IN THE STATE OF MISSISSIPPI SUPREME COURT

CAUSE NUMBER 2007-WC-00346

NHAN NEILL **APPELLANT**

VERSUS

WATERWAY, INC./TEAM AMERICA and TENNESSEE INSURANCE GUARANTY FUND (for the now insolvent LEGION INSURANCE COMPANY) **APPELLEES**

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Honorable Judges of the State of Mississippi Court of Appeals or Honorable Justices of the State of Mississippi Supreme Court may evaluate possible disqualification or recusal.

Nhan Neill	Appellant
Austin R. Nimocks	Appellate Counsel for the Appellant
K. Don Bishop	Trial and Appellate Counsel for the Appellant
Waterway, Inc./Team America	Appellee
Legion Insurance Company (now insolvent)	Appellee
Tennessee Insurance Guaranty Fund, Successor to insolvent Legion Insurance Company	Appellee
William R. Bradley, Jr., Esquire	Trial and Appellate Counsel for the Appellees

The Honorable Thomas J. Gardner, III, Circuit Court of Tishomingo County	Circuit Judge, on Appeal from MWCC
The Honorable Liles Williams, Chairman, Mississippi Workers' Compensation Commission	Commissioner, on Appeal from the Administrative Judge
The Honorable Lydia Quarles, Commissioner, Mississippi Workers' Compensation Commission	Commissioner, on Appeal from the Administrative Judge
The Honorable Barney Schoby, Commissioner, Mississippi Workers' Compensation Commission	Commissioner, on Appeal from the Administrative Judge
The Honorable Cindy P. Wilson, Administrative Judge, Mississippi Workers' Compensation Commission	Administrative and and Trial Judge

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STATEMENT OF THE ISSUES

In light of the errors occurring below, the Appellant respectfully brings its appeal to this Honorable Court and asserts the following points of error:

WHERE THE EMPLOYER AND CARRIER HAVE NO WITNESSES, THE CIRCUIT JUDGE ERRED IN AFFIRMING THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION.

THE OVERWHELMING WEIGHT OF EVIDENCE SHOWS THAT NHAN IS PERMANENTLY TOTALLY DISABLED.

STATEMENT OF THE CASE

Facts and Procedural History

This case involves a thirty (30) year old man injured beyond his physical and vocational capabilities. The unrefuted testimony and evidence presented on behalf of the Claimant, Nhan Neill, demonstrates that his unfortunate bi-lateral injuries will forever prevent him from working again.

On April 12, 2001, Nhan Neill (hereinafter "Nhan"), a normal, healthy thirty (30) year old man, was performing his usual duties as Laborer for Waterway, Inc./Team America. Throughout his life to that point, Nhan had only been able to perform medial, labor-intensive jobs[1] as he possessed only an IQ of 75—borderline, mild, mentally retarded range. (Tr. at 73). Nhan speaks with broken English, reads between the 3rd and 4th grade levels and spells at the 6th grade level, so his opportunities for employment are vastly limited. (Tr. at 72, 74). This is especially so given the small communities in which he lived (Savannah, TN) and worked (Iuka, MS). As this Court is well aware, those communities and counties possess little industry and few employment opportunities.

When he started to work for Waterway, and continuing to the date of his injury, Nhan did not have a history of prior operations, chronic medical problems, or allergies.[2] Nhan worked without any medical difficulty until April 12, 2001, which was several months following Waterway's product production change requiring Nhan, and one co-worker, to lift molded plastic units weighing about three hundred (300) pounds each, fasten them to a frame by "hand squeezing" them into place utilizing and awkward process requiring stretching, reaching, and very strong gripping action. (Tr. at 13-17). Thereafter, Nhan would assemble lights from an assortment of component parts and then

1 Before his injury, Nhan worked bagging groceries, landscaping, fixing mobile home bathtubs, helping an electrician, stocking, and repairing swimming pool/water slide fiberglass parts. (Tr. at 8-12).

2 Nhan's pre-Waterway employment history lasted about fourteen (14) years. He once had a minor pulled muscle which resulted in no claims. (Tr. at 10). Otherwise, Nhan never had any problems with his hands or wrists before April 21, 2001. (Tr. at 31, 59-60).

installing the lights on each unit all of which required using hand tools requiring delicate and awkward finger, hand, wrist, and arm actions. (Tr. at 17-20). This is a process that Nhan was required to perform fourteen (14) times per day. (Tr. at 20-21, 22). Finally, after several months of this repeat manual process, on April 12, 2001 Nhan's right hand "froze up" and he had to have help to remove it from the unit he was working on and to pry the tool he was using from his hand. (Tr. at 22-23).

