

IN THE SUPREME COURT OF MISSISSIPPI

GOOLSBY TRUCKING COMPANY, INC.

EMPLOYER/ APPELLANT

V.

CAUSE NO. CV06-273-GA

THERESA ALEXANDER

CLAIMANT/APPELLEE

BRIEF OF THE APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF ALCORN COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

KEITH S. CARLTON
WOOD & CARLTON, P.C.
ATTORNEYS AT LAW
P.O. BOX 1415
CORINTH, MS 38835-1415
662-287-8037
MS. BAR NO. [REDACTED]
ATTORNEY FOR APPELLEE

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 Judges/Justices of this Court may evaluate possible disqualification or recusal.

1. Theresa Alexander: Employee, Appellee
2. Goolsby Trucking Company, Inc.: Employer, Appellant
3. Keith S. Carlton, Esquire: Attorney for Appellee
4. Joe M. Davis, Esquire: Attorney for Appellant



KEITH S. CARLTON
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

Certificate of Interested Persons.....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
Statement of the Issues.....	1
Statement of the Case.....	2
Summary of the Argument.....	13
Argument.....	17
 I. SUBSTANTIAL EVIDENCE SUPPORTS THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT ALEXANDER HAS SUSTAINED A 70% LOSS OF WAGE EARNING CAPACITY.....	 17
 II. GOOLSBY TRUCKING COMPANY WAS ALEXANDER'S EMPLOYER AT THE TIME OF THIS WORK INCIDENT.....	 23
Conclusion.....	28
Certificate of Service.....	29

TABLE OF AUTHORITIES

CASES:

	PAGE
<i>Coulter v. Harvey</i> , 190 So.2d 894 (Miss.1966).....	19
<i>Delaughter v. South Central Tractor Parts</i> , 642 So.2d 375 (Miss.1994).....	19
<i>Georgia Pacific Corp. v. Taplin</i> , 586 So.2d 823 (Miss.1991).....	17, 19
<i>Liberty Mutual Insurance Co. v. Holliman</i> , 765 So.2d 564 (Miss.Ct.App. 2000).....	13
<i>Martin v. L & A Contracting Company</i> , 162 So.2d 870 (Miss.1964).....	24
<i>Metal Trims Industries, Inc. v. Stovall</i> , 562 So.2d 1293 (Miss.1990).....	17
<i>Natchez Equipment Co., Inc. v. Gibbs</i> , 623 So.2d 270 (Miss.1993).....	17
<i>Public Employees' Retirement System v. Marquez</i> , 774 So.2d 421 (Miss.2000).....	13
<i>Reading & Bates, Inc. v. Whittington</i> , 208 So.2d 437 (Miss.1968).....	27
<i>Richards v. Harrah's Entertainment, Inc.</i> , 881 So.2d 329 (Miss.Ct.App.2004).....	19
<i>Vance v. Twin River Homes, Inc.</i> , 641 So.2d 1176 (Miss.1994).....	13, 17
<i>Weatherspoon v. Croft Metals, Inc.</i> , 853 So.2d 776 (Miss.2003).....	13

STATUTES:

Miss. Code Ann. Section 71-3-3(i) (Supp.2002).....	19
--	----

OTHER:

Dunn, Vardeman S., <i>Mississippi Workers' Compensation</i> (3 rd Edition, 1982).....	19, 26, 27
--	------------

STATEMENT OF THE ISSUES

I. SUBSTANTIAL EVIDENCE SUPPORTS THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT ALEXANDER HAS SUSTAINED A 70% LOSS OF WAGE EARNING CAPACITY.....18

II. GOOLSBY TRUCKING COMPANY WAS ALEXANDER'S EMPLOYER AT THE TIME OF THIS WORK INCIDENT.....24

STATEMENT OF THE CASE

This is a Workers' Compensation Appeal filed by the Employer, Goolsby Trucking Company, Inc. ("Goolsby") seeking relief from an Order dated November 10, 2006, entered by the Circuit Court of Alcorn County, Mississippi, affirming the prior decision of the Mississippi Workers' Compensation Commission ("the Commission"). [Goolsby Rule 30 Record Excerpts, hereafter "G.R.E.", at 20]

The June 13, 2006, Full Commission Order affirmed and adopted the prior "Order of the Administrative Judge" dated November 15, 2005, [G.R.E. at 5-16], finding that Claimant/Appellee, Theresa Alexander, had sustained a 70% loss of wage earning capacity as a result of a work related injury while employed with Goolsby, and was therefore entitled to permanent disability benefits in the amount of \$331.06 per week for a period of 450 weeks. [G.R.E. at 2]

UNDERLYING FACTS AND CLAIMANT'S TESTIMONY

The Commission's decision is based on the underlying facts which are contained in the Trial Record in this case (hereafter "T.R."): Theresa Alexander was a 42-year-old African American female who had grown up and gone to school in Corinth, Mississippi. She was a single mother who had two (2) children residing in her home. After completing high school in 1981, Alexander had attended both Northeast Mississippi Junior College and the University of North Alabama where she earned approximately 70 hours of college credit but did not complete any degree. Her first employment occurred while she was attending Junior College, when she worked part time as a dispatcher for both the Corinth Police Department and the Alcorn County Sheriff's Department. After approximately two (2) years, she left the work force due to her pregnancies and the need to attend to her children. [G.R.E. at 23-25]

In 1990, Alexander completed a six-week training course which allowed her to obtain a commercial truck driver's license. She immediately went to work as an over-the-road truck driver working for various employers in the southeast. [G.R.E. at 6, 26-27] She worked exclusively at the occupation for nearly 15 years.

