BEFORE THE MISSISSIPPI SUPREME COURT
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GARY HOLLOWAY	**CLAIMANT/APPELLEE**
V.	**NO. 2007-WC-00155**
F&F CONSTRUCTION	**EMPLOYER/APPELLANT**
A MEMBER OF THE BUILDERS AND CONTRACTORS ASSOCIATION OF MISSISSIPPI SELF-INSURERS' FUND	

BRIEF OF APPELLANT/EMPLOYER

Prepared by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that an appropriate evaluation may be made regarding possible disqualification or recusal.

1. Gary Holloway, 1111 Fornier Ave Tr 8, Gulfport, Mississippi 39502, Claimant;
2. James K. Wetzel, Esq., P.O. Box 1, Gulfport, Mississippi 39502, Attorney of Record for the Claimant;
3. F&F Construction, P.O. Box 6097, D'Iberville, Mississippi 39540-6097, Employer;
4. The law firm of Markow Walker, P.A., P.O. Box 13669, Jackson, MS 39236-3633, attorneys of record for F&F Construction.

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STATEMENT OF THE CASE

From a procedural standpoint, claimant filed a Petition to Controvert on October 18, 2004, alleging a work injury of September 17, 2004. Due to a problem of factual impossibility surrounding claimant's initial date of alleged injury of September 17, 2004, an Amended Petition to Controvert was filed contending a new date of injury of September 10, 2004. Compensability of an alleged injury on either of the two aforementioned dates has been disputed by this employer. (Record at 1, RE Tab 1). The only issue involved the determination of whether or not a compensable work injury actually occurred on the date alleged. (Record at 53-54, RE Tab 2).

A Hearing on the Merits was initially held on October 25, 2005, and the Administrative Judge found claimant met his burden of proving he sustained a work-related injury on September 10, 2004. (Record at 46-47, RE Tab 3). From this decision of the Administrative Judge, the employer appealed to the Full Commission, the basis of this appeal being that the Administrative Judge erred as follows: 1) in finding claimant sustained a work-related injury on September 10, 2004; 2) in finding claimant was simply confused about the date of the incident as a result of his being inarticulate and uneducated; 3) in the characterization of the testimony of witness, Mr. Francis Hayden, as supporting claimant's allegations; 4) in finding that claimant either mistakenly reported an injury to the employer or the employer mistakenly heard claimant report an injury; and 5) in finding claimant's version of the facts to be credible, in light of all the evidence to the contrary. (Record at 49-50, RE Tab 4). The aforementioned errors worked together to form the basis for an award that was contrary to the great and overwhelming weight of the credible evidence and contrary to the law. After refusing oral arguments (which were

requested), the Full Commission reviewed the appeal of Employer and affirmed the Administrative Judge's prior ruling without comment by Order dated April 28, 2006.

Aggrieved by the decision of the Full Commission, employer appealed to the Circuit Court of Harrison County. By Order dated December 13, 2006 the Harrison County Circuit Court affirmed the Order of the Full Commission and specifically noted that they felt as though they were being called upon to re-weigh the evidence. It is from this Order of the Harrison County Circuit Court that Employer now appeals to the Court of Appeals of the State of Mississippi.

A clear and concise understanding of the facts associated with this appeal is paramount. Employer believes that the lack of a thorough understanding of the pertinent facts associated with this claim is what has led to all erroneous prior rulings. For this very reason, oral arguments are being requested in conjunction with this appeal.

The entirety of the body of evidence consists of the testimony of claimant, medical records associated with claimant's initial medical treatment, a recorded and written statement of claimant, payroll exhibits offered by employer at the Hearing on the Merits, and the testimony of Mr. Fred Fayard, Ms. Terri Waugh, Mr. Charlie Daniels, and Mr. Francis Hayden. When the foregoing evidence is viewed individually or as a whole, it does not rise to the level of either credible or substantial evidence capable of proving the occurrence of a work-related injury.

