

**STATE OF MISSISSIPPI SUPREME COURT
CAUSE NUMBER 2007-WC-00346**

NEHAN T. NEILL

APPELLANT

VERSUS

**WATERWAY INC./TEAM AMERICA and
LEGION INS. COMPANY'S SUCCESSOR,
TENNESSEE INSURANCE GUARANTY FUND**

APPELLEES

BRIEF OF THE APPELLEES

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STATEMENT OF THE ISSUES

- I. In his appellate brief, Neill inaccurately recounts the rulings of the circuit judge and the administrative law judge are inaccurate, as well as the substance of the proof.**
- II. The circuit court did not err in affirming the decision of the Full Commission awarding Neill benefits for permanent partial disability.**
- III. The overwhelming weight of the evidence supports the decisions of the administrative law judge, the Full Commission and the Circuit Court of Toshiungo County that Neill is permanently partially disabled.**

STATEMENT OF THE CASE

I. Statement of Facts

On April 12, 2001, Nhan T. Neill ("Neill") was an employee of Waterway, Inc./Team America when he claimed to have suffered an injury on the job to his right hand after approximately four months. (R. Vol. 5, p. 43; R.E. Tab 5). At the time of the alleged injury to his right hand, Neill denied that he had any problems with his left hand. (R. Vol. 5, p. 46; R.E. Tab 5).

Subsequent to Neill's alleged injury, Neill was referred to Dr. John Fraser, a neurosurgeon for evaluation. (R. Vol. 3, p. 209; R.E. Tab 5). Dr. Fraser's opinion was that the claimant had bilateral carpal tunnel syndrome; however, his opinion was that this was part of a general over-use syndrome of the hands. (R. Vol. 3, p. 209; R.E. Tab 5). Neill underwent a left-carpal tunnel release on June 27, 2001, and a right-carpal tunnel release on August 15, 2001. (R. Vol. 3, p. 209; R.E. Tab 5).

Prior to the surgery, Neill also had been complaining of scaling, itching and swelling of his palms. (R. Vol. 3, p. 212; R.E. Tab 5). On May 2, 2001, Neill was seen by Dr. James Mallette, an allergist, for the rash on his hands. (R. Vol. 3, p. 244; R.E. Tab 5). Dr. Mallette prescribed some topical treatments to be applied to his hands and some oral medicine to control the itching. (R. Vol. 3, p. 244; R.E. Tab 5). Neill's hand condition improved sufficiently that Dr. Fraser could perform the surgery. (R. Vol. 3, p. 213; R.E. Tab 5).

On February 11, 2002, Dr. Dale Cunningham, a psychiatrist, saw Neill. Dr. Cunningham repeated the electrodiagnostic studies of both upper extremities. As of March 25, 2002, Dr. Cunningham noted that the claimant had reached maximum medical improvement. Dr. Cunningham gave him an anatomical rating of 11% to the body as a whole. (Exhibit CL 4 at

CPM-21; R.E. Tab 6). He also concluded that Neill had a 10% permanent disability impairment to his left upper extremity and 8% to his right upper extremity. (Exhibit CL4 at CPM-22; R.E. Tab 6).

At the request of Dr. Fraser, Neill was seen by Dr. Gilbert Nelson, an orthopedic surgeon, in order to determine if there was any underlying orthopedic pathology. Dr. Gilbert could find none and stated that the claimant should be seen by a rheumatologist or possibly a neurologist.

On September 11, 2002, Neill was seen by Dr. Fuchs, a rheumatologist. (Exhibit CL 5, Fuchs depo., p. 7, L. 16; R.E. Tab 7). As of November 2002, Dr. Fuchs recommended that Neill see a neurologist because Dr. Fuchs did not believe he had a primary rheumatological problem. (*Id.* at p. 11, L. 3; R.E. Tab 7). Instead, Dr. Fuchs believed that the pain in his hands was likely due to an abnormal nerve reaction. (*Id.* at p. 11, L. 8; R.E. Tab 7).