In May 2002, Alexander sought employment with Goolsby Trucking Company, a local trucking company, located in New Albany, Mississippi. The Record establishes that on May 5, 2002, Alexander traveled to New Albany, Mississippi, to meet Lee Edwin Goolsby, Jr. ("Sport Goolsby") and filled out an application to go to work for Goolsby Trucking Company. [G.R.E at 7, T.R. at 22-24] (*See, Exhibit 6, Application, T.R. at 245-246; Alexander Rule 30(b) Record Excerpts, hereafter "A.R.E.", at 1-2.*)

Alexander described the employment/interview process and the documents she signed in order to become an employee with Goolsby Trucking Company. [T.R. at 22-28] The Record contains a copy of the employment application as well as other documents prepared by Goolsby which confirm that Alexander was hired by Goolsby. The application was signed by Theresa Alexander and approved by Pam Goolsby Walker on behalf of Goolsby Trucking Company. Exhibit 7 is an investigation report prepared by Pam Walker, secretary for Goolsby Trucking Company. On the third page of Exhibit 7, under the "Certificate of Review," Lee Goolsby verified that he had reviewed Theresa Alexander's driving record on May 6, 2002, and certified on behalf of Goolsby Trucking Company that Theresa Alexander was eligible and met the minimum requirements for safe driving as an over-the-road truck driver. [A.R.E. at 3-5, T.R. at 248-250] (*Each of these documents reflects that Alexander was applying for work with Goolsby Trucking Company*).

After reviewing Alexander's application, investigating her former work, and certifying that she met

the minimum requirements necessary to become an over-the-road truck driver, Alexander was hired by Goolsby and began work in May 2002. [G.R.E. at 7; T.R. at 24-25] Alexander was to be paid 23 cents (\$.23) per mile for each mile that she drove. *The Parties stipulated that, under this arrangement, Alexander earned wages between May 2002 and March 2003 so as to produce an average weekly wage of \$920.00 per week.* [G.R.E. at 5, ¶ 2]

Alexander worked for Goolsby as an over-the-road truck driver, without consequence from May of 2002 until March 31, 2003. Her job duties required her to haul loads of furniture all over the country and to assist with the unloading. Alexander explained that most of her loads were “driver assist”, which meant that she was responsible for helping to unload the furniture that she delivered. The physical requirements, along with the driving, required her regularly to lift between 75 - 100 pounds and spend her nights sleeping in the truck while she was on the road. [G.R.E. at 7; T.R. at 27-31]

Alexander explained that she was paid in two (2) separate checks each week after she turned in her miles. One of the checks came from Goolsby and the other came from an entity named Fleet Force. [G.R.E. at 28-32] Alexander explained she never questioned the situation, but she had assumed that Fleet Force was simply handling part of Goolsby’s payroll. [G.R.E. at 7, 9, 30] (*The Record is clear that Alexander never had any contact or received any instructions from any representative of Fleet Force prior to her injury in March 2003.*) [G.R.E. at 7-8, 11, 33]

At the Hearing in this case, Alexander confirmed that all of her instructions, all of her duties and all of her business affairs were handled and directed by Goolsby Trucking Company. [G.R.E. at 7-8, 33] Alexander also produced Exhibits 11, 13 and 14 which are payroll checks and Federal W-2 wage forms issued by Goolsby Trucking Company verifying that Goolsby Trucking had paid her employment wages

in 2002 and in 2003. [A.R.E. at 9-12; T.R. at 263-264, 268, 270]

THE INJURY

On March 31, 2003, Alexander was dispatched to Corinth, Mississippi, by Goolsby representatives, to drop off a trailer at the Corinthian Furniture Company before leaving for the Carolinas. After entering the premises of Corinthian Furniture and exiting her vehicle to speak to the security guard, Alexander explained that she injured her back when she slipped and fell on a slick surface in the parking lot while walking to the trailer. [G.R.E. at 8, 33-34] The incident was witnessed by the security guard.

Rather than seeking medical treatment at that time, Alexander explained that she tried to "shake it off". She simply changed her muddy clothes, got back up in the truck and proceeded to finish her run. However, while on this trip to the Carolinas and New Jersey, her symptoms began to increase. She began to have numbness in her leg and pain into her back. [G.R.E. at 8, 34-35] She notified her supervisor, Sport Goolsby, of the injury and visited the local Emergency Room in Corinth, Mississippi, as soon as she could get home. She explained that the Emergency Room physician advised her to follow up with her family doctor, Paula Stennett, in Corinth, Mississippi. She was then treated and examined by Dr. Stennett. Dr. Stennett ordered an MRI, and then referred her to a spine specialist, Dr. Glenn Crosby, a neurosurgeon in Memphis, Tennessee. [G.R.E. at 8, 35-36]

Alexander explained that she saw Dr. Crosby on one (1) occasion, at which time he reviewed her MRI scans and ordered physical therapy. Although, Dr. Crosby requested that she follow up with him after her therapy, this did not take place. [T.R. at 41-42; G.R.E. at 8]

THE DISPUTE

While Alexander was off work under Dr. Stennett and Dr. Crosby's care, a dispute arose. After

seeing Dr. Crosby, Alexander explained that she was contacted by a Teresa Dill who identified herself as a representative for Fleet Force. Teresa Dill indicated that she would be handling her workers' compensation injury and she sent Alexander a workers' compensation TTD check in the amount of \$110.00. Upon receipt of the check and believing Fleet to be her workers' compensation carrier, Alexander contacted Teresa Dill to find out why her workers' compensation TTD checks were only \$110.00, since her regular wages were nearly \$1,000.00 per week. Alexander subsequently learned during her conversations with Teresa Dill that Goolsby had only reported part of her income to Fleet Force. Thereafter, Alexander furnished Teresa Dill with copies of all her checks from Goolsby, in hopes that she would be paid the correct workers' compensation TTD benefits. Alexander testified that when she furnished this information to Teresa Dill, Ms. Dill then advised her that Fleet would no longer provide any workers' compensation benefits due to the fact that Fleet Force believed that Goolsby had misrepresented her wages. [G.R.E. at 8; T.R. at 40-42]

As a result of this dispute, Alexander was not allowed to return to Dr. Crosby for further treatment and was not allowed to complete the therapy that he ordered in June 2003. At this point, Alexander testified that she felt forced to return to work even though she had not finished her treatment. [T.R. at 43] Alexander returned to work for Goolsby in late June 2003 and attempted to continue her over-the-road duties. Upon returning to work, Alexander notified her supervisor, Sport Goolsby, that she was having ongoing problems with her back. She requested to haul only the loads where unloading furniture would not be required. Alexander testified that Goolsby initially provided her with some "no touch" runs to Joppa, Maryland, but in August 2003 Sport Goolsby told her "that he was running out of places for her to go." Alexander explained that she understood this to mean that, if she couldn't unload the furniture anymore,

it was time for her to leave. [T.R. at 43]