After Nhan's injury, the Employer & Carrier provided medical treatment, but when conventional conservative treatment failed, Nhan was referred to Dr. Fraser who diagnosed Nhan as suffering from bilateral carpal tunnel syndrome, worse on the right than the left. Dr. Fraser recognized and reported Nhan's carpal tunnel syndrome was only part of his hand and wrist "overuse syndrome" and that carpal tunnel surgery would not solve all of his problems. In the medical work-up leading to surgery, Dr. Fraser noticed Nhan had dermatitis symptoms on his hands and wrists. Surgery was postponed until these symptoms could be controlled. (Exhibit 3).

Dr. Mallette, an allergist, was brought in to treat the dermatitis symptoms. Dr. Mallette concluded Nhan's rash problem was hand eczema. (See Exhibit 7 at pp. 8, 9). Eczema is a condition that frequently causes a person to be unable to use their hands. (Exhibit 7 at p.12). "It is debilitating because the hands will crack, peel, they can bleed and swell . . . ." (Exhibit 7 at p. 12). Dr. Mallette prescribed a regiment of treatment that helped control the condition and make surgery possible.

Dr. Fraser elected to do the left carpal tunnel surgery in late June 2001. (Exhibit 3). By early August 2001, Dr. Fraser noted that Nhan was still recovering from that surgery, but complaining of stinging when gripping with the left hand. (Exhibit 3). Later in August 2001, the right carpal tunnel surgery was performed. Dr. Fraser noted in late September 2001 that Nhan still complained of "stinging" and "itching" and, by late October 2001, Nhan complained of pain in both hands and wrist

causing Nhan to be ". . . stressed out and going crazy." (Exhibit 3) In November 2001, Dr. Fraser referred Mr. Neill to a rheumatologist to determine the underlying problem. (Exhibit 3).

In February 2002, though he was still having several problems, the Employer & Carrier referred Nhan to Dr. Cunningham to obtain a rating. (Exhibit 4). Dr. Cunningham concluded Nhan had reached maximum medical improvement, had suffered permanent medical impairment of eleven (11%) percent to the body, and could return to work subject to work restrictions ". . . of light duty work with no highly repetitive motion in both hands." (Exhibit 4). Nhan returned to work on a test basis and his unrefuted testimony was that Waterway ignored Dr. Cunningham's restrictions and had him doing the same work he was doing before his April 12, 2001 injury, except he was not having to do the heavy lifting of the molded plastic units. (Tr. at 26). Both Nhan and his spouse, Tabitha, testified this work caused his hands to flame up, swell, and blister so badly that he could not continue to work. (Tr. at 26, 61).

Dr. Fraser, on April 26, 2002, noted Nhan had tried unsuccessfully to return to work about a year after his injury. Dr. Fraser concluded Nhan's residual symptoms were not attributable to the carpal tunnel surgery he had performed (apparently being related to "overuse syndrome" he previously diagnosed during the initial 4/23/01 office visit). On June 3, 2002, Dr. Fraser found Nhan's hands to be tender with complaints of swelling and itching and concluded there was nothing to offer him form a neurosurgical standpoint. He prescribed medication, including steroid cream for his hands. (Exhibit 3). Thus, the problems with Nhan's hands continued.

On June 20, 2002, Nhan saw Dr. Melson, an orthopedic surgeon and another physician that the Employer & Carrier referred him to see. (Exhibit 2). Dr. Melson concluded Nhan needed to see a rheumatologist to determine the cause of his synovitis stating that ". . . if it is a medical condition I think then possibly he could be treated and be sent back to work. If it is that he has developed a

synovitis, swelling and stiffness because of his work that seems to be chronic now, then probably he will not be able to go back to the same work." (Exhibit 2). Thus, the medical profession was finally starting to realize that Nhan may not be able to return to work.

