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IN THE STATE OF MISSISSIPPI COURT OF APPEALS

CAUSE NUMBER 2007-WC-00346-COA

NHAN NEILL — APPELLANT

VERSUS

WATERWAY, INC./TEAM AMERICA and LEGION INSURANCE COMPANY — APPELLEES

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

Respectfully submitted by: Austin R. Nimocks, Esquire
Mississippi Bar Number [redacted]

Austin R. Nimocks & Associates, P.L.L.C.
Post Office Box 8025
Biloxi, Mississippi 39535
Telephone: (228) 435-2500
Telecopier: (228) 435-5035
E-Mail: animocks@animocks.com

K. Don Bishop, Esquire*
Tennessee Bar Number [redacted]

Bishop Law Firm
Post Office Box 10965
Jackson, Tennessee 38308
Telephone: (731) 256-0100
Telecopier: (731) 212-4699
E-Mail: dbishop@bishoplawfirm.com

ATTORNEYS FOR THE APPELLANT

* Admitted *pro hac vice*

REPLY ARGUMENT

I. THE EMPLOYER AND CARRIER IGNORE THE IMPORTANT DIFFERENCE BETWEEN THE MEDICAL EXPERTS AND THE SOLE VOCATIONAL EXPERT.

In making its arguments, the Employer and Carrier labor to convince this Court that the medical testimony alone supports the conclusion that Nhan is not permanently totally disabled. Conveniently, the Employer and Carrier focus solely on the medical aspects of Nhan's claim, without exploring the vocational aspects of his claim. As this Court is well aware, it is a unique combination of both medical disability and vocational abilities that results in an injured Claimant's overall vocational disability. One cannot be considered without the other. For example, a severe lower back injury would likely not affect the vocational capacity of a lawyer, but it would permanently disable a construction worker. An injured worker's education, experience, and abilities are always an essential part of the disability equation.

In making its flawed argument, the Employer and Carrier never once mention in their brief the following:

(a) Nhan's academic capabilities are poor, and he is reading at only the 3rd or 4th grade level;

(b) Nhan functions in the borderline range of intellectual capabilities;

(c) Nhan possesses no licenses, degrees, or certificates;

(d) Nhan possesses only an IQ of 75—borderline, mild, mentally retarded range;

(e) Nhan speaks with broken English.

Moreover, the Employer and Carrier deceptively present Dr. Boals testimony. While arguing

that Nhan could return to work, the Employer and Carrier highlight Dr. Boals' answer that "[h]e should be able to work. He just needs to meet those restrictions and be careful." (*See* Employer and Carrier's Brief at 9). Yet, the Employer and Carrier ignore that "those restrictions" are light and sedentary work—far from the substantial acts of Nhan's usual employment. All of Nhan's prior employment involved heavy duty jobs.

This is why the testimony of the only vocational expert, Dr. Kennon, is imperative in this case. The medical experts testify only as to whether Nhan can work from a medical/physical standpoint. They do not take into account job skills, labor experience, cognitive abilities, language barriers, geography, and other important factors. Comparing the conclusions of Dr. Kennon to the testimony of the medical doctors is an improper, *apples vs. oranges* type of comparison. Dr. Kennon is the only expert who takes the medical conclusions reached by the medical experts, and then adds the other important ingredients in answering the large question—Nhan's industrial loss of use or occupational disability.

This is also why the Administrative Judge's omission of reference to Dr. Kennon in her decision is so gravely improper. The Employer and Carrier suggest that the Claimant misrepresents this fact, but to no avail. (Brief of Employer and Carrier at 6). In her actual "FINDINGS AND DECISION," the Administrative Judge does not once mention Dr. Kennon, while giving express note to Dr. Fuchs, Dr. Fraser, Dr. Cunningham, Dr. Malette, and Dr. Boals. (C.P. at 426-29). Making the same error as the Employer and Carrier, the Administrative Judge over focuses on the medical testimony without giving any weight to the other important factors which determine one's employability. That the Administrative Judge

outlined Dr. Kennon's testimony in her recitation of the evidence presented, but then expressly omitted him from her "FINDINGS AND DECISION" is a clear indication that Dr. Kennon's testimony and opinions were completely ignored and/or dismissed by the Administrative Judge in reaching her ultimate decision.

Finally, both the Administrative Judge and the Employer and Carrier ignored another important and substantial factor in determining Nhan's ability to return to work and again become gainfully employed—geography. As was mentioned in the Appellant's initial brief, he is a resident of Savannah, TN (pop. 7,248)[1] and Hardin County, TN (pop. 26,089).[2] This Court has been clear that a Claimant's local county and community is the dispositive geography to be considered on the extent of their occupational disability. ***See Piper Industries, Inc. v. Herod***, 560 So.2d 732, 735 (Miss.1990); ***Pontotoc Wire Products Co. v. Ferguson***, 384 So.2d 601, 603 (Miss.1980); ***Georgia Pacific Corp. v. Taplin***, 586 So. 2d 823 (Miss. 1991); ***McCray v. Key Constructors, Inc.***, 803 So. 2d 1199 (Miss. 2000); ***Thompson v. Wells-Lamont Corp.***, 362 So. 2d 638 (Miss. 1978). More importantly, where the Employer & Carrier fail to offer any evidence of local accessible employment opportunities, the Claimant's evidence is dispositive of the issue. ***Piper***, 560 So. 2d at 735 (citing ***Ponotoc***, 384 So. 2d at 602). When the Claimant's testimony and case-in-chief is undisputed, the Claimant's requested relief shall be granted. ***See, e.g., Barta v. Harrell Constr. & ACIG Ins. Co.***, 2007 WL 892470 (MWCC 2007); ***Shaffer v. Layne Cent. Div. of Layne Christensen Co.***, 2006 WL 1414201 (MWCC 2006) (finding in full favor of the Claimant where the

1 http://www.city-data.com/city/Savannah-Tennessee.html

Employer and Carrier called no witnesses to refute the Claimant's testimony); ***Lodriques v. Marcia Johnson Constr., Inc.***, 2004 WL 1779106 (MWCC 2004); ***Ware-Ladnier v. Park Place Entertainment/Grand Casino***, 2003 WL 22598558 (MWCC 2003).