Due to the ongoing problems from her injury and the inability to handle the trips where unloading was required, Alexander left employment with Goolsby in August 2003. [G.R.E. at 37] However, rather than giving up, Alexander decided to purchase a trailer and leased a truck for herself with the idea of working on her own. She felt that if she could work for herself as an Independent Contractor, where she could avoid the long runs and the weight lifting required by the Goolsby job, she could continue trucking. [G.R.E. at 37]

Alexander testified that she worked for herself on and off from September 2003 up through May 2004 as an Independent Contractor. However, her condition continued to worsen and it got to the point where it was unbearable. [T.R. at 44-45] In July of 2004 Alexander finally made arrangements to see Dr. James O'Brien, an orthopaedic specialist in Alabama, who had previously treated her in 2001. Dr. O'Brien examined her, obtained additional diagnostic studies and concluded that Alexander had disc protrusions at three (3) levels in her thoracic spine. He explained that there was little surgical help for this problem, except a major spinal fusion, which he advised against. His recommendations were restricting her activities and ceasing work as a truck driver since he felt that her ongoing work was contributing to the worsening of her condition . [T.R. at 45-46; G.R.E. at 61]

Based on Dr. O'Brien's medical assessment and recommendations, Ms. Alexander sold her truck and trailer and began looking for light duty work. [G.R.E. at 38] She testified to numerous places where she sought light duty type employment. These included Wal-Mart, Goodys, K-Mart, Tecumseh Products, Timber Products, J.C. Penney's, Kimberly Clark Corporation, Dollar General, Dade Corners Travel Plot, Sears Optical, Marriott Suites, as well as Advantage Mortgage Broker School. [G.R.E. at 9; T.R. at 48-

50] Alexander also enrolled in a course in Mortgage Origination in order to obtain a Mortgage Brokerage license. She explained that her idea was, hopefully, to someday relocate to an area where she could work in a position that was more light duty so as to avoid any more strain on her back. As of the time of the hearing, Alexander had been unsuccessful in obtaining new employment, except she had been able to register her license with Friendly Financial Services in Florida. While this was not a formal job offer, she would now be able to originate loans, if she could move to Florida and locate potential clients. [G.R.E. at 9, 38-39; T.R. at 46-47, 49-50]

PHYSICAL LIMITATIONS

Alexander testified that she continued to suffer from her back injury. She explained that she had a constant coldness running down her spine and pressure in the middle and center of her back. She suffered from leg numbness, and most physical activities aggravated her back and made her condition worse. Walking, standing and bending caused her condition to worsen and she could no longer sleep well at night without getting into certain positions. She had continued to need treatment from her family doctor, who had prescribed medications such as Flexeril, Valium and Lortab, which she took daily in order to deal with her back pain. [T.R. at 50-51]

Alexander also testified that she wanted to work and felt that, if she could obtain some kind of light duty type position, she could possibly manage her back pain in such a situation. [G.R.E. at 9; T.R. at 50] The Record establishes that she can no longer lift heavy objects or sit in a truck 8 - 10 hours a day as required for a truck driving position. She did explain that she was a "fighter" and she did not plan to give up. [T.R. at 52-54] However, she had been unable to secure a full time job that was producing any income. In fact she had earned no wages since 2004. Alexander acknowledged that she hoped someday

to be able to work as a Mortgage Broker in Florida, but she explained that any income she would make would solely be on a commission basis and, at this point, she had not originated any loans and did not necessarily have any prospects at the present time. She explained that she had lived on child support and through the help of her parents. [T.R. at 54]

The only other live witness was Lee Edwin Goolsby, Jr. (Sport Goolsby), who testified on behalf of Goolsby Trucking Company. Sport Goolsby testified that he was the general manager for Goolsby Trucking Company. Sport Goolsby attempted to persuade the Administrative Judge that Goolsby had "leased" its employees from an Alabama company named Fleet Force and therefore Alexander was not Goolsby's employee. Goolsby explained that his company felt that it was cheaper to lease employees from Fleet Force than to hire them himself. He indicated that "this arrangement" had been in practice for approximately 13 years when his father had been running the company. [T.R. at 64-65]

Sport Goolsby offered into evidence a "Service Agreement", (Exhibit 4), which attempts to specify an agreement between Fleet Force, Inc. and Sport Goolsby Trucking, wherein Fleet Force agreed to lease certain employees to Sport Goolsby Trucking. [G.R.E. at 14; T.R. at 14, 224-231] This Agreement reflects that it was signed on July 2, 2003. Sport Goolsby acknowledged that Exhibit 4 was signed after Alexander was hired, but he testified that "this [July 2, 2003] agreement" was similar to the arrangement that he felt was in place when Ms. Alexander was hired. [T.R. at 70, 77] He further acknowledged that "Goolsby Trucking Company" and "Sport Goolsby Trucking" were two different companies. [T.R. at 79] (*Neither Sport Goolsby nor anyone else from Goolsby Trucking Company offered into evidence any type of "Service Agreement" between Fleet Force and Goolsby Trucking Company which would have covered Theresa Alexander's employment.*)