On July 25, 2002 Dr. Fraser reported that Nhan's second attempt to return to "light duty" work made his hands swell and break. (Exhibit 3). Thus, he held him off work until he saw yet another rheumatologist and dermatologist. Thereafter, according to unrefuted testimony by Nhan, he has never been able to return to any work.[3] (Tr. at 30). Nhan and Tabitha, his wife, also provided unrefuted testimony that routine daily activities, such as the following, sets off episodes of pain, itching, and blistering:

1. Exposure to washing dishes without protective gloves.
2. Running a vacuum cleaner.
3. Activities requiring use of his hands such as driving a car.
4. Yard work.
5. Trying to play with his children.
6. Weather changes.
7. Sometimes no apparent reason at all.

(Tr. at 30-31, 35, 59-60). Moreover, getting restful sleep for Nhan is sometime impossible, even with the medication. (Tr. at 37). He has to apply hot wax as a daily routine to relieve itching and testified he continues to see Dr. Fuchs and Dr. Mellette on a scheduled basis and this will be required into the future. Dr. Fuchs prescribed gloves for Nhan and he wears them constantly. (Tr. at 32-33, 62).

Supporting Nhan's unrefuted conclusion that he can no longer work, Dr. Mallette testified that carpal tunnel surgery was a primary trigger that brought the hand eczema out or initially caused it. (Exhibit 7 at p. 9). Dr. Mallette testified that once hand eczema is triggered, it continues on spontaneously. (Exhibit 7 at p. 12). According to Dr. Mallette, Nhan's eczema is with him about

Ninety (90%) percent of time and it is not likely to ever resolve itself and the odds are he will have to live with it the rest of his life. (Exhibit 7 at p. 10). An episode of eczema will start with itching, then little red bumps, then blisters, then busted blisters, then intense itching at all times, then blisters dry up and then it is time for another cycle to start again. (Exhibit 7 at pp. 11-12). Hand eczema is debilitating because the hands will crack, peel, bleed, swell, and cause a person to be unable to use their hands. (Exhibit 7 at p. 12-13). Basically, Dr. Mallette said he is just treating Nhan's eczema symptoms and all that can be done at these appointments is to renew his medications and, from time to time, prescribe new ones as they become available. (Exhibit 7 at p. 16).

Dr. Fuchs, a Vanderbilt Hospital physician specializing in rheumatology, started treating Nhan in September 2002 and continues as a treating physician. Dr. Fuchs testified by deposition and concluded that the type of labor-intensive work that Nhan did is the kind of work that triggers reflex-sympathetic-dystrophy (RSD). Nhan's RSD caused swelling and that swelling caused his carpal tunnel syndrome. Nhan has reached maximum medical improvement, but because Nhan has very sensitive palms he is unable to really do manipulatives with his hands. He even has problems holding on to a pen and writing and he would have difficulties doing near most anything with his hands. Mr. Neill can not really file papers with his hands, he can not write with his hands, he probably could not tolerate typing either and heavier work is probably more of a problem in that he will end up having trouble with his grip strength and holding on to objects. (Exhibit 5).

Dr. Boals, orthopedic surgeon, saw Nhan on two occasions at the request of Nhan's attorney, K. Don Bishop, for the purpose of rendering an opinion as to Nhan's medical impairment. He opined a permanent anatomical impairment of Twenty (20%) percent to each upper extremity; recommended work restrictions of light, sedentary jobs, avoiding repetition and heavy griping because of Nhan's

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3 Nhan's previously described good faith attempt to return to work at Waterway is the only work he has performed since

"overuse syndrome" residuals; thought work in a labor intensive situation would be very bad. Nhan has a type of skin problem associated with the injuries he experienced and, though it would be good if Nhan could find work within the stated work restrictions, he did not know if such work would be available in Nhan's injured condition. (Exhibit 8).

Finally, and most importantly, Dr. Kennon (Ph.D.), a psychological and vocational expert, saw Nhan on February 12, 2003 and August 13, 2004 and testified at trial. (Tr. at 64-98).[4] Based on his tests and evaluations of Nhan, Dr. Kennon testified that he is in the lower five (5%) percent range of his age group for intelligence (IQ) and academics ability. (Tr. at 73). As previously mentioned, Dr. Kennon established that Nhan reads at a third (3rd) or fourth (4th) grade level, spells at a sixth (6th) grade level, and does math at an eighth (8th) grade level. Dr. Kennon also established that Nhan was not malingering, tested way below the level considered normal for manual hand and finger dexterity, and that Nhan suffered from RSD related to his work injury. (Tr. at 74-75, 86-87). Considering all of this, Dr. Kennon opined that Nhan cannot work and earn wages ever. (Tr. at 91-92). On cross examination, Dr. Kennon conclusively confirmed that Nhan could not even perform the simplest work of a Wal-Mart greeter.[5]

April 12, 2001. (Tr. at 27).