Although never reflected in his medical records, Dr. Fuchs testified during his deposition that he believed that Neill had suffered at some point in time in the past from reflex sympathetic dystrophy, which was subsequently resolved. (*Id.* at p. 19, L. 18; R.E. Tab 7). Dr. Fuchs believed that the RSD, although resolved, caused the bilateral carpal tunnel syndrome. (*Id.* at p. 23, L. 6; R.E. Tab 7). Dr. Fuchs stated that there was a fifty-fifty chance that Neill's type of work could have triggered the RSD. (*Id.* at p. 23, L. 8; R.E. Tab 7).

Neill's counsel had Neill evaluated by Dr. Joseph Boals, who is an orthopedic surgeon. (Exhibit CL 8, Boals depo., p. 6, L. 1; R.E. Tab 8). Dr. Boals opined that Neill suffered from residuals from bilateral-carpal tunnel release. (*Id.* at p. 9, L. 12; R.E. Tab 8). Dr. Boals assessed an impairment of 20% of each upper extremity. (*Id.* at p. 10, L.8; R.E. Tab 8). Additionally, Dr. Boals' opinion was that Neill could perform light, sedentary work. (*Id.* at p. 11, L. 6; R.E. Tab

8). Additionally, Dr. Boals stated that Neill should avoid repetitive work and heavy gripping in the future. (*Id.* at p. 11, L. 9-10; R.E. Tab 8).

Dr. Boals testified that claimant could work; however, Neill needed a position within his restrictions. (*Id.* at p. 19, L. 17-24; R.E. Tab 8). Dr. Boals noted that Neill was young, needed to work and needed to find some position where he could wear his gloves. (*Id.* at p. 19, L. 20; R.E. Tab 8). Dr. Boals testified that claimant would be able to perform construction work, lifting very light objects and transferring materials; however, he could not perform heavy construction work. (*Id.* at p. 21, L. 13-16; R.E. Tab 8).

II. Procedural History

On March 13, 2003, Neill filed a Petition to Controvert, alleging that he suffered compensable injuries to both upper extremities. (R. Vol. 2, p. 1; R.E. Tab 10). Waterway, Inc./Team America and its carrier, Legion Insurance Company, now known as Tennessee Insurance Guaranty Fund (hereinafter the employer and carrier are collectively referred to as “Waterway”), contested the compensability of the alleged injury. (R. Vol. 4, p. 414; R.E. Tab 1). On September 30, 2005, the administrative law judge entered an order awarding Neill permanent partial disability benefits in the amount of \$266.40 per week for a period of 120 weeks for the right upper extremity, and permanent partial disability benefits in the amount of \$266.40 for an additional 120 weeks for the left upper extremity. (R. Vol. 4, p. 429; R.E. Tab 1). The administrative law judge further ordered that Waterway provide Neill with all reasonable and necessary medical services and supplies as may be required by the nature of his injury, pursuant to Mississippi Code Annotated section 71-3-15 (Rev. 2000). (R. Vol. 4, p. 429; R.E. Tab 1).

Neill petitioned for a review of the administrative law judge’s order, and a Full Commission hearing was held on April 3, 2006. (R. Vol. 4, p. 445; R.E. Tab 2). A Full

Commission Order was entered on April 6, 2006 affirming the order of the administrative law judge. (R. Vol. 4, p. 445; R.E. Tab 2). Neill appealed the Full Commission Order. (R. Vol. 4, 449; R.E. Tab 3). On January 31, 2007, the Circuit Court of Tishomingo County entered an order affirming the order of the Full Commission and finding that “the decision of the Administrative Judge and Full Commission of the Mississippi Workers’ Compensation contain [sic] no errors of fact or law.” (R. Vol. 1, p. 7; R.E. Tab 4).