EMPLOYER ADMISSIONS

Sport Goolsby also admitted that Alexander was paid wages by Goolsby Trucking Company. [T.R. at 65-66] He acknowledged that Pam Walker, his sister, took care of the benefits for Goolsby Trucking Company. [T.R. at 68] He explained that Goolsby Trucking Company did not have any workers' compensation insurance. [T.R. at 66] On cross examination, Sport Goolsby acknowledged that Theresa Alexander filled out an application to work for "Goolsby Trucking Company." [T.R. at 71] He acknowledged that the application does not mention anything about employment with Fleet Force. [T.R. at 71, 72] He acknowledged that Exhibit 7 was an "Investigation" into Alexander's previous employment which was performed by Goolsby Trucking Company. [A.R.E. at 3-5; T.R. at 71-72] He also acknowledged that Theresa Alexander came to New Albany, Mississippi, and filled out a Goolsby Trucking Company Employment Application. He acknowledged that Goolsby was operating a business in New Albany, Mississippi; that the Claimant lived in Corinth, Mississippi at the time of her hire; and that she was regularly dispatched from New Albany, Mississippi, by Goolsby personnel. Sport Goolsby agreed that Alexander received all directions regarding work from Goolsby Trucking Company and that Fleet Force did not call her or direct her in any manner regarding the work that she would perform. [A.R.E. at 13-16; T.R. at 72-74] He further acknowledged that Fleet Force's only involvement was to send Alexander a certain portion of her payroll checks based upon the information that Goolsby provided to Fleet Force. [A.R.E. at 15; T.R. at 73] He acknowledged that Goolsby Trucking Company sent Federal W-2 forms to Theresa Alexander, verifying that she had worked for Goolsby in the year of 2002 and 2003, and that income taxes were withheld by Goolsby on her account. [A.R.E. at 16, 23-24; T.R. at 74] Exhibits 13 and 14 were entered into evidence verifying the W-2 wages. [A.R.E. at 11-12; T.R. at 268,

On cross examination, Sport Goolsby further conceded that Exhibit 4, the "Service Agreement" that was entered into evidence, was not in effect at the time that Theresa Alexander was hired. [A.R.E. at 19; T.R. at 77] Goolsby also acknowledged that in the summer of 2003 he was aware that Ms. Alexander was having ongoing problems with her back, but he felt he had tried to accommodate her. He acknowledged there were a limited number of places where she could haul loads that did not require operator assistance. [A.R.E. at 21; T.R. at 79] He acknowledged that he hired employees in 2000, 2001 and 2002 for Goolsby Trucking Company. Finally, Sport Goolsby admitted that he did not have any document or other evidence which showed that Theresa Alexander was ever a leased employee from Fleet Force. [A.R.E. at 22; T.R. at 80] *Based on Goolsby's own admissions, there is un-refuted evidence that Goolsby was Alexander's employer.*

MEDICAL EVIDENCE

The Trial Record also contains the medical deposition of Dr. James O'Brien, an orthopaedic surgeon in Athens, Alabama. Dr. O'Brien's testimony demonstrates that he had seen Theresa Alexander on two (2) occasions. He had previously treated her in 2001 for a lower back injury. [G.R.E. at 59-60] He later saw her again in 2004 for the work injury sustained while working for Goolsby Trucking Company. Dr. O'Brien's history confirmed that Alexander had suffered back and leg pain since she had fallen in March of 2003. Dr. O'Brien explained that he had reviewed her MRI's and diagnostic studies from both 2001 and 2003 and that in his opinion her present problems were solely related to the work injury at Goolsby Trucking Company since her studies showed the new changes in her spine. Dr. O'Brien explained that there had been a significant change in her condition after he had seen her in 2001, due to the

fact that her MRI of the thoracic spine in 2001 had been normal. However, the MRI performed in 2003 after the work incident at Goolsby showed three (3) new disc protrusions in the thoracic spine. Dr. O'Brien indicated that the fall in March of 2003 was the cause of the disc injury in Alexander's thoracic spine. [G.R.E. at 66-69]

Dr. O'Brien indicated that he did not believe that much could be done to help Alexander's condition. He was not in favor of any invasive medical treatment given the multiple levels of involvement in her spine. He discussed the possibility of epidural steroid injections and other conservative treatment, but his recommendations were for Alexander to change her job and abide by various restrictions such as no stooping, lifting and bending, in hopes of dealing with her condition. [G.R.E. at 68-70] Dr. O'Brien concluded that the Alexander reached maximum medical improvement approximately six (6) months after her injury of March 31, 2003. [G.R.E. at 70-71] It was Dr. O'Brien's opinion that she had a 10% impairment rating to the whole person as a result of the March 31, 2003, incident. [G.R.E. at 71] Dr. O'Brien testified that Alexander was not able to return to work as a truck driver and he was not optimistic about her ability to return to any work. [G.R.E. at 73-74, 79] He opined that she might possibly be able to return to some type of sedentary type work. [G.R.E. at 74] When asked specifically to define the limitations and restrictions, Dr. O'Brien indicated that she should not lift more than 20 pounds with no repetitive lifting. He indicated that she should not be doing any climbing and she would be limited to 10 pounds of pushing and pulling and that certain activities such as sitting would likely aggravate her condition. [G.R.E. at 76-78] *Dr. O'Brien's opinions were never disputed.*

SUMMARY OF THE ARGUMENT

The standard of review for an Appeal from a decision of the Mississippi Workers' Compensation Commission is very limited. *Weatherspoon v. Croft Metals, Inc.*, 853 So.2d 776, 778 (Miss.2003). The Mississippi Supreme Court has dictated "that the findings and Order of the Workers' Compensation Commission are binding on the Courts as long as they are 'supported by substantial evidence.'" *Liberty Mutual Insurance Co. v. Holliman*, 765 So.2d 564, 567-8 (Miss.Ct.App.2000)(Quoting *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss.1994)) The Commission's Order will only be reversed "if the Court finds that the Order was clearly erroneous and contrary to the overwhelming weight of the evidence." *Id* at 568. While this Court may review the findings of fact of the Commission, it is not entitled to re-weigh the facts or substitute its own judgment for that of the Commission. *Public Employees' Retirement System v. Marquez*, 774 So.2d 421, 425 (Miss.2000) As in this case, where the Commission does not present its own findings of fact, but rather affirms those made by the Administrative Judge, this Court looks to the findings of fact made by the Administrative Law Judge in order to determine whether there is substantial evidence to support them.