Claimant initially alleged he sustained a work-related injury on September 17, 2004. (Record at 1, RE Tab 1). During this time frame, this employer was operating two separate and distinct job sites. Claimant often worked at each of these job sites, pursuant to the needs of the Employer. Claimant contends he was injured while working at the "Airport" Project, while it is

known that he also worked at the other job site, known as the "Bayview" Project. These two jobs were separate and payroll was individually maintained for each location for accounting purposes. (Exhibit 1, RE Tab 5). Claimant has alleged this injury occurred while he was "pulling up on pipe" at the "Airport" Project. (Transcript at lines 3 and 10, RE Tab 6). Because the date of the alleged injury was later changed from September 17, 2004 to September 10, 2004, it is important to understand the history associated with claimant's allegations, because claimant did not work at the "Airport" Project on Friday, September 10, 2004. (Record at 7, RE Tab 7).

For treatment of this alleged injury, claimant initially presented to the Memorial Hospital in Gulfport, Mississippi at 7:58 a.m. on Friday, September 17, 2004. At that time, claimant presented complaining of back pain which occurred due to his "pulling up on pipe three days ago." It is also important to note that at this initial visit, **claimant reported this injury was not the result of an on-the-job accident**. (Exhibit 6, RE Tab 8). Claimant later came under the care of Dr. Eugene McNally on October 6, 2004 and specifically reported that he had sustained an injury at work on September 17, 2004. (Exhibit 5, RE Tab 9).

Claimant's recorded statement was taken on October 8, 2004, at which time his attorney was present. At that time, claimant provided a detailed history of an accident occurring at work on September 17, 2004, while laying pipe at the "Airport" Project. **Claimant noted that he presented to the emergency room for treatment on the same date as the incident**. (Exhibit 2, RE Tab 10). This recorded statement was later followed up with a written statement of October 12, 2004, wherein the claimant reiterated he was injured on September 17, 2004 while laying pipe at the "Airport". (Exhibit 3, RE Tab 11).

Payroll records for both the "Airport" Project and the "Bayview" Project were entered into evidence. Basically, these records reveal that claimant worked 40 hours at the "Bayview" Project from September 10, 2004 (Friday) through September 14, 2004 (Tuesday). Claimant did not work at all from September 15, 2004 (Wednesday) through September 19, 2004 (Sunday) due to Hurricane Ivan striking the Mississippi Gulf Coast on September 16, 2004. Claimant worked eight hours at the "Bayview" Project on September 20, 2004 and then eight more hours at the Airport Project on September 22, 2004. The foregoing is a record of all the time and dates worked by claimant between September 10, 2004 and September 23, 2004. (Exhibit 1, RE Tab 5).

Testimony from witnesses and the aforementioned evidence shows that claimant's initial allegation of sustaining a work-related injury on September 17, 2004 is a factual impossibility, since claimant did not work in any capacity on that date. This impossibility prompted claimant to amend his Petition to Controvert and allege a new date of injury of September 10, 2004. The evidence also shows that an injury date of September 10, 2004, clearly is unsupported by the overwhelming weight of the credible evidence and is likewise a factual impossibility. This mistake in a determination of fact is what brings us to this appeal today.

STATEMENT OF THE ISSUE

Whether the Order of the Mississippi Workers' Compensation Commission of April 28, 2006 was not supported by the weight of substantial evidence and therefore contrary to law.

SUMMARY OF THE ARGUMENT

The lower courts erred inasmuch as their findings are not supported by substantial evidence. The only proof that exists to support claimant's story is just that: claimant's story.

ALL of the medical evidence (two different medical providers' records), **ALL** witness testimony (testimony of four witnesses), and **ALL** physical evidence (payroll records) explicitly shows that claimant's story of a work-related injury on September 10, 2004 is not possible. There simply is no other evidence, credible or not, in the record. Employer is not asking for the evidence to be "re-weighed," but employer would like to point out that no prior ruling, by either the Administrative Judge, the Full Commission, or the Circuit Court was based upon the substantial weight of the credible evidence, and therefore should be reversed.

ARGUMENT

While the facts of this case are quite in depth and convoluted, the premise behind these facts is simple. Claimant has alleged an initial date of injury (September 17, 2004). When it was proved that this could not be factually possible, claimant alleged a different date of injury (September 10, 2004). It has been proved that this new date of injury likewise is not factually possible.

