attorney's fees based

on a life-care plan estimating Claimant's future medical expenses. These motion was set for hearing on a motion day. Counsel for Employer and Carrier was not given notice that evidence would be presented at the motion hearing. On June 26, 2003, the administrative judge issued an order ruling that Claimant had not followed Commission procedure in setting an evidentiary hearing before the administrative judge, but nonetheless, the administrative judge considered the relevant issues and found that Claimant had not made out a prima facie case for relief on any of the issues presented. Claimant appealed this ruling to the full Commission, which, by an order of May 7, 2004, affirmed the order of the administrative judge. Claimant appealed this matter to the Circuit Court of Marshall County. On September 13, 2006, the circuit court affirmed the full Commission on the denial of the appointment of a life care plan administrator and the denial of additional attorney's fees but reversed the full Commission's denial of twenty-four hour per day nursing care reimbursement to Claimant's mother and step-father. On October 6, 2006, Employer and Carrier perfected their appeal to this Court. No cross-appeal was filed.

B. Facts Relevant to the Issues Presented for Review

Claimant presented several witnesses during the motion day hearing, which was not scheduled as an evidentiary hearing. Counsel for Employer and Carrier did not cross-examine any witnesses or present proof, due to the improper nature of the evidentiary hearing.

Michael Holloway testified on his own behalf. Mr. Holloway testified that his mother and stepfather take care of him on a day to day basis. Transcript (hereinafter "T") at 11. Claimant also testified that a nurse sees him once a week and a nurse's aide comes by every day. T at 12. According to Claimant, the nurses stay about an hour per visit. T at 12. With regard to the care provided by Claimant's mother and stepfather, Claimant testified that they cook his meals, feed

him and dress him. T at 13-14.

Claimant's mother, Ms. Nettie Wiseman, also testified at the improper evidentiary hearing. Ms. Wiseman testified that she washes and bathes her son, changes his bed, prepares his food, dresses him and often takes him for rides. T at 16-17. Ms. Wiseman testified that she received training in 1996 to help her care for her son. T at 17. Ms. Wiseman further testified that she takes her son to church and has to assist him in changing the television channel. T at 19. Ms. Wiseman indicated that she and her husband sleep simultaneously during the night, other than having to occasionally get up to get water for Claimant. T at 20.

Ms. Wiseman further testified regarding changes which had been made to her home, at the expense of Carrier and about other changes which had been recommended but had not been completed at the time of the hearing. T at 20. Ms. Wiseman testified that Carrier had provided a handicap accessible van to carry her son and that she had the van worked on twice. T at 21. According to Ms. Wiseman overall the van was running well. T at 21.

Ms. Wiseman testified regarding a certain type of chair which Claimant needed at home. T at 22. However, she did not document the Carrier's refusal to provide the chair, and Claimant failed to provide proof of a medical prescription for the chair. T at 22.

Mr. James Wiseman, stepfather of Claimant, testified next. Mr. Wiseman testified that he and his wife provide primary care for Michael Holloway. T at 28.

Ms. Jackie Moore was presented by Claimant to testify as a certified life care planner and rehabilitation nurse. T at 29. Ms. Moore was not a medical provider in this matter but was instead hired by Claimant's attorneys to provide an opinion regarding Claimant's status and to provide recommendations regarding Claimant's future needs. T at 35. Ms. Moore testified that

Claimant needs twenty-four hours a day of nursing care. T at 38. However, Ms. Moore also testified that Mr. and Mrs. Wiseman were providing a “very high level of care”. T at 39. It should be reiterated here that, per Mr. and Mrs. Wiseman’s own testimony, they were not providing Claimant twenty-four hours a day nursing care. T at 20. Ms. Moore actually testified that Mr. and Mrs. Wiseman were providing care for twenty-four hours per day, though she did not attempt to reconcile her testimony with the testimony of Ms. Wiseman. T at 41.

Ms. Moore also prepared a life care plan and provided an assessment of Mr. Holloway’s future medical needs and the cost for these medical needs. T at 41-43. To the best of Employer and Carrier’s knowledge, Claimant has made no allegation that Employer and Carrier are not paying his medical bills in accordance with the prior order of the Mississippi Workers Compensation Commission.