STANDARD OF REVIEW

This Court’s review of the decisions of the Workers’ Compensation Commission is very limited and deferential. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (Miss. 2003). The Court may reverse the Commission only if its decision was unsupported by substantial evidence, was arbitrary and capricious, or involved in an erroneous application of the law. *Id.* While the review of questions of law is *de novo*, the Court is prohibited from retrying *de novo* matters on appeal from the Commission. *Ricks v. Miss. State Dep’t of Health*, 719 So. 2d 173 177(¶10) (Miss.1998). Rather, the Court’s review of the evidence before the Commission is limited to determining whether there was evidence substantially supporting the Commission’s decision such that its decision was not arbitrary and capricious. *Weatherspoon*, 853 So. 2d at 778. “Substantial evidence” has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” and affords “a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Cent. Elec. Power Ass’n v. Hicks*, 236 Miss. 378, 389, 110 So. 2d 351, 357 (1959). If substantial evidence supports the Commission’s decision, this Court may not reverse even if, acting as the fact-finder, we would have reached the opposite conclusion. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). To do otherwise constitutes an impermissible intrusion by this Court into the field of the

Commission. *Miss. State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969).

ARGUMENT

I. In his appellate brief, Neill inaccurately recounts the rulings of the circuit judge and the administrative law judge are inaccurate, as well as the substance of Waterway's proof.

It is first necessary to point out several wholly inaccurate assertions made by Neill in his brief to this Court. First, Neill maintains that the circuit judge had "reservations" about affirming the Commission's ruling. (Appellant's Brief, p. 8). This is not accurate. The judge merely recited the applicable legal standard that "this Court is bound by those findings and orders of the Mississippi Workers' Compensation Commission which are supported by substantial evidence. This is so, even though the evidence might convince the Court otherwise if this Court were the fact finder."¹ (R. Vol. 1, p. 7). Nothing in the record suggests that the Circuit Judge disagreed with the Commission's findings. Neill further incorrectly maintains that the Administrative Law Judge failed to mention "even once" in her opinion the testimony, or even the presence at trial, of Neill's vocational expert, Dr. Kennon. (Appellant's Brief, p. 13). In truth, the Administrative Law Judge discussed Dr. Kennon's testimony and credentials at length in pages 6 through 7 of her opinion. (R. Vol. 4, pp. 419-420; R.E. Tab 1).

Neill also wrongfully asserts that Waterway offered no proof when, in fact, the Waterway relied on deposition testimony and Neill's medical records to rebut Neill's position that he could never work again as a result of his alleged injuries suffered while working for the employer. Most significantly, Neill completely distorts Dr. Mallette's testimony regarding the cause of his hand eczema condition. Although Neill states that the carpal tunnel surgery initially caused the

¹ This is almost a direct quote from *Smith v. Durant Electric Corporation*, 918 So. 2d 860, 863 (Miss. Ct. App. 2006) ("This is so, even if the evidence would convince the Court otherwise, were we the fact finder")

condition, Dr. Mallette actually testified that he had no opinion on what caused the condition but that the current outbreaks of the hand eczema were not the result of the carpal tunnel surgery.

(Exhibit 5, p. 14, L. 3; R.E. Tab 9). The proof was that Neill had outbreaks before the surgery.

Notwithstanding Neill's protestations, substantial evidence supports the Commission's findings. There was conflicting evidence as to Neill's medical impairment with the greatest anatomical rating being assessed by a paid expert at 20% to each upper extremity. As to whether Neill was totally disabled, the proof conflicted. Although Neill's vocational expert opined that he suffered a total loss of wage-earning capacity, Neill's treating physician and another one of the Neill's experts concluded that he was or would be able to work.

II. The circuit court did not err in affirming the decision of the Full Commission awarding Neill benefits for permanent partial disability.

III. Substantial evidence supports the decisions of the administrative law judge, the Full Commission and the Circuit Court of Tishomingo County that Neill is permanently partially disabled.

The Administrative Law Judge and the Full Commission concluded that Neill suffered a 60% loss of industrial use of both his right and left upper extremity. Neill maintains that the trial court erred in affirming the decision of the Commission denying him permanent full disability benefits.

A worker who receives a permanent functional impairment is guaranteed some measure of compensation. Miss. Code Ann. §71-3-17(c) (Rev. 2000). The upper extremity is included as a scheduled member. *Id.* The measure of compensation in a scheduled member case depends on two factors: (i) the degree of functional loss of use as demonstrated by the medical evidence, usually expressed as a percentage, and (ii) the impact the loss of function has on the worker's ability to perform and customary duties associated with his usual employment. *Smith v. Jackson Const. Co.*, 607 So. 2d 1119, 1128 (Miss. 1992). The first aspect of disability of determination is

known as functional disability, and the second aspect of disability of determination is known as industrial disability. *Robertson v. Packard Elec. Div., General Motors Corp.*, 523 So. 2d 329, 331 (Miss. 1988).