4 Aside from calling no witnesses of their own, the Employer & Carrier's cross-examination of Dr. Kennon lasted only six (6) pages and neither challenged nor undermined any of Dr. Kennon's conclusions. (Tr. at 93-98).

5 The end of Dr. Kennon's cross-examination, confirming that Nhan cannot work as a Wal-Mart greeter, clearly underscores what this case is all about—Nhan Neill is permanently totally disabled and deserves to be compensated accordingly. The final transaction with Dr. Kennon is worth duplicating, and went as follows:

> Q. So your opinion is he couldn't even do something as – as simple as perhaps a person that greets at Wal-Mart? He can't do something like that?
>
> A. Well, the issue is – is whether he can sustain that related to pain. I think another issue is is [sic] whether Wal-Mart while he's on Darvon pain medication. I think another issue is is [sic] his consistency of being able to drive to work and get there and – and deal with his pain features while at work and how does he go about doing that. And if they have other duties for him like most greeters, which may include moving carts, stacking them. Those are going to be problematic, I think, for Mr. Neill. I thought of that too, and I – you know, I've looked at all the proverbial gate guard, security guard, what he might be able to do. And – and in his current status, I'm not convinced that he's – he going to be able to do that. But I'm even less convinced that he could get hired doing that.

(Tr. at 98).

The Employer & Carrier offered no proof, witnesses, or argument to refute Dr. Kennon's vocational and psychological testimony.[6] Moreover, the Employer & Carrier offered only one piece of evidence—a one-page report from a Rehabilitation Specialist who never talked to or met with Nhan. (Exhibit 12). Of course, this evidence was worthless since the opinions contained within it were contingent upon "no further medical complications [developing] during the interim." (Exhibit 12). Clearly, "further medical complications" did develop and continue to this date.

Yet, without any rational basis or explanation in her opinion, the Administrative Judge concluded that Nhan sustained only a 60% loss of industrial use to the right and left upper extremities. (MWCC at 429). On review by the full Mississippi Workers' Compensation Commission, the findings of facts and conclusions of law by the Administrative Judge were affirmed, but not unanimously. In a separate, written opinion, utilizing the appropriate legal standard, Commissioner Schoby concluded that Nhan was entitled to 450 weeks of benefits for permanent total disability.[7]

On appeal to the Circuit Court of Tishomingo County, though he affirmed the conclusion of the Mississippi Workers' Compensation Commission, Judge Gardner expressed reservations about whether the Workers' Compensation Commission got it right.[8] Nhan now appeals to this Honorable

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6 The Employer & Carrier's offer of no proof or argument has continued throughout the appeal of this matter. The Employer & Carrier did not submit a brief to the full Mississippi Workers' Compensation Commission. On appeal to the Circuit Court of Tishomingo County, the Employer & Carrier also did not submit a brief.

7 In point of fact, Commissioner Schoby was the first and only jurist throughout this matter to mention or employ the proper legal standard. Moreover, as this Court is well aware:

> Where an employee suffers an injury covered by the schedule in Section 71-3-17(c)and where that injury results in a permanent loss of wage earning capacity within Section 71-3-17(a), the latter section controls exclusively and the employee is not limited to the number of weeks of compensation prescribed in Section 71-3-17(c)'s schedule. To this limited extent *M.T. Reed* stands overruled. Only insofar as they may be found inconsistent with today's holding, *Walker Manufacturing, Richey, Lucedale Veneer, Luker, Nowlin,* and *Modern Laundry, Inc. v. Williams,* 224 Miss. 174, 79 So.2d 829 (1955), stand modified.

Smith v. Jackson Constr. Co., 607 So. 2d 1119, 1128 (Miss. 1992).

8 Judge Gardner felt constrained to affirm the findings of the Mississippi Workers' Compensation Commission "even though the evidence might convince this Court otherwise if this Court were the fact finder." (C.P. at 7). Thus, now a

Court insistent that the decision by the Mississippi Workers' Compensation Commission was in error and not supported by substantial evidence.

growing number of judges are questioning whether the Administrative Judge got it right.