A review of the Administrative Judge's findings in this case reveals that there is substantial evidence to support her decision. Based upon the facts set forth in the Trial Record and the prevailing law in the State of Mississippi, there is simply no question that Theresa Alexander was an employee of Goolsby Trucking Company on the date of her injury. Furthermore, the medical and lay proof in the Record establish that the injury in question has caused Alexander to sustain a significant loss of wage-earning capacity. In fact, this Appeal raises no new issues which were not presented to the Commission or the Circuit Court. In short, Goolsby is simply asking this Court to substitute its judgment for that of the

Commission.

After reviewing the oral testimony of the Claimant and other witnesses, as well as the medical depositions and other exhibits entered into the Record, Administrative Judge Wilson entered an Order on November 15, 2005, concluding *inter alia* that Theresa Alexander had sustained a permanent physical injury as a result of the work incident on March 31, 2003, and that said injury had caused a 70% loss of wage-earning capacity. Judge Wilson also concluded that Goolsby Trucking was Alexander's statutory employer. [G.R.E. at 13-15, ¶'s 6, 8[b] and 8[a], respectively]

These conclusions were based on the fact that the Administrative Judge found Alexander to be a very credible witness who had previously displayed a strong work ethic. [G.R.E. at 13, ¶6] Alexander's principal vocation since 1990 had been that of a truck driver and Alexander was physically unable to return to her prior employment as a truck driver as a result of the March 31, 2003, injury to her back.

The Administrative Judge further found that Alexander had made reasonable and extensive efforts to find other employment. [G.R.E. at 13, ¶7] Her job search had failed to procure any significant gainful employment. Although Alexander had potentially secured a position to work as a mortgage originator in the State of Florida, the prospect of any income from such employment was so uncertain and insecure, that this potential job did not qualify as comparable employment according to the Administrative Judge. Furthermore, due to Alexander's financial restraints, she was unable to relocate her family to Florida to try to start this new job.

Based upon the nature and extent of Alexander's injury, as well as her work restrictions and her inability to return to her former employment, and considering her age, education, work history and her present geographic location, the Administrative Judge concluded that the Claimant had suffered a 70% loss

of wage-earning capacity as a result of the March 31, 2003, injury. The Administrative Judge ordered that the Claimant be paid permanent partial disability benefits in the amount of \$154.34 per week for 450 weeks. [G.R.E. at 14-15, ¶ 8 and Decision, ¶ 1] (This portion of the Order was amended on November 22, 2005, to reflect a typographical error as the Administrative Judge had intended for the Claimant to receive \$331.06 per week based on a 70% loss of wage-earning capacity. [G.R.E at 16]) .

After determining that Alexander had sustained a significant loss of wage-earning capacity, the Administrative Judge next addressed the question of whether Alexander was a Goolsby employee. Although Goolsby had argued that Alexander was employed by another company named Fleet Force, Judge Wilson concluded that Alexander was an employee of Goolsby Trucking Company. This decision is based on the fact that Goolsby had hired her; controlled her work; and paid her wages. In reaching this conclusion, Judge Wilson specifically noted that: 1) Alexander had completed an application for employment with Goolsby Trucking Company in New Albany, Mississippi; 2) she had met with Goolsby representatives for the interview; and 3) all documents reflecting any relationship between the parties referenced Goolsby Trucking Company as the Employer. [G.R.E. at 14, ¶ 8] Goolsby was therefore ordered to pay permanent partial disability benefits, together with penalties and interest, as well as providing medical services and supplies. [G.R.E. at 16]

Goolsby Trucking Company filed a Notice of Appeal to the Full Commission requesting a reversal of the Administrative Judge's decision. Before the Commission, Goolsby presented two (2) arguments in support of its petition for relief:

1. Goolsby argued that Theresa Alexander is not entitled to permanent partial disability benefits;
- and

2. Goolsby argued that, even if Theresa Alexander were entitled to disability benefits, the Administrative Judge erred in concluding that Goolsby was her employer.

Goolsby's appeal was thoroughly considered by the Mississippi Workers' Compensation Commission. The parties submitted extensive briefs. After reviewing the Record of the proceedings and considering the arguments of the parties, the Commission entered an Order dated June 13, 2006, affirming and adopting the Order and findings of the Administrative Judge in all respects. [G.R.E. at 2] This decision was later affirmed by the Circuit Court of Alcorn County by Order dated November 10, 2006. [G.R.E. at 20] Goolsby raises those same arguments in this appeal. Because the decision by the Administrative Judge/Commission is based on a factual determination regarding the extent of her injury and the nature of her employment, that decision should be affirmed since there is overwhelming evidence to support it.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT ALEXANDER HAS SUSTAINED A 70% LOSS OF WAGE EARNING CAPACITY.

The standard of review for Appeals from the decision of the Workers' Compensation Commission is well settled. "Absent an error of law, and if the decision of the Commission is based upon substantial evidence, the decision will be affirmed on appeal." *Metal Trims Industries, Inc. v. Stovall*, 562 So.2d 1293, 1296-7 (Miss.1990).

No court will reverse the Commission's decision so long as there is a "quantum of credible evidence" supporting the decision. *Id.* at 1297. This is the case even though the evidence might convince this Court otherwise if it were the finder of fact. *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss.1994).

"This highly deferential standard of review essentially means that a Court will not overturn a Commission decision unless the court finds that the Commission's decision was arbitrary and capricious." *Georgia Pacific Corp. v. Taplin*, 586 So.2d 823, 826 (Miss.1991). A court clearly commits error if it supplants its judgment for that of the Commission. *Natchez Equipment Co., Inc. v. Gibbs*, 623 So.2d 270, 274 (Miss.1993).

A review of the undisputed facts in this Record clearly shows that there is substantial evidence to support the finding by the Commission that Alexander had sustained, at the very least, a 70% loss of wage-earning capacity as a result of this work incident. It is undisputed that Alexander has devoted most of her work life to being a truck driver. It is undisputed that as a result of the work injury in March of 2003,

Alexander now has pain and limitations which affect her ability to function and which prevent her from returning to her former employment of nearly 15 years. The undisputed medical proof clearly establishes that the work incident in March 2003 caused her to sustain three (3) disc protrusions in her thoracic spine. Dr. O'Brien's testimony confirms that these disks were normal in 2001 and were severely injured in the March 2003 incident.