The permanently injured worker is entitled to compensation based on the greater of the percentage of the functional disability or the percentage of the industrial disability. *Smith*, 607 So. 2d at 1127. Where the claimant wishes to prove total occupational loss, the claimant bears the burden of proving that he sought and been unable to find work “in the same or other employment.” *Jordan v. Hercules, Inc.* 600 So. 2d 179, 183 (Miss. 1992) (quoting Miss. Code Ann. §71-3-3(I) (Rev. 2000)).

The facts in this case, not unlike others, involve a situation where the medical proof as to anatomical impairment is conflicting. One of Neill’s treating physicians concluded that, after reaching maximum medical improvement, Neill suffered an 8% permanent impairment to his left upper extremity and a 10% permanent impairment to his right upper extremity. The expert hired by the Neill, Dr. Boals, concluded that Neill suffered a 20% permanent impairment to both extremities. Dr. Boals’ practice largely consists of evaluating claimants and giving testimony on their behalf. The Workers’ Compensation Commission was entitled to favor the testimony of a treating physician over a physical who has seen the claimant for the purpose of testifying. *South Central Bell Telephone Co. v. Adain*, 474 So. 2d. 584, 593 (Miss. 1985).

The expert evidence also conflicted as to whether Neill was totally and permanently disabled. Dr. Kennon, Neill’s vocation expert, testified that Neill was permanently and totally disabled. (R. Vol. 5, p. 90-91; R.E. Tab 5). Dr. Cunningham concluded that Neill was able to return to work with restrictions of light capacity work. (Exhibit CL 4 at CPM-21; R.E. Tab 6). Dr. Joseph Boals, who was hired as an expert witness by Neill to give testimony in the

proceeding, found that he could work and should work with restrictions. (R. Vol. 2, p. 40; R.E. Tab 11).

Dr. Boals testified that he had evaluated thousands of carpal-tunnel patients. (Exhibit CL 8, p. 16, L. 19-21; R.E. Tab 8). Dr. Boals testified that the usual anatomical impairments would be approximately 10%. (Exhibit CL 8, p. 16, L. 3-5; R.E. Tab 8). He concluded that Neill's excessive grip loss warranted a higher rating of 20%. (Exhibit CL 8, p. 17, L. 6; R.E. Tab 8). Dr. Boals testified that he had evaluated patients with greater impairments than Neill. Neill maintains that he has never been able to return to any work. Yet, Dr. Boals gave the following testimony in 2003, long after Neill walked off the job at Waterway:

Question: Is there any reason in your opinion that this man should not be able to work at all?

Answer: No. He should be able to work. He just needs to meet those restrictions and be careful. This is a young guy. He needs to work. He needs to find something, and he's wearing protective gloves now. When he goes to work, that's got to be taken into consideration. You don't want him around a press or machinery where he might catch that glove and roll it up. It's got to be kind of, you know, adjusted by his treating doctor.

(Exhibit CL 8, p. 19-20, L. 15-1; R.E. Tab 8).

Neill's testimony was that he walked off the job. (R. Vol. 5, p. 47; R.E. Tab 5). Neill never made any attempt to locate or secure employment after he left Waterways. (R. Vol. 5, p. 48; R.E. Tab 5). Neill never applied for any job. (R. Vol. 5, p. 50; R.E. Tab 5). Neill took no effort whatsoever to ascertain whether he could find a job for which he was suitable. (R. Vol. 5, p. 48; R.E. Tab 5).

Legitimate questions exist whether Neill is willing to work. The vocational expert's amended report is also telling:

He is also markedly elevated on the symptom dependency scale, suggestive that he may be utilizing his current medical condition as

a means of eliciting sympathy and attention from loved ones. He is admitting to features which suggest that he enjoys attention that comes from being a patient. Interestingly, his preservation score was quite low. Low scores on this scale suggest lack of motivation necessary to face the challenges of a rigorous rehabilitation program.