SUMMARY OF THE ARGUMENT

WHERE THE EMPLOYER AND CARRIER HAVE NO WITNESSES, THE CIRCUIT JUDGE ERRED IN AFFIRMING THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION.

THE OVERWHELMING WEIGHT OF EVIDENCE SHOWS THAT NHAN IS PERMANENTLY TOTALLY DISABLED.

Nhan Neill, a resident of Savannah, TN (pop. 7,248)[9] and Hardin County, TN (pop. 26,089),[10] became permanently totally disabled as a result of work-related injuries. Nhan provided unrefuted testimony about his attempts to return to work and his inability to return to work. Nhan's testimony was supported, not only by his medical providers, but also by the unrefuted testimony of Dr. Robert W. Kennon, and psychologist and vocational expert who testified live at the trial.

The Employer & Carrier called no witnesses at trial. The Employer & Carrier offered no evidence to impeach Nhan or challenge the opinions of Dr. Kennon. Yet, contrary to the overwhelming weight of the evidence, and without any explanation, the Administrative Judge concluded that Nhan suffered only a 60% loss of industrial use to his upper extremities. All of the evidence presented in this case, which necessarily includes the overwhelming weight of the evidence, clearly establishes that Nhan is permanently totally disabled and he should be awarded 450 weeks of permanent total disability compensation.

9 http://www.city-data.com/city/Savannah-Tennessee.html
10 http://www.2.tnecd.net/prospect/comdatarpt.asp?id=Savannah

STANDARD OF REVIEW

In appeals originating from the Mississippi Workers' Compensation Commission, it is recognized that the Commission is the ultimate finder of fact and, upon review, this Court will generally apply a deferential standard of review. ***McCarty Farms, Inc. v. Kelly***, 811 So. 2d 250, 253 (Miss. App. 2001) (citation omitted). The findings of the Commission will be reversed where the findings are clearly erroneous and contrary to the overwhelming weight of the evidence. ***McCarty***, 811 So. 2d at 253 (citation omitted). Here, where the Employer and Carrier offered no witnesses, the findings of the Commission are clearly erroneous and contrary to the overwhelming weight of the evidence and should be reversed.

ARGUMENT

WHERE THE EMPLOYER AND CARRIER HAVE NO WITNESSES, THE CIRCUIT JUDGE ERRED IN AFFIRMING THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION.

THE OVERWHELMING WEIGHT OF EVIDENCE SHOWS THAT NHAN IS PERMANENTLY TOTALLY DISABLED.

The controlling law in the case *sub judice* is provided in ***Weatherspoon v. Croft Metals, Inc.***, 853 So. 2d 776 (Miss. 2003). Moreover, the medical facts of ***Weatherspoon*** are almost identical to those presented in this matter. This precedent was ignored by all but Commissioner Schoby.

In ***Weatherspoon***, the Claimant was a production worker who, as a result of her employment, developed bi-lateral injuries to her upper extremities. ***Weatherspoon***, 853 So. 2d at 777. Following bi-lateral surgeries, the Claimant was assigned a 10% PPI to each upper extremity, along with permanent activity restrictions, all of which prevented her from returning to her duties with the Employer. ***Id.*** In the instant case, Nhan Neill was a production worker[11] who, as a result of his

[11] Notably, Mr. Neill's production work was much more labor-intensive than that of Weatherspoon. Before his April 12,

employment, developed bi-lateral injuries to his upper extremities. Mr. Neill received surgery on both of his upper extremities (Tr. at 69), resulting in a 20% PPI to each upper extremity, along with multiple permanent activity restrictions.[12] (Exhibit 8 at 9-11). This is twice the impairment rating received by the Claimant in ***Weatherspoon***. Mr. Neill's injuries also prevent him from returning to his work with the Employer.[13] (Exhibit 8 at 11; Exhibit 4 at 21-22).

Following the process outlined in ***Weatherspoon***, the Workers' Compensation Commission was to answer the question as to whether Nhan's resulting medical condition and restrictions prevent him from "performing the 'substantial acts of his usual employment.'"[14] ***Weatherspoon***, 853 So. 2d at 778 (*quoting* ***McGowan v. Orleans Furniture Co.***, 586 So. 2d 163 (Miss. 1991)). When a worker is unable to continue in the position held at the time of the injury, there exists a rebutable presumption that the Claimant has sustained a total occupational loss of use of the scheduled member(s). ***Id.*** at 779 (*citing* ***McGowan***, 586 So. 2d at 167).