Ms. Moore also testified about other items needed by Mr. Holloway. T at 44-45. Curiously, she testified in detail regarding Claimant’s need for a handicap accessible van, though it is not disputed by any of the parties that Employer and Carrier have provided a handicap accessible van. In fact, Ms. Nettie Wiseman testified that the van had performed well. T at 21.

Counsel for Employer and Carrier did not cross-examine any of the witnesses and specifically reserved the right to do so until such time as discovery had been undertaken and counsel for Employer and Carrier had time to adequately to prepare for a hearing on the merits. T at 49. Employer and Carrier did introduce Claimant’s counsel’s letter to George Read enclosing copies of Claimant’s motion and Claimant’s notice of motion. Neither of these documents contained any indication that the hearing on the motion was to be an evidentiary hearing. T at 49-50. Counsel for Employer and Carrier represented to the Commission that he had spoken

directly with both of Claimant's attorneys in setting the motion for hearing and that neither attorney gave indication whatsoever that any evidence was to be presented at the hearing. T at 50. Claimant's counsel did not dispute this assertion.

II. Summary of the Argument

The circuit court judge in this matter did not review this appeal under a substantial evidence standard but instead made his own vague factual findings and improperly substituted his judgment for that of the Commission. Given the parameters set out by the Mississippi Supreme Court and by this Court regarding payments to the relative of a disabled Claimant's relative for required nursing services, the full Commission's order was supported by substantial evidence. The proof presented by Claimant established that Claimant's mother and stepfather sleep simultaneously through the night and that a trained nursing assistant provides care for at least an hour a day. Further, the testimony of claimant's mother and stepfather establish that many of the tasks they perform are general household tasks or other activities which, by law, are not required nursing services subject to compensation. For many years now, Employer and Carrier have provided payment to Claimant's mother and stepfather for home nursing services for sixteen hours per day. Given the uncontested proof regarding the actual services being provided by Claimant's mother and stepfather, the Commission's determination regarding the sufficiency of payment for nursing services for sixteen hours per day is supported by substantial evidence.

The circuit court had two options in this matter - to affirm or to remand for further evidentiary proceedings on the core issues. The circuit court did not have the option to reverse the Commission, given the full Commission finding that Claimant failed to follow Commission procedure in setting a hearing on the merits. Though counsel for Employer and Carrier does not

ascribe any sinister motivation to Claimant's counsel, the hearing that took place was an unintentional trap by ambush. Both the administrative judge and the full Commission determined that Claimant's counsel failed to follow Commission procedure in setting an evidentiary hearing. No petition to controvert was filed, no discovery took place, and Claimant did not provide the mandatory Prehearing Statement, which includes disclosure of proposed exhibits and fact and expert witnesses. Nonetheless, both the administrative judge and the full Commission found that Claimant had the opportunity to present all of the proof which Claimant desired to present and that Claimant still failed to make out a prima facie case that his mother and stepfather were providing required nursing care for 24 hours a day.

III. Mississippi Law and its Application to this Case

- A. The full Commission is the ultimate fact finder, and the circuit court could overturn the Commission ruling only if the Commission's ruling was not supported by any credible evidence.**

In reviewing an order of the Workers' Compensation Commission, a circuit court acts as an appellate court. *See, e.g., Leathers v. Tupelo Coffee Co.*, 423 So. 2d 122 (Miss. 1982). In *Natchez Equipment Co., Inc. v. Gibbs*, 623 So.2d 270 (Miss. 1993), the Mississippi Supreme Court stated: "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 substantial evidence." *Natchez Equipment Co., Inc.*, 623 So. 2d at 274 (citing *Roberts v. Jr. Food Mart*, 308 So. 2d 232, 234-35 (Miss. 1975)). *See also, e.g., Lanterman*, 608 So. 2d at 1345 (appeals court applies "deferential standard of review" to findings and decisions of Commission). In *Hill v. Ruleville Health Care Center*, 687 So. 2d 1221 (Miss. 1997), the Mississippi Supreme Court expounded on the responsibility of a circuit court in workers'

compensation appeals:

It is not the role of the circuit courts to determine where the preponderance of the evidence lies, when the evidence is conflicting, given that it is presumed that the Commission as trier of fact has previously determined which evidence is credible and which evidence is not. This highly deferential standard of review essentially means that this Court and circuit courts will not overturn a Commission decision unless said decision was arbitrary and capricious. . . . **[C]aselaw from this Court indicates that it is only in rather extraordinary cases that a circuit court should reverse the findings of the Commission.**

Hill, 687 So. 2d at 1225 (citations omitted) (emphasis added). A Commission decision may not be overturned unless it is clearly erroneous, manifestly wrong and contrary to the overwhelming weight of the evidence. *See, e.g., Nettles v. Gulf City Fisheries, Inc.*, 629 So. 2d 554, 557 (Miss. 1993) and *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 165 (Miss. 1991). As the trier of fact, the Full Commission is the judge of the credibility of all witnesses. *Miller Transporters, Inc. v. Guthrie*, 554 So. 2d 917, 918 (Miss. 1989) (citations omitted).

Consequently, the role of the Circuit Court of Marshall County as an appellate court should have been limited. Since Claimant was not alleging that the full Commission Order contains an error of law, the circuit court should have used the arbitrary and capricious standard in reviewing the factual findings from which Claimant is appealing. *See Walker Mfg. Co. V. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991). The supported factual finding of the Commission should have been upheld, despite the disagreement with the factual conclusions of the Commission. *See Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (Miss. 1994).

B. The Mississippi Workers' Compensation Commission correctly determined that Employer and Carrier are providing reasonable compensation for nursing care provided by James and Nettie Wiseman.

Since this Court issued its ruling on the earlier appeal in this matter, Employer and Carrier

have in all ways complied with the prior affirmed Full Commission Order and have not in any way resisted their statutory obligation to provide medical care in this matter. This medical care includes paying for sixteen hours a day of unskilled nursing care provided by Claimant's mother. A line of cases cited by the Mississippi Supreme Court and by this Court clearly establish that a claimant's spouse can provide nursing care and be compensated by the Carrier for this nursing care. While this case involves Claimant's mother, Employer and Carrier have never made an issue of this fact, as the rationale set out in the relevant cases would apply to a claimant's mother just as it would apply to the spouse of a claimant.

The Mississippi Supreme Court first considered the issue of home care provided by a spouse in the case of *Graham v. City of Kosciusko*, 339 So. 2d 60 (Miss. 1976).¹ In *Graham I*, the claimant was rendered a paraplegic after he suffered an industrial accident while working as an electrical lineman for the City of Kosciusko. *Graham*, 339 So. 2d at 61. Claimant's accident occurred in 1964. In 1972, claimant's attorney made a request that the carrier provide payment for nursing services being rendered by the wife of the claimant. *Id.* This request made in 1972 was prospective only, not covering the period of 1964 through 1972. *Id.* On June 19, 1972, after the carrier failed to pay for the nursing services, claimant filed a Petition to Controvert requesting that the carrier be required to pay \$392.87 per month for nursing services provided by claimant's wife. *Id.* at 62. This amount was based on payment to claimant's wife for eight hours per day. *Id.* After hearing, the administrative judge ruled that claimant's wife is entitled to payment for nursing care for sixteen hours per day from 1964 to 1972 and eight hours per day thereafter. *Id.*

¹

This case will be referred to as "*Graham I*," since a second appeal was considered by the Mississippi Supreme Court in the same case.

The full Commission affirmed the order of the administrative judge but did remand the case for further findings regarding specific amounts which should be paid to claimant's wife for certain periods of time. After remand, the administrative judge issued an order making detailed findings as to the number of hours per day, an hourly rate for which claimant's wife was due reimbursement since claimant's date of injury. This order was again appealed and the full Commission affirmed the order. *Id.* at 63.

In considering the evidence, the Mississippi Supreme Court noted the differing opinions of several treating physicians as to the number of hours per day for which claimant would need treatment. *Id.* at 63-64. The Court further examined the testimony of fact witnesses and noted "her testimony and that of the Claimant hopelessly intermingled his special nursing needs with her general household duties of preparing meals, washing clothes, and cleaning the home." *Id.* at 64.