(Dr. Kennon's supplemental report at page 5, Exhibit CL1 at 16; R.E. Tab 12).

In light of the conflicting testimony in the case sub judice, it is important to bear in mind this Court's standard of review. The Mississippi Supreme Court has established that "whenever the expert evidence is conflicting the court will affirm the Commission whether the award is for or against the claimant." *Smith v. Durant Electric Corporation*, 918 So. 2d 860, 863 (¶10) (Miss. Ct. App. 2005) (quoting *Raytheon Aerospace Support Serv. v. Miller*, 861 So. 2d 330, 336 (¶13) (Miss. 2003)). In *Smith*, the claimant argued that the circuit court erred in affirming the order of the Commission denying her an award for permanent full disability. *Id.* at 862. The claimant in *Smith* urged the Mississippi Court of Appeals to give greater weight to the testimony of one expert who testified that claimant was occupationally disabled. *Id.* at 863. In declining "to assign new weight to the various medical opinions present before the Commission," the court of appeals emphasized its limited standard of review and explained that "even were we to agree with [the claimant's] contention that Dr. Ramsey's medical opinion was the most credible . . . [the claimant] has failed to establish reversible error." *Id.*

In addition to the conflicting expert testimony, a host of undisputed facts that completely undercut Neill's contention that he is permanently disabled, including undisputed facts regarding carpal tunnel syndrome, hand eczema, and the work-relatedness of the injury.

A) Carpal Tunnel Syndrome

One of the central issues in this workers' compensation proceeding was whether the conditions from which Neil suffers were caused by work-related injuries. Employee's

rheumatologist, Dr. Fuchs, concluded that Neill suffered from reflux-sympathetic-dystrophy (RSD). Dr. Fuchs opined that Neill's RSD caused his carpal tunnel syndrome. Significantly, Dr. Fuchs did not testify to a reasonable degree of medical certainty that the RSD was caused by work activities.

Dr. Fuchs' testimony not meet the evidentiary standard to prove causation. Dr. Fuchs testified that he could say with 100% certainty that it was impossible to state with any certainty what caused the syndrome. (Exhibit CL 5, p. 22-23, L. 20-1; R.E. Tab 7). He then went on to testify that there was a fifty-fifty chance that Neill's condition was work-related. (*Id.* at p. 23, L.1-8; R.E. Tab 7). Such testimony clearly does not establish that it was more probable than not that the condition was caused as a result of work-place activities. At the very best, such proof establishes that it is equally possible that the condition, if it existed, occurred as a result of factors complete unrelated to work.

Notwithstanding, the administrative law judge and the Full Commission gave Neill the benefit of the doubt by concluding that his bilateral, carpal-tunnel syndrome arose out of his employment.

B) Hand Eczema Condition

Bilateral, carpal-tunnel syndrome was but one of several conditions from which Neill suffered. Neill's testimony was very clear that the primary problem, which he currently has, is the dishydroticeczema or hand eczema. This condition, which affects both his hands and feet, existed before Neill had surgery for repetitive motion injuries.

Both employee and his wife testified that his primary problem was the blistering in connection with the hand eczema. Neill's testimony was that the overwhelming majority of his current problems are the result of the blistering on his palms. (R. Vol. 5, pp. 49-50; R.E. Tab 5).

He testified that his primary problem was the blistering of his left hand although he had some problems with his right hand. (R. Vol. 5, p. 53; R.E. Tab 5).

Mrs. Neill testified:

Question: "And the primary problem you have observed is blistering?"

Answer: "Yuh, the blistering and the itching is really -- it gets frustrating, and I have to get on to him about stretching it."

(R. Vol. 5, p. 62, L. 10-14; R.E. Tab 5).

Neill testified:

Question: "And is it your position that the reason you are not applying [for a job] is because your left hand hurts so bad?"

Answer: "Yes, sir, my hand flame up."

Question: "All right. Let's -- let's talk about flame up for a minute so the court can have some understanding."