The Employer and Carrier offered no evidence regarding employment opportunities for Nhan in either Savannah, TN or Hardin County, TN. Their only attempt at this was when Dr. Kennon was asked if Nhan could work as a greeter at Wal-Mart. As already outlined in the Appellant's Initial Brief, he could not. (Appellant's Brief at 15). This testimony was unrefuted.

II. THE EMPLOYER AND CARRIER IMPROPERLY ATTEMPT TO MANUFACTURE A NEW ISSUE OF MEDICAL CAUSATION ON APPEAL.

In an effort to detract this Court from its failure to provide any evidence that Nhan is capable of performing any jobs within his local community or home county, the Employer and Carrier attempt to manufacture a new issue on appeal—medical causation. Though there was some conflicting or inconsistent testimony about the cause of Nhan's medical conditions, the Administrative Judge did correctly conclude that Nhan sustained work-related injuries to both of his upper extremities. (MWCC at 426-27). This has never been challenged by the Employer & Carrier and the only issue presented on appeal is the extent of Nhan's occupational disability.

Yet, the Employer and Carrier dedicate eight pages of their brief (pp. 7-14) arguing the non-existent issues of medical causation. They even create subheadings of "Carpal Tunnel Syndrome" and "Hand Eczema Condition," though the causation of these items is not

2 http://www.2.tnecd.net/prospect/comdatarpt.asp?id=Savannah

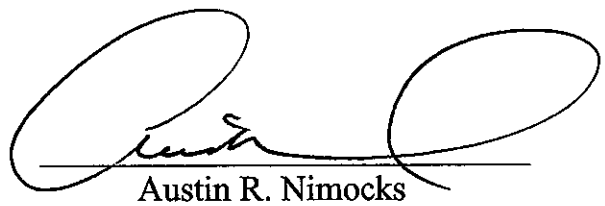
before the court. The Administrative Judge decided all of these issues in favor of Nhan and the Employer and Carrier never sought to appeal. The Employer and Carrier cannot now re-litigate these issues before this Court.

Clearly, the motive of the Employer and Carrier in manufacturing a non-existent issue of medical causation is to detract attention from its lack of an answer to Dr. Kennon. Though the Employer and Carrier would like to pretend otherwise, no doctor testified about matters covered by Dr. Kennon. The doctors testified only about medical impairment and medical restrictions. That testimony had nothing to do with the areas covered by Dr. Kennon.

CONCLUSION

Medical evidence is vastly different from vocational evidence. The vocational testimony is clear and unrefuted that Nhan cannot return to the work force, even as a Wal-Mart greeter. With unrefuted expert testimony that the Claimant is permanently totally disabled, the Administrative Judge erred in her decision, and the circuit judge erred in upholding her decision. As stated by Workers' Compensation Commissioner Schoby, Nhan is entitled to receive 450 weeks of permanent disability compensation. This Court should reverse the Circuit Court's judgment and render judgment for 450 weeks of disability benefits.

RESPECTFULLY SUBMITTED, this the 1 day of October, 2007.



Austin R. Nimocks
Miss. Bar No. [redacted]

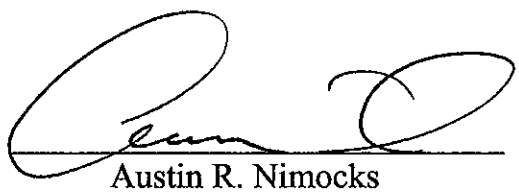
Austin R. Nimocks & Associates, P.L.L.C.
Post Office Box 8025
Biloxi, Mississippi 39535
Telephone: (228) 435-2500
Telecopier: (228) 435-5035
E-Mail: animocks@animocks.com

ATTORNEYS FOR THE APPELLANT

CERTIFICATE OF SERVICE

I, Austin R. Nimocks, do hereby certify that I have this day mailed, through the United States Mail, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF OF THE APPELLANT to (a) William R. Bradley, Esquire, Glanker Brown, PLLC, One Commerce Square, Seventeenth Floor, Memphis, Tennessee 38103-2566; (b) Honorable Thomas Gardner, Circuit Court of Tishomingo County, Post Office Drawer 1100, Tupelo, Mississippi 38802; (c) Mississippi Workers' Compensation Commission, Post Office box 5300, Jackson, Mississippi 39296-5300; and (d) Nhan Neill, Post Office Box 1054, Savannah, Tennessee 38372.

SO CERTIFIED, this the 1 day of October, 2007.



Austin R. Nimocks

Austin R. Nimocks & Associates, P.L.L.C.
Post Office Box 8025
Biloxi, Mississippi 39535
Telephone: (228) 435-2500
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