The Mississippi Supreme Court then examined the matter from a legal standpoint, noting that the question of payment to a wife for special nursing services rendered to a disabled husband was a matter of first impression in Mississippi. *Id.* The Court quoted with favor from a leading workers' compensation treatise:

Later cases, however, have permitted the charge, on the reasoning that the employer, by statute, has the affirmative duty of furnishing this kind of nursing service. If he has not done so, and if the wife then takes over these duties in addition to her regular household work and does exactly what a hired nurse would have had to do, the charge is proper.

Id., (quoting *Larson Workman's Compensation Law*, Section 61.13 (1976).

While the Mississippi Supreme Court adopted the principle that payment to a spouse for nursing services is proper, the Court held that the Full Commission improperly considered the question of nursing services provided from 1964 to 1972, since these nursing services were never addressed

in the initial Petition to Controvert. *Id.* at 65. The Court noted as follows:

Each case must be considered on its own merits; There is no standard solution for every case regardless of the facts. . .The defendants were never heard on their defenses of no notice, no request, no doctor's prescription, nor on their defenses of the several statutes of limitation . . . A full hearing should be afforded both sides. Required nursing services should be separated from general household duties and work that a wife ordinarily performs in and about the home and looking after and caring for her husband and children. There should be testimony from doctors as to how many hours per day would be required for special nursing services for the claimant from July 8, 1964 to February 23, 1972.

Id.

Four years later, in the case of *Babcock & Wilcox Co. and the Travelers Ins. Co. v. Smith*, 379 So.2d 538 (Miss. 1980), the Mississippi Supreme Court again addressed the issue of nursing care provided to a disabled claimant by the claimant's wife. In *Babcock*, the full Commission ruled that the claimant's wife was entitled to payment for nursing services for four hours per day for a specified period of time and two hours a day thereafter for claimant's life for home nursing services provided by claimant's wife. *Babcock*, 379 So. 2d at 539. The Mississippi Supreme Court held that this care provided for claimant, who was a paraplegic, was reasonable, and the Commission's finding was supported by substantial evidence. *Id.* The Court also held that the care provided by the claimant's wife did not have to be skilled nursing care: "we also think insignificant that fact that the assistance requested involves essentially non-technical tasks resembling those performed by orderlies or licensed practical nurses in hospitals." *Id.* Finally, the *Babcock* Court noted that claimant put on clear evidence that the medical care was requested in a timely fashion. *Id.*

In 1982, the Supreme Court considered the second appeal in the case of *City of Kosciusko*

and *United States Fidelity and Guaranty Co. v. Graham*, 119 So. 2d 1005 (Miss. 1982) (*Graham II*). In *Graham II*, the Mississippi Supreme Court considered issues which were raised following the remand of the initial case to the Mississippi Workers' Compensation Commission. Following remand, the administrative judge found that claimant's wife was entitled to be reimbursed for nursing services for eight hours per day from July 8, 1964 through February 23, 1972, and this finding was affirmed by the full Commission and the appropriate circuit court. *Id.* at 1006-1007. The Supreme Court rejected the employer and carrier's argument that claimant had not made a timely request for the nursing services, as required by Miss. Code Ann. § 71-3-15(1). The Court ruled that the evidence was uncontested that claimant had discussed with a representative of U.S.F. & G. the issue of reimbursement for home nursing services immediately following claimant's discharge from the hospital in October of 1964. *Id.* at 1007. With regard to nursing services, the Mississippi Supreme Court further considered the issue of whether the award of the Commission was excessive. The Court held that the Commission's award for eight hours a day for nursing services was supported by the testimony from the treating physician. *Id.* at 1009. Claimant's wife had asserted that she spent fourteen to fifteen hours a day providing nursing services for her husband. *Id.* The Court further affirmed the rate of compensation found reasonable by the Commission and held that all of the Commission's findings were supported by substantial evidence. *Id.*

In *Mississippi Transp. Comm'n v. Dewease*, 691 So.2d 1007 (Miss. 1997), the Mississippi Supreme Court considered an appeal by an employer and carrier regarding the reasonableness and necessity of compensation awarded to that claimant's wife for home nursing services. In that case, the claimant sustained an injury and subsequently suffered a stroke apparently stemming from his

original injury. *Dewease*, 691 So. 2d at 1009. The claimant was rendered paralyzed and his speech was limited following the stroke. *Id.* Following the claimant's injury, a representative of the employer and carrier met with claimant and his wife, and it was initially agreed that the claimant's wife would be compensated for four hours per day of home nursing care. *Id.* at 1010. The claimant's wife's testimony at the hearing on the merits was that she actually provided nursing care for fifteen hours per day to her husband between 1982 and 1988, when Mr. Dewease was ultimately placed in a nursing home. *Id.*