Answer: "Yes, sir."

Question: "You're talking about a reaction or a blistering or something on your hand?"

Answer: "It's not on the top of my hand, it's on the palm of my hand."

Question: "I'm sorry, on the palm of your hand?"

Answer: "Yes, sir."

Question: "And how often do you have that occurrence?"

Answer: "Well, it's -- right now it's just -- just depending on the weather and the -- it does not even go away. It just swell up and blisters. It just swell up and blisters and will get worse and get better and then worse again."

(R. Vol. 5, pp. 48-49, L. 24-11; R.E. Tab 5).

Significantly, nothing connects with his current symptoms with his work injuries. Dr. Fraser's opinion was that Neill's current symptomology was not related to bilateral carpal tunnel

syndrome. (Exhibit CL 3; R.E. Tab 13). Dr. Fraser also concluded that Neill's current or residual symptoms were not attributable to carpal tunnel syndrome. (Exhibit CL 3; R.E. Tab 13). Dr. Fraser stated: "I do not think his residual symptoms are attributable to carpal tunnel syndrome and I doubt that any surgical correctable problem is going to be identified." (Exhibit CL 3; R.E. Tab 13).

Dr. Mallette, Neill's treating allergist, concluded that he could not tie the current eczema with either workplace injury or surgery. (Exhibit CL 7, p. 13, L. 22; R.E. Tab 9). Dr. Mallette further unequivocally testified that he did not know what caused the hand eczema condition. (Exhibit CL 7, p. 9, L. 10; R.E. Tab 9).

Certainly, no physician, including Dr. Mallette, ever testified that Neill's employment caused this condition. Furthermore, Dr. Mallette's testimony was very clear that the current breakout of eczema is not triggered by the surgery or employment. (Exhibit CL 7, p. 14, L. 3; R.E. Tab 9).

"I do not feel at this time that this rash is related to the surgery." Mallette's deposition, (Exhibit CL 7 at page 9, L. 22-23 see Tab 9). Moreover, Dr. Mallette testified that this condition could be controlled with proper care. His testimony was:

Q. Is Mr. Neil [sic] still under your care?

A. Yes, sir. He still continues to have problems with now both hands instead of one hand, and it breaks out from time to time, but he can control it as long as he avoids things that irritates his hands with the steroid cream I gave him and he treats his itching with oral medication to control that. This rash can itch very intensely and can be very severe.

Mallette's deposition, Exhibit CL 7 at pages 8-9, L. 20-5 see Tab 9.

Dr. Kennon was the only expert who testified that Neill was totally and permanently disabled. He completely glossed over the fact that no medical doctor concluded the eczema

condition, which affected Neill's hands and feet, was caused or aggravated by work. Moreover, Dr. Kennon failed to take into consideration that he condition, regardless of its cause, could be controlled.

There was no miscarriage of justice in this case. Beginning with the Administrative Law Judge, there has been a careful sifting through the conflicting expert evidence. The opinion of the experts as to cause of the carpal tunnel syndrome was contradictory. One said RSD caused it and the other concluded repetitive motion caused the problem. The evidence conflicted as to Neill's ability to work. Two medical doctors concluded that he could work, while Neill's vocational expert testified that he could not do anything. Moreover, Neill failed to muster the proof that either his current medical condition is attributable to work or could not be controlled if he follows his physician's advice.

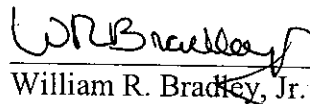

CONCLUSION

For reasons stated herein, Waterway requests that this Court affirm the order of the Full Commission and the ruling of the administrative law judge.

Respectfully submitted,

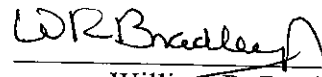
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CERTIFICATE OF SERVICE

I William R. Bradley, Jr. do hereby certify that a copy of the foregoing Pretrial Statement was mailed, postage prepaid, on September 14, 2007, to the K. Don Bishop, Bishop Law Firm, P.O. Box 408, Henderson, Tennessee 38340 and Austin R. Nimocks, 175 Main Street, Biloxi, Mississippi 39530, counsel of record:



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