In the realm of Workers' Compensation Law in Mississippi, "The injured employee bears the general burden of proof of establishing every essential element of the claim." ***Toldson v. Anderson-Tully Co.***, 724 So.2d 399, 402 (Miss. Ct. App.1998). Also, "[T]he claimant bears the burden of proof to show an injury arising out of employment, ***AND*** [emphasis added] a causal connection between the injury and the claimed disability." ***Penrod Drilling Co. v. Etheridge***, 487 So.2d 1330 (Miss. 1986). Here, claimant only produces his uncorroborated testimony to causally relate this alleged injury to his employment with F&F Construction in order to meet his burden of proof.

Under Mississippi law, the Workers' Compensation Commission is the ultimate finder of fact in workers' compensation cases. ***Natchez Equip. Co., Inc. v. Gibbs,*** 623 So.2d 270, 273

(Miss. 1993) (citations omitted). "The Commission is free to accept or reject the [Administrative Law Judge's] findings, so long as the Commission's actions are based on substantial evidence." *Id.* It has been determined that "substantial evidence" is "evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can reasonably be inferred. [*emphasis added*]" ***Lucas v. Angelica Uniform Group,*** 733 So.2d 285, 291. (Miss. Ct. App. 1998). If a decision of the Workers' Compensation Commission is based on substantial evidence, the Circuit Court and the Supreme Court are obligated to uphold the finding of fact made by the Commission. ***International Paper Co. v. Kelly,*** 562 So.2d 1298 (Miss 1990). However, in this case, it is readily apparent that the Full Commission, as the ultimate finder of fact, did not base their findings upon substantial evidence and therefore the decision should be reversed. Instead, the decision of the Administrative Judge and the Full Commission was based upon pure conjecture.

The Administrative Judge's finding of compensability, which was adopted by all lower Courts, was premised upon: 1) Claimant being confused and not being articulate; 2) That it is "certainly believable" that a person who performed manual labor could have injured his back in such a manner; 3) The "mis-characterization" of the testimony of Mr. Francis Hayden; 4) A mistake in communication between the claimant and the employer; and 5) That the claimant's "story is credible."

First, if claimant was confused or inarticulate, why is it that between his deposition testimony and his testimony at the Hearing on the Merits, claimant testified **forty (40)** times that he injured his back on a Friday? Similarly, claimant is also adamant that he injured his back at the "Airport" Project, as he testified to on at least **ten (10)** occasions at the Hearing on the Merits. (Exhibit 4 at 25-27,29,30,35, RE Tab 12 and Transcript at 14-16,20,25-27,29,31-

37,39,40,42-45, RE Tab 13). Claimant does not seem confused or inarticulate. Regardless of this determination, it cannot be said that either confusion of being inarticulate rises to the level of substantial evidence in support of compensability.

Second, a major premise in the Order of the Administrative Judge is "It is certainly believed that he could have injured his back as he said he did because of the kind of work he regularly did as a pipe layer." (Record at 47, RE Tab 14). Basically, the Courts are saying that since claimant did manual labor and alleges he hurt his back, then the case is automatically compensable, when more pure conjecture can just as easily point to claimant injuring his back performing duties associated with Hurricane Ivan, which occurred right between his two dates of alleged injury. This conjecture likewise does not satisfy the requirement that claimant bears the burden of proving his case by substantial/credible evidence.

Third, we have a serious mis-characterization of the testimony of a witness. The Administrative Judge found that "Frank Hayden supported Mr. Holloway's story that he reported an injury to him on Tuesday, September 21, 2004,..." Unfortunately, this is a slight mis-characterization of the testimony of Mr. Hayden. Mr. Hayden was a project manager and a supervisor at the time of this alleged incident; however, he no longer works with this employer and is currently employed with GeoPave. (Exhibit 9, at 6, RE Tab 15). Mr. Hayden testified that all employees knew how to report a workers' compensation injury. (Exhibit 9, at7, RE Tab 16). Mr. Hayden has testified that claimant did indeed come to him on the Tuesday after Hurricane Ivan struck the Mississippi Coast and related that he had been in the hospital over the weekend due to an injury which occurred the prior Friday at the "Bayview" Project, which would have been Friday, September 17, 2004. The problem here is Mr. Hayden testified that this was not possible because claimant did not work at all on this prior Friday (September 17, 2004), which is

also verified by the payroll records. Additionally, claimant changed his story to Mr. Hayden to state this **injury occurred as a result of his lifting a manhole cover**, which is distinctly different than an injury alleged as the result of "pulling up on some pipe." (Exhibit 9, at 9-10, RE Tab 17).