The Record displays, as the Administrative Judge concluded, that Alexander has a strong work ethic and is a single mother who has suffered financially and who still has significant pain as a result of this injury. In this case, Alexander was not allowed to complete the medical treatment recommended by Dr. Crosby, and her condition continued to deteriorate when she attempted to return to work to take care of her family. Although she attempted to continue her career for nearly a year prior to seeing Dr. O'Brien, Alexander was subsequently advised to cease work as a truck driver. The inability to return to this type of work has drastically impacted Ms Alexander's capacity to earn a living.

When she was advised by Dr. O'Brien that she could no longer return to driving a truck, Alexander began to extensively search for light duty employment at various employers in her local geographical area. Unfortunately, she was unsuccessful in obtaining any light duty employment. Given her injury, her age and her lack of experience in anything other than working as a truck driver or dispatcher this is a likely scenario. She did attempt to better herself by enrolling in a course to obtain a Mortgage Originator License. She registered this license with a broker in Florida; however, at the time of the Hearing, Alexander had been unable to begin to work at this occupation because she did not have the guarantee of any steady income and could not afford to move to Florida.

"Disability" under the Workers' Compensation Law is defined as the "incapacity due to injury, to

earn the wages which the employee was receiving at the time of the injury, in the same or other employment.” *Mississippi Code Annotated Section 71-3-3(i)*. Once a permanent injury has been established, the Claimant proves her “disability” by showing that she has sought and been unable to find work in the same or other employment at a comparable wage. *Coulter v. Harvey*, 190 So.2d 894, 897 (Miss.1966). Various factors have been listed by our Supreme Court as important to the loss of wage-earning capacity analysis. In *Delaughter v. South Central Tractor Parts*, 642 So.2d 375, 379 (Miss.1994), the Court stated that loss of wage-earning capacity is determined by “the amount of education and training which the Claimant has had, his inability to work, his failure to be hired elsewhere and the continuance of pain and other related circumstances.”

In a workers’ compensation case, the Claimant has the burden to prove that she has sustained a medical impairment as a result of her industrial injury and that the medical impairment resulted in a loss of wage-earning capacity. *Richards v. Harrah’s Entertainment, Inc.*, 881 So.2d 329, 332 (Miss.Ct. App.2004). The decision as to the extent of loss of wage-earning capacity is “largely factual and largely left to the discretion and estimate of the Commission.” Dunn, Vardeman S., *Mississippi Workers’ Compensation*, § 68 (3rd Edition, 1982) at 80. An injured employee establishes a prima facie case of disability by showing that because of the work related injury he cannot secure work in the same or other jobs at pre-injury pay. *Georgia Pacific Corp. v. Taplin*, 586 So.2d 823, 827 (Miss.1991).

In this case, the Commission was required to determine the extent of Claimant’s loss of wage-earning capacity by considering the evidence as a whole. *Delaughter v. South Central Tractor Parts*, 642 So.2d 375, 379 (Miss.1994). In the present case, there was ample evidence to support the Commission/Administrative Judge’s finding of 70% of loss of wage-earning capacity. This factual

determination was within the province of the Commission as fact finder and is clearly supported by the fact that the work injury has caused serious complications in Alexander's thoracic spine. Even though she attempted for a period of time to return to this form of work, ultimately, her (3) disc protrusions progressively worsened to the point where her orthopaedic surgeon advised her not to return to her former type of employment.

At the time of the injury Alexander was earning approximately \$920.00 per week working as a truck driver. Truck driving had been her exclusive vocation for nearly 15 years. Given her age, lack of experience and her minimal work history in any other employment, she arguably established a case for 100% permanent total occupational loss. Dr. O'Brien testified that he didn't believe that she could return to any work except possibly in a reduced capacity in some type of office job. [G.R.E. at 74] The Record demonstrates that she has not been able to find a job to replace her wages, even though she has extensively searched the local geographic area. Her only hope at this point was to try to move to Florida where she has obtained a mortgage origination license and hope that she can "hustle up" some business.

This Court should be mindful of the fact Goolsby Trucking Company does not dispute the fact that Alexander cannot return to trucking nor did it submit any proof that she could work as a truck driver. Goolsby did not argue that Alexander had not made reasonable efforts to try to find other employment. Goolsby's only argument is that, because Alexander has now obtained a Mortgage Broker's License, she somehow has no wage loss. According to Goolsby, her failure to move to Florida and begin work is some type of "sham" or "hoax". These "allegations" by Goolsby are simply allegations and there are no facts to support them. Alexander acknowledged at the Hearing that she hoped to be able to move to Florida, but she did not have the financial resources at the present time to relocate and she further explained that she

had no guarantee of any type of income if she moved. Her decision to obtain the Mortgage License was simply an effort to provide her with some options down the road if she were, in fact, able to relocate.

Goolsby's statement that "[T]he issue in this case is not that she sought employment, but that she has been accepted for employment, and yet refuses to work" simply misstates the facts. [Goolsby Brief at 10, 13] There is no offer of employment from Friendly Financial Services in Florida. There is no guaranteed salary, no benefits, no moving expenses, no detailed job duties. Alexander has merely been allowed to register her license under a Florida broker. This is proposed self employment. It would be similar to commission only sales. Alexander certainly has not refused to go to work, but rather the move to Florida is a risky venture that Alexander cannot afford to take at this time. [T.R. at 46-47, 57]

Goolsby submitted with its brief a National Compensation Survey for Tampa/St. Petersburg, Florida, which was prepared in 2004. These statistics show average wages for various types of employment in the Florida economy. Based on these statistics, Goolsby has argued that Alexander could somehow be making "\$38.19 per hour in the Tampa/St. Petersburg market because she has a 'professional specialty'." These late filed "statistics," were not a part of the Record and furthermore they offer no evidence that Alexander could make this type of money if she could move to Florida. The term "professional specialty" is not defined by Goolsby's statistics and there is nothing to suggest that working as a Mortgage Originator would qualify as a professional specialty career.