Of course, as this Court is undoubtedly aware, the definition of what encompasses ones "substantial acts of [their] usual employment" was expanded by this Court in ***Meridian Professional Baseball Club v. Jensen***, 828 So. 2d 740 (Miss. 2002). In ***Jensen***, a professional baseball player

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2001 injury, Mr. Neill's job involved manufacturing plastic molded front and rear units for "on-the road motor homes also requiring light assembly. (Tr. at 13 and 14). The molded plastic units weighed about three hundred (300) pounds which he and a one co-worker lifted and fastened to frames utilizing clamping devises that had to be "hand squeezed into place" involving an awkward process requiring stretching, reaching, and very strong gripping actions. (Tr. at 15-17). Once the units were fastened, the lights had to be assembled from many stocked parts using an assortment of hand tools including power and hand-operated screwdrivers and other devices requiring delicate and awkward finger, hand, wrist, and arm repetitive motions to get lights assembled and installed on the molded plastic units. (Tr. at 17-20). This process was repeated day after day. (Tr. at 20-22).

[12] Mr. Neill was separately assigned an 11% whole body impairment rating by Dr. Cunningham, an Employer-referred physician, along with an 8% PPI to the right upper extremity and a 10% PPI to the left upper extremity. (Exhibit 4 at 20-22).

[13] Mr. Neill has not returned to work except for two (2) unsuccessful so called "light duty" work test efforts which turned out to be the same work that caused the injury, except he did not have to lift the heavy units. (Tr. at 26). This test work caused Mr. Neill's hands to flame-up and, finally, Dr. Cunningham took him off work after a few days. Subsequently, another doctor returned him to work, but after a few days his hands again worsened and Mr. Neill had to stop work. Except for about two (2) weeks trying to work, Mr. Neill has not worked since April 12, 2001. (Tr. at 27).

[14] This important and necessary legal standard is never once mentioned in the Administrative Judge's or Circuit Judge's

who sustained only a 7% PPI to his arm sought benefits for a 100% loss of use because he could no longer perform the "substantial acts of his usual employment" as a professional baseball player. ***Jensen***, 828 So. 2d at 743. Because Jensen worked other jobs during the baseball off-season, and some of those other jobs netted him more money than he made playing baseball, this Court fielded (no pun intended) the question as to what constituted Jensen's "usual employment." ***Id.*** at 747.

"'[U]sual employment' is broader in scope than the job held at the time of the injury, and narrower than 'other employment' as contained in § 71-3-3(i)" of the Mississippi Code, so an exhaustive analysis of Jensen's past education, work history, and experience was applied. ***Id.*** "Usual employment in this context means the jobs in which the claimant has past experience, jobs requiring similar skills, or jobs for which the worker is otherwise suited by his age, education, experience, and any other relevant factual criteria." ***Id.*** Therefore, the presumption of 100% loss of use is subject to the Claimant making an affirmative showing that (a) he can't find work in his usual employment, or (b) makes other proof of his inability to perform the substantial acts of his usual employment. ***Id.*** at 748. Rebuttal is shown by all the evidence concerning wage-earning capacity, including education and training which the claimant has had, his age, continuance of pain, and any other related circumstances. ***Id.***

This standard requires the Workers' Compensation Commission's consideration of, not only the testimony of the Claimant and his physicians, but the uncontroverted testimony of Robert W. Kennon, M.D. (Tr. at 64-99). Dr. Kennon is a psychologist and vocational expert who testified live at the hearing before the Administrative Judge. Yet, while Dr. Kennon's testimony comprises almost 40% of the testimony offered at the hearing, neither Dr. Kennon's testimony nor his presence at trial is even once mentioned by the Administrative Judge in rendering her written decision.

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written decisions on this matter.