Fourth, we are led to believe that there was a mistake in communication between the claimant and the employer. However, all evidence on the record points to the contrary. In addition to the foregoing testimony of Francis Hayden, claimant testified he provided notice of this injury to Mr. Charlie Daniels while also in the presence of Mr. Hayden. (Transcript at 15-16, RE Tab 13). Mr. Daniels is a foreman with this employer and was claimant's direct supervisor during the time period in question. Mr. Daniels testified claimant did not report an on the job injury to him and he was not aware of any such work injury. Mr. Daniels also testified that all employees knew the procedure for reporting such an incident. (Exhibit 8, at 7-9, RE Tab 18). The deposition testimony of Mr. Fred Fayard, owner of the company, very much mirrors the testimony of Mr. Daniels and Mr. Hayden insomuch as Mr. Fayard was not advised of any alleged work injury and claimant's story did not match up with the certified records of his whereabouts on the dates alleged. (Exhibit 7, at.7-8 and 19, RE Tab 19). The testimony of Ms. Terri Waugh, safety director and head of payroll, is also very similar to the testimony of Mr. Fayard, Mr. Daniels, and Mr. Hayden. Ms. Waugh testified that claimant did not work at the "Airport" on September 10, 2004 and he did not work at all on September 17, 2004. (Transcript at 54-55 and 58-59, RE Tab 20).

Finally, the Administrative Judge found that claimant's "story is credible." In light of all of the foregoing evidence to the contrary, this does not appear to be the case. Please note, once again, that claimant's allegations are supported by nothing more than his lone testimony. It is not

the duty of the Employer to prove that claimant's alleged injury occurred in some other fashion, as has been argued by counsel opposite. Rather, it is the burden of claimant to prove in convincing fashion each and every aspect of his case.

With regard to the standard of review, this Court has even gone one step further and stated,

> We hold that judicial review of findings of the Commission extends to a determination of whether they are clearly erroneous. And a finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and its application of the Act. ***J.R. Logging v. Halford***, 765 So.2d 580 (Miss. Ct. App. 2000).

The certified payroll records show claimant's initial alleged injury date of September 17, 2004 to be an impossibility, as claimant did not work in any capacity on that date. In fact, claimant did not work at all from September 15, 2004 through September 19, 2004. (Exhibit 1, RE Tab 5). Strangely enough, claimant presented to the emergency room at Gulfport Memorial Hospital on September 17, 2004 at 7:58 a.m. and stated that he was injured three days prior while "pulling up on pipe." (Exhibit 6, RE Tab 8). At that time, **claimant also provided that this injury was not work related**. Approximately three weeks later, claimant presented to Dr. Eugene McNally on October 6, 2004 and provided a different history, this time alleging a work injury occurred on September 17, 2004. (Exhibit 5, RE Tab 9). Claimant's subsequent recorded statement and written statement also confirmed his allegations of a September 17, 2004 work injury date. (Exhibits 2, RE Tab 10 and 3, RE Tab 11, respectively). Payroll records specifically show that claimant did not work in any capacity on September 17, 2004. (Exhibit 1, RE Tab 5).

When confronted with the foregoing information at his deposition, claimant changed his story, filed an Amended Petition to Controvert, and alleged the more convenient date of injury of

September 10, 2004. This new date of injury is not congruent with the initial treatment records of the Gulfport Memorial Hospital Emergency Room which note that claimant injured his back three days prior to the September 17, 2004 treatment date (not to mention the fact that this injury was specifically designated as non-work related at that time). (Exhibit 6, RE Tab 8). The new date also does not comport with claimant's story as presented to Dr. McNally, which consisted of the allegation of a work injury on September 17, 2004. (Exhibit 5, RE Tab 9). Furthermore, at both his deposition and the Hearing on the Merits, claimant was adamant that he injured his back on a Friday at the "Airport" Project; however, the payroll records specifically reflect that claimant did not work at the "Airport" on either Friday, September 10, 2004 or Friday, September 17, 2004. (Exhibit 1, RE Tab 5). Ironically, the payroll records do reflect that claimant worked in his full duty capacity on several occasions following this new alleged date of injury (September 10, 2004), which would seem to show that no disabling injury had occurred, since he was able to continue with his employment. No attempt to refute the information contained in the payroll records was ever made by claimant or counsel opposite.