Furthermore, it is preposterous to assume that Alexander would stay in Mississippi waiting on a workers' compensation settlement if she could move to Florida and make nearly \$80,000.00 a year as Goolsby suggests. This type of action is wholly contrary to Judge Wilson's assessment of Alexander. Judge Wilson identified Alexander as having a strong work ethic and there is nothing in the Record to suggest

otherwise. She does now have a license to originate loans. However, this type of job is even more speculative than most Sales jobs. This is particularly true since there is no guaranteed income and it will be very hard for Alexander to track people down on the street who want to start a new mortgage. This type of position might be lucrative several years down the road, when a person has established himself in the industry in a particular location; however, at this point it is merely a hopeful endeavor. These issues were considered by the Commission in reaching its decision and it was in the Commission's discretion to conclude that Alexander did not have any reasonable prospects of comparable employment.

In the present case, Alexander clearly met her burden of establishing loss of wage-earning capacity consistent with the Administrative Judge's decision. The Record reveals that Alexander has pain and permanent medical impairments which prevent her from returning to her usual and former occupation as a truck driver, where she earned nearly \$1,000.00 per week. She has unsuccessfully attempted to find other employment with numerous employers and, even if we were to assume that Alexander might get a job at some minimum wage, light duty position, there is no evidence to suggest that she could make more than \$200.00 - \$300.00 per week. In this case, Goolsby put on no proof to dispute that Alexander can no longer work as a truck driver. Goolsby put on no proof that her attempts to find employment were unreasonable. Goolsby simply argues that if Alexander would move to Florida, she would start earning comparable wages even though she has no guarantee of an income. There are simply no facts to support this contention.

In the present case, Judge Wilson obviously concluded that Ms Alexander could possibly do some type of light duty work and maybe earn \$6.00 - \$7.00 per hour at some type of employment. Based upon this assumption, the Administrative Judge did not find permanent total disability, but rather concluded that

Alexander had suffered only a 70% loss of wage-earning capacity. In this case, a 70% loss of wage-earning capacity fairly represents the impact on Alexander's ability to make a living. The 70% wage loss puts her at the maximum benefit rate for a 2003 injury. A thorough review of the testimony and the medical proof in this case clearly shows that the Commission/ Administrative Judge's decision is well reasoned. Alexander has shown by ample proof that she is a hard worker, who before this injury was able to survive and maintain a job normally available only to men. She has succeeded in this industry for nearly 13 years prior to sustaining this serious injury to her back in 2003. As a result of the incident, she can no longer return to that employment and she has been unable to find comparable work anywhere else. As such, there is clearly substantial evidence to support the Administrative Judge's decision awarding permanent disability benefits in the amount of \$331.06 per week and this conclusion should be affirmed.

II. GOOLSBY TRUCKING COMPANY WAS ALEXANDER'S EMPLOYER AT THE TIME OF THIS WORK INCIDENT UNDER MISSISSIPPI LAW.

Goolsby's second argument on this Appeal asserts that the Commission/Administrative Judge erred in concluding that Goolsby Trucking was Theresa Alexander's employer.

This argument is certainly contrary to the facts in this case. The Record shows that on May 5, 2002, Theresa Alexander signed an Application of Employment to go to work for Goolsby Trucking Company. Goolsby Trucking Company investigated her background; required her to undergo drug and alcohol testing; issued safety booklets; and certified that she met the requirements to be an over-the-road driver. (Exhibits 6, 7, 9, 10 [A.R.E. at 1-8]) There is no question that Sport Goolsby and Lee Goolsby approved and made the decision to hire Theresa Alexander, and Goolsby Trucking maintained complete control over her actions.

Goolsby told her where to go, when to go and how to do her job. [A.R.E. at 13-24] As such, Goolsby is clearly her employer.

In this case, Goolsby has attempted to avoid the Workers' Compensation Laws of the State of Mississippi by arguing that Alexander was somehow employed by a company named Fleet Force, and Goolsby merely leased her from Fleet Force. **The Record is void of any paperwork wherein Alexander filled out an Employment Application for Fleet Force or signed any documents relative to any employment with Fleet or otherwise.** Fleet Force is not a party to this Workers' Compensation case and, as far as Claimant knows, it is an Alabama Corporation doing business in Alabama.

Apparently, Goolsby and Fleet have attempted to work out some arrangement where Goolsby would hire its drivers and then somehow make them Fleet employees. Goolsby would pay Fleet a certain amount of money each month to carry benefits, workers' compensation and to handle its payroll. Goolsby produced a document (Exhibit #4 [T.R. at 224-231]) which appears to be an Agreement between Fleet Force and Sport Goolsby Trucking signed in July of 2003 (one year after this accident) wherein Sport Goolsby has agreed to lease its employees from Fleet Force. That Agreement may be a valid Agreement between Sport Goolsby and Fleet Force for employees hired after July 2003, but said document does not apply to the present case.

Judge Wilson found: "This agreement was executed post-accident and, as such, is not pertinent to this case."

[G.R.E. at 14, ¶ 8[a]]

An employee hired and regularly employed in the State of Mississippi is entitled to compensation under the Mississippi Workers' Compensation Law. *Martin v. L & A Contracting Company*, 162 So.2d 870, 872 (Miss. 1964). Whatever arrangement, that Goolsby and Fleet Force may have attempted to procure, is simply inapplicable to the facts of this case. The evidence in this Record clearly shows that Theresa Alexander was

hired and employed by Goolsby. Alexander met with Goolsby representatives in New Albany, Mississippi; signed an Application to go to work for Goolsby Trucking Company; Goolsby sent out forms and authorizations to various entities seeking information and verifying that Theresa Alexander was considered a potential employee of Goolsby Trucking Company; and Goolsby Trucking Company directed, controlled and oversaw all of her employment. Goolsby directly paid a substantial amount of her wages through its own payroll checks. The mere fact that Goolsby wanted to consider Alexander to be Fleet's employee does not control the employment relationship between Alexander and Goolsby. In this case, Alexander never performed any services for Fleet Force. Alexander had no contact with Fleet Force.