Dr. Kennon's credentials are above reproach[15] and he clearly carried any burden of proof required to be carried by the Claimant to establish the presumption of 100% loss of industrial use of both of his upper extremities. As was already outlined above, the Claimant already established the presumption of 100% loss of use through his own testimony about his good faith, though unsuccessful, attempts to return to work in his usual employment. (See fn. 10, *supra*). Beyond that, Dr. Kennon clearly established Mr. Neill's inability to perform the substantial acts of his usual employment through his testimony. During the hearing, the following transaction was had:

> Q. And, Doctor, based on the two times you've seen [Mr. Neill] before today and what you've seen here today and heard from him today, in your own background and experience and work in this area, do you have an opinion as to whether or not Mr. Neill can perform his usual and customary job duties of his employment?
>
> A. Yes, I do.
>
> Q. And what is that opinion?
>
> A. Well, he – I do not believe that he can perform his usual and customary duties. He has – he's not able, based upon his doctors' restrictions, to return to any of his prior employments. Secondly, his is not – he has no transferable skills based upon his doctor's opinions as to what he can and cannot do and based upon – in light of his intellectual and academic limitations. So he has no developed skills. He has no transferable skills. He has no capacity to return to what he's done in the past or even anything similar to that and then we're dealing with a person, on top of that, who has chronic pain features, is functioning on the borderline mild, mentally retarded range, is academically functioning at a third to fourth grade level in spelling and reading and those – that combined – those combined issues don't speak

[15] *See* Tr. at 64-67 and Dr. Kennon's 6-page *Curriculum Vitae* included within Exhibit 1. Moreover, counsel for the Employer and Carrier did not object to Dr. Kennon's tender to this Commission as an expert witness (Tr. at 67) and did not lodge a single objection throughout Dr. Kennon's testimony. (Tr. at 64-99).

Dr. Kennon is a Tennessee-licensed psychologist who has also practiced in Texas and New York. He has B.S., M.S., and Ph.D. in psychology. He is a retired Army Captain where he was involved providing fitness-for-duty evaluations, vocational evaluations, psychological treatment, and work as a hospital team member. His current practice includes performing 1300 vocational evaluations per year for the State of Tennessee, additional psychological evaluations for police and law enforcement departments, and independent psychological evaluations in cases like this. (Tr. at 64-65). Dr. Kennon has had experience in diagnosing Reflex Sympathetic Dystrophy (RSD). He was on the staff at William Beaumont Army Medical Center in El Paso, Texas where he was involved as a team member with physicians and others dealing with RSD diagnosis, cause, and treatment issues. He evaluated individuals for RSD and performed psychological evaluations to rule out malingering, which requires knowledge of the nature and causes of RSD. (Tr. at 65-66).

well for any opportunities for Mr. Neill.

Q. Are there any jobs in, start with, the national economy that – given all that, that he can do?

A. I don't know of any positions nationally that he's going to be capable of engaging based upon the restrictions that he has. And another issue for Mr. Neill is he has a problem, I think, that I didn't mention, was the depression, problems with pain and tension, problems with the interference of his attention span, his ability to concentrate and attend as a result of his pain. He's frequently interrupted by pain features and has problems, you know, concentrating in that regard.

. . .

[During Cross-Examination]

Q. So is it your opinion you can't conceive of any type of employment this man can obtain in the foreseeable future?

A. Not with the limitations that Dr. Fuchs has placed upon him and indicated that he – what he could and couldn't do.

. . .

Q. So your opinion is he couldn't even do something as – as simple as perhaps a person that greets at Wal-Mart? He can't do something like that?

A. Well, the issue is – is whether he can sustain that related to pain. I think another issue is is [sic] whether Wal-Mart while he's on Darvon pain medication. I think another issue is is [sic] consistency of being able to drive to work and get there and – and deal with his pain features while at work and how does he go about doing that. And if they have other duties for him like most greeters, which may include moving carts, stacking them. Those are going to be problematic, I think, for Mr. Neill. I thought of that too, and I – you know, I've looked at all the proverbial gate guard, security guard, what he might be able to do. And – and in his current status, I'm not convinced that he's – he's going to be able to do that. But I'm even less convinced that he could get hired by doing that.

(Tr. at 91-92, 97-98) (emphasis added).

Thus, following his work-related injuries,[16] Nhan can't even work as a greeter at Wal-Mart.