In 1991, Dewease's attorneys filed a Petition to Controvert claiming among other things that payment was due to Mrs. Dewease for nursing services provided since August 7, 1974. The administrative judge ultimately determined that Mrs. Dewease was due to be paid for sixteen hours per day for nursing services from date of injury in 1974 until the date in 1988 when claimant was admitted to a nursing home. *Id.* at 1011. The employer appealed this finding, and the commission ultimately affirmed the administrative Judge's order. *Id.* The Mississippi Supreme Court ruled that the full Commission's Order was not supported by substantial evidence. The Court noted that:

The ALJ found that Mrs. Dewease was providing her husband with sixteen hours a day of nursing care despite her testimony that she spent fifteen hours a day taking care of him. That included the five or six hours a day she spent going out to eat, sight-seeing and visiting friends with him. The ALJ's findings further do not appear to have separated that part of Mrs. Dewease's duties which could be considered general household duties, such as laundry and fixing meals, from actual nursing care.

Id. at 1013. The Court further noted that "the record does not support the finding that Mrs. Dewease spent sixteen hours a day providing 'nursing care' for her husband separate and apart from her ordinary household duties between 1982 and 1988." *Id.*

This Court addressed the issue of nursing care in the case of *Port Gibson Oil Works v. Estate of Hughes*, 823 So. 2d 613 (Miss. App. 2002). This case involved nursing care provided by a spouse to a claimant who sustained a work injury which resulted in the loss of the claimant's left leg. *Hughes*, 823 So. 2d at 613. In *Hughes*, the Commission determined that claimant's spouse was entitled to payment for four hours a day for nursing services provided to her husband, based on the evidence presented. *Id.* at 614. In addressing the employer and carrier's challenge to the Commission finding, this Court provided a comprehensive discussion of the law in Mississippi on payments made to the spouse of a claimant for nursing care. This Court ultimately determined that the finding of the Commission, as to the number of hours and hourly rate for which claimant's wife was to be reimbursed, was supported by substantial evidence. *Id.* at 617.

These cases highlight two primary points which are relevant to the case at hand. First, the determination of what is reasonable with regard to home nursing care is a fact specific inquiry. Second, a relative of a disabled claimant can only be compensated for actual nursing services provided, though these nursing services can be skilled or unskilled.

Given the guidelines set out in the cases discussed above, the succinct question in this matter is whether the Commission's determination, that Claimant's mother and step-father were entitled to payment for sixteen hours a day rather than twenty-four hours a day, is supported by substantial evidence. Clearly, it is. The following facts are not contested. First, Claimant's mother and step-father sleep simultaneously during the night. This fact, in and of itself, establishes that Claimant's mother and step-father are not providing nursing services twenty-four hours a day. There is not one case in Mississippi that even suggests that sleeping would qualify as the provision of nursing services. Second, an actual nurse visits claimant for an hour per day.

Of course, Claimant's relatives would not be entitled to reimbursement for supposed nursing services provided during this time. Third, the testimony of Claimant's mother and Claimant's step-father indicates that many of the services they perform are actually general household duties rather than required nursing services. Fourth, Claimant's mother testified that she and her husband often take claimant with them to visit friends and relatives and go to church. The case of *Mississippi Transp. Comm'n v. Dewease*, 691 So.2d 1007, 1013 (Miss. 1997) specifically indicated that these type of activities did not constitute required nursing services.

Given the uncontested proof regarding Claimant's mother and step-father sleeping simultaneously and the proof regarding the performing of general household duties as opposed to required nursing services, if the Commission had ruled that Claimant was receiving twenty-four hours a day nursing care from his mother and step-father, this determination would not be supported by substantial evidence. The circuit court made no effort to address the specific facts of this case or explain how it arrived at its determination that Claimant's mother and step-father actually provide 24-hours a day of care, given the uncontested proof to the contrary. Not only did the circuit court in this case improperly substitute its judgment for the judgment of the full Commission, but there were insufficient facts in the record to support this reweighing of the evidence, even if it had been in the province of the circuit court to reweigh the evidence.