In its Brief, Goolsby's attorney incorrectly states "the relationship can be traced to the formal employment agreement between Fleet Force and [Alexander]." [Goolsby Brief at 10, 16] There is absolutely no speck of evidence in this Record to substantiate the statement by Goolsby counsel. **There was no formal Employment Agreement between Fleet Force and Alexander.** Alexander's only Employment Agreement was with Goolsby Trucking Company.

Were this a case where Alexander had contacted Fleet Force in Alabama, executed a Fleet Force Application and later been sent to work for Goolsby Trucking Company, Goolsby's arguments might have some merit. However, in this case, Alexander directly inquired about a job with Goolsby Trucking Company. She filled out an application with Goolsby Trucking Company. Goolsby Trucking Company hired her. Goolsby then directed her work and told her how to perform her tasks. Fleet Force was not involved in any of these actions or decisions between Goolsby and Alexander. There is no "loaned servant" or "dual employment" situation in this case.

It is unclear what type of scheme Goolsby has attempted to promulgate in this case. Goolsby clearly

hired and employed Alexander, but apparently Goolsby has tried to circumvent the Workers' Compensation Laws by having Fleet Force handle a portion of its payroll. However, Goolsby even misrepresented to Fleet Force what amounts of wages that Alexander was being paid. Goolsby clearly has unclean hands. Fleet Force apparently intended to honor this Agreement until it learned that Goolsby was also paying Alexander. Goolsby cannot honestly argue to the Commission that Alexander was not its employee considering that they directed her work and paid her wages.

Exhibits 13 and 14 [A.R.E. at 11-12] verify that Goolsby informed the United States Government that Theresa Alexander was its employee in 2002 and 2003, when it filed W-2 forms showing that wages were paid and taxes withheld. Under these facts, there is simply no reason to engage in a "loaned servant" or "dual employment" analysis as Goolsby suggests. Goolsby was the employer. Even if the Commission had applied these facts to the "loaned servant" doctrine or "dual employment" doctrine, Goolsby would still be the employer as a matter of law since Alexander was under Goolsby's exclusive control and direction. See Dunn, § 186, page 233.

Goolsby spends pages arguing that Alexander is a "loaned servant" and, since she did not "consent" to the arrangement between Goolsby and Fleet, she remains Fleet's employee. However, Goolsby simply can not prove any employment relationship between Alexander and Fleet. See supra. There is no documented evidence of any relationship between Alexander and Fleet Force and as such this argument is simply without merit.

There is no doubt that Goolsby has failed to establish the necessary connections between Alexander and Fleet required to support its position. An employer cannot unilaterally create such a relationship between Alexander and another party. The Supreme Court has stated: "As a general rule, an employment contract

between an employer and employee cannot arbitrarily be changed by the employer to the detriment of the employee without the knowledge and consent of the employee.” *Reading & Bates, Inc. v. Whittington*, 208 So.2d 437, 439 (Miss.1968)

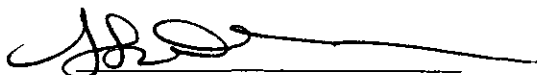
Furthermore, there is also no “dual employment” in this case as Alexander was not performing two (2) authorized employments. Alexander worked exclusively for Goolsby. Fleet merely handled a part of Goolsby’s payroll. Even if the Commission had found some type of “joint service” or “dual employment,” Mississippi cases firmly hold that the employee may recover workers’ compensation from either employer. If under some stretch of the facts, Fleet Force were also found to be one of Alexander’s employers, Alexander still retains the right to proceed solely against Goolsby for workers compensation benefits, as she has done in this case. *See* Dunn § 185, page 232.

Fleet Force is not a party to this suit and Goolsby may not shuck its responsibility to Alexander by arguing that Fleet somehow is responsible for this incident. The facts of this case show a clear cut employee/employer relationship between Alexander and Goolsby and, as such, the Commission/Administrative Judge was correct to conclude that, because Goolsby hired Alexander, controlled Alexander’s work and paid her wages, Goolsby would be considered her statutory employer and therefore responsible for the Workers’ Compensation Benefits under the Workers’ Compensation Act. Accordingly, there is substantial evidence to support the Commission’s finding that Goolsby was Alexander’s employer.

CONCLUSION

For the reasons specified above, Alexander respectfully submits that the decision by the Workers' Compensation Commission is supported by substantial evidence and therefore should be affirmed. The Record shows that the Commission rightfully concluded that Alexander had established, through medical evidence and lay testimony, that she sustained a permanent medical impairment which prevents her from performing her usual and customary job and which has prevented her from obtaining comparable work elsewhere. At the time of this incident, she was the sole employee of Goolsby Trucking Company and Goolsby controlled the nature of the work, the manner and hours which she worked, and was vested with the ability to hire and fire her. Substantial evidence supports the Decision ordering Goolsby to pay permanent partial disability benefits in the amount of \$331.06 per week for a period of 450 weeks.

Respectfully submitted,



**KEITH S. CARLTON
WOOD AND CARLTON
ATTORNEYS AT LAW
POST OFFICE BOX 1415
CORINTH, MS 38835-1415
662-287-8037
MS BAR NO [REDACTED]**

**ATTORNEY FOR CLAIMANT
THERESA ALEXANDER**

CERTIFICATE OF SERVICE

I, **KEITH S. CARLTON**, do hereby certify that I have this date served a true and correct copy of the above and foregoing on all Counsel of record by placing said copy in the United States Mail, postage prepaid, addressed to him/her at his/her usual post office address as follows.

Mr. Joe M. Davis
Attorney for the Employer, Goolsby Trucking Company, Inc.
113 West Bankhead Street
Post Office Box 29
New Albany, MS 38652

Honorable Thomas J. Gardner, III
Circuit Court Judge
Post Office Box 430
Corinth, MS 38835-0430

Ms Betty Sephton
Supreme Court Clerk
Post Office Box 249
Jackson, MS 39205-0249

Dated this the 22 day of June 2007.



KEITH S. CARLTON

**WOOD AND CARLTON
ATTORNEYS AT LAW
POST OFFICE BOX 1415
CORINTH, MS 38835-1415
662-287-8037
MS BAR NO. [REDACTED]**