Both aspects of claimant's story are unsubstantiated by the unbiased medical records of two separate and distinct providers. Both aspects of claimant's story are unsubstantiated by the testimony of three separate individuals: the owner of this company, claimant's direct supervisor, and the safety director. Both aspects of claimant's story are unsubstantiated by the unbiased testimony of a former foreman who no longer works for this employer. Both aspects of claimant's story are unsubstantiated by the payroll records (which is unrebutted direct evidence that also happens to be the only physical evidence of any kind). Where is the overwhelming weight of credible evidence proving a compensable injury?

Based upon the foregoing, the employer avers that the finding of the Full Commission was not based upon substantial evidence. More specifically, employer avers that the finding of the Full Commission was based upon no evidence whatsoever other than the unfounded allegations of claimant, which have been summarily contradicted by **ALL** other evidence. The Employer is not asking for this Honorable Court to "re-weigh" any evidence. Instead, the Employer would show that there is **NO** evidence to weigh on the side of the claimant and all the evidence on the record disputes his allegations. To correct such oversights is exactly why we have a standard of review. In further support of the position of the Employer, the Mississippi Court of Appeals has previously stated that they

> Agree with the Full Commission that speculation, surmise, conjecture and the like have no place in their decisions and that not even a liberal interpretation of the law and evidence will permit the Commission to forge an otherwise questionable claim into some compensable shape or form. ***Westmoreland v. Landmark Furniture, Inc.,*** 752 So. 2d 444, 451 (1998) (1999) (citations omitted).

CONCLUSION

Claimant was admittedly incorrect regarding his initial date of alleged injury and had to file an amended Petition to Controvert to correct the mistake after same was proved to be a factual impossibility. The date, as amended, has also been proved to be a factual impossibility. When claimant initially presented for medical treatment, he specifically stated the injury was not work-related. Furthermore, claimant changed his story regarding the mechanism of injury from "pulling up on some pipe" to "lifting a manhole cover." It has also been shown that claimant obviously did not know where he was when the alleged injury occurred. Claimant had no witnesses to this alleged occurrence, called no supporting witnesses at trial, and did not attack the credibility of the only physical evidence (payroll records) or the medical records.

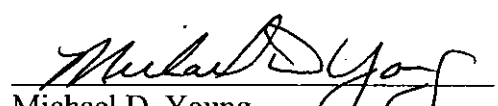
If claimant did not know when the injury occurred, how the injury occurred, where the injury occurred, had no witnesses to the alleged occurrence, and had no evidence to support his allegations other than his own unsubstantiated testimony, how can any Court find that his story is supported by substantial evidence? Furthermore, what credible evidence can even be cited to prove claimant's unfounded allegations?

WHEREFORE, PREMISES CONSIDERED, the employer respectfully requests that the this Honorable Court reverse the opinion of the Circuit Court of Harrison County, which affirmed the Administrative Law Judge and the Full Commission and found this claimant's alleged work injury of September 10, 2004 to be causally related to his employment with F&F Construction. The employer respectfully requests this Honorable Court reverse the decision of the Administrative Law Judge, which was adopted without clarification by both the Full Commission and the Circuit Court, due to the fact that the decision of the Administrative Law Judge as adopted by the Full Commission is based upon something far less than the substantial weight of the credible evidence.

Respectfully submitted,

F & F CONSTRUCTION A MEMBER OF
THE BUILDERS AND CONTRACTORS
ASSOCIATION OF MISSISSIPPI SELF-INSURER'S
FUND

BY: MARKOW WALKER, P.A.

BY: 

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CERTIFICATE OF SERVICE

I, Michael D. Young, attorney for the employer, does hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Employer to the following:

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This the 25th day of May, 2007.

Michael D. Young