Mr. and Mrs. Wiseman are currently being paid for nursing services sixteen hours per day. Given the Wisemans' testimony that an actual nurse is present for at least one hour per day, the Wisemans sleep during the night, and the Wisemans spend a significant portion of their time performing general household duties, payment to the Wisemans for nursing services for sixteen hours per day is more than sufficient, in light of the proof presented.

C. Claimant has failed to follow Commission procedure and has failed to abide by past Commission rulings with regard to the issues presently on appeal.

The issue of nursing care was addressed twice by the Full Commission. On March 13, 2000, Claimant filed a Motion for Sum Certain Judgment. One of the requests contained in this motion was that Employer and Carrier be required to provide claimant with nursing care for 24 hours a day. Employer and Carrier responded to this aspect of Claimant's Motion for Sum Certain Judgment by pointing out that, in order for this matter to be resolved, it would be necessary to convene a hearing on the merits before an administrative judge and for each party to have the opportunity to present relevant proof. In its Order of May 10, 2000, the full Commission agreed with Employer and Carrier's position and held that an evidentiary hearing was necessary for this matter to be resolved, and as a result, Claimant's motion was denied at that time.

Claimant did nothing else in this matter for over two years until the motion presently at issue was filed. Claimant's counsel set this motion for a regularly scheduled motion day in Batesville, Mississippi. Claimant's counsel contacted the Administrative Judge's court reporter to request her presence at the hearing but did not notify defense counsel that a court reporter would be present at the hearing. Further, Claimant's counsel did not notify defense counsel that witnesses would be testifying at the hearing or that documents would be presented at the hearing. No discovery was conducted, and Claimant did not file a Prehearing Statement, which would have included a list of proposed exhibits and the names of all anticipated fact and expert witnesses. Claimant ultimately presented the testimony of an expert witness, who was not properly designated prior to the hearing. Counsel for Employer and Carrier did not have an opportunity to prepare for the evidentiary hearing.

Rules 2 through 7 of the Procedural Rules of the Mississippi Workers' Compensation

Commission require that, in order to controvert an issue, a claimant must file a Petition to Controvert, and the employer and carrier must then file an Answer. After discovery takes place, the parties are required to file Prehearing Statements with specified information included, and only then can an evidentiary hearing on the merits take place. In *Graham I*, the Mississippi Supreme Court held that, in order to properly raise the issue of home nursing care, the claimant should have filed a petition, employer and carrier should have been given the opportunity to raise all defenses, and “[a] full hearing should be afforded both sides”. *Graham I*, 339 So.2d at 65.

The administrative judge and the Commission correctly determined that Claimant did not comply with the full Commission’s prior order and did not follow proper procedure in setting up an evidentiary hearing on the record. Nonetheless, the administrative judge and the full Commission determined that Claimant had the opportunity to fully present all testimony and evidence which Claimant desired to present, but Claimant had failed to prove entitlement to relief on any of the three issues raised, and the full Commission affirmed this order. Employer and Carrier concur with the administrative judge and the full Commission that Claimant failed to make out a *prima facie* case for relief. Employer and Carrier did not object to full Commission proceedings taking place to consider the administrative judge’s order. However, it was and is Employer and Carrier’s position that the circuit court had two options to conclude the current appeal. First, the circuit court could have affirmed the order of the full Commission, as Claimant had the opportunity to present all testimony and proof which Claimant desired to present. Second, should the circuit court have decided not to affirm the full Commission’s order, due process rights required that this matter be remanded back to the Commission and ultimately to the administrative judge in order for discovery to take place and so that a hearing on the merits could be convened

to properly consider the issues which have been raised.


IV. Conclusion

Employer and Carrier respectfully request that the Mississippi Court of Appeals reverse the circuit court's order and reinstate the order of the Mississippi Workers' Compensation Commission.

Respectfully submitted,

HURDLE & SON AND MISSISSIPPI
CASUALTY INSURANCE COMPANY,
EMPLOYER AND CARRIER

BY: 
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CERTIFICATE OF SERVICE

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I have this day mailed a true and correct copy of the above and foregoing pleading to:

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THIS, the 29th day of MAY, 2007.



J. KEITH PEARSON