16 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

Nhan, a high school graduate with no additional formal training, age 33 (Tr. at 7-8), had worked as a grocery store bagger, landscaper, bath tub manufacturer, electrical helper, and water slide fiberglass repairman prior to his work with the Employer. (Tr. at 8-11; Exhibit 1). Dr. Kennon also took a detailed description of Nhan's work history which is outlined in his report. (Exhibit 1). Beyond that, Mr. Neill is "functioning in the borderline range of intellectual capabilities."[17] (Exhibit 1). Moreover, Mr. Neill's academic capabilities are poor and he is reading only at a 3rd or 4th grade level. (Exhibit 1). Mr. Neill possesses no licenses, degrees, or certificates. (Exhibit 1). Given all of his physical limitations, including his ongoing problems, Dr. Kennon opined that Mr. Neill presents an 81% vocational disability. (Exhibit 1). This 81% vocational disability is regarding all potential jobs available to Nhan throughout the entire country. When Dr. Kennon analyzed this in detail, especially with what may be available to him in his small community,[18] he concluded that Nhan cannot even work as a greeter at Wal-Mart. (Tr. at 98).

Dr. Kennon concluded that Nhan is permanently totally disabled from further employment. With the Employer & Carrier neither (a) presenting their own witnesses, nor (b) refuting Dr. Kennon's findings,[19] Dr. Kennon's opinions are, as a matter of law, the overwhelming weight of the evidence.[20] The Circuit Court of Tishomingo County and Mississippi Workers' Compensation

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the extent of Nhan's occupational disability.

17 In fact, Mr. Neill was determined to be in the "borderline, mild, mentally retarded range of functioning." (Tr. at 73). This placed him in the 5th percentile in his age group, meaning that 95% of persons his age are more intelligent than him. (Tr. at 73-74).

18 In ***Walker Manuf. Co. v. Cantrell***, 577 So. 2d 1243, 1249 (Miss. 1991), this Court established its "home county" rule regarding how broadly the Workers' Compensation Commission must consider other employment available to the Claimant. Here, it is well known that Hardin County, Tennessee possesses little industry and few employment opportunities, especially where Dr. Kennon concludes that Nhan can't return to the work force, even as a Wal-Mart greeter.

19 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 Indus., Inc. v. Herod***, 560 So. 2d 732, 735 (Miss. 1990) (citing ***Ponotoc Wire Prod. Co. v. Ferguson***, 384 So. 2d 601, 602 (Miss. 1980)).

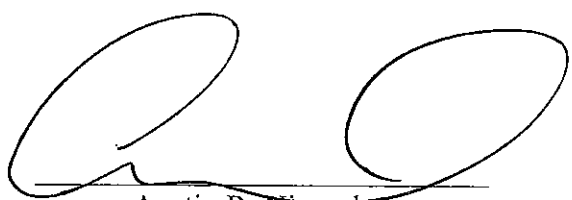
20 It is well established in workers' compensation cases that, when the Claimant's testimony and case-in-chief is undisputed, the Claimant's requested relief shall be granted. *See, e.g.*, ***Barta v. Harrell Constr. & ACIG Ins. Co.***, 2007 WL 892470 (MWCC 2007); ***Shaffer v. Layne Cent. Div. of Layne Christensen Co.***, 2006 WL 1414201 (MWCC 2006)

Commission both failed to recognize the overwhelming weight of the evidence. Nhan's circumstances are more severe and extraordinary than those presented in ***Weatherspoon*** and he is entitled to permanent total disability benefits.

CONCLUSION

All of the evidence, which is necessarily also the overwhelming weight of the evidence, demonstrates that Nhan is permanently totally disabled. The vocational testimony is clear and unrefuted that Nhan cannot return to the work force, even as a Wal-Mart greeter. However, though he possessed reservations about so doing, the Circuit Judge erred in upholding the Workers' Compensation Commission's finding of a 60% industrial loss of use to both upper extremities. As stated by 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 16th day of July, 2007.



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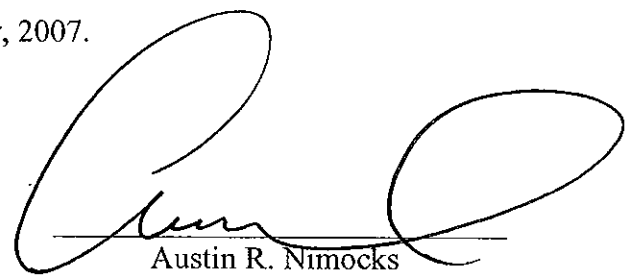
(finding in full favor of the Claimant where the Employer and Carrier called no witnesses to refute the Claimant's testimony); ***Lodriques v. Marcia Johnson Constr., Inc.***, 2004 WL 1779106 (MWCC 2004); and ***Ware-Ladnier v. Park Place Entertainment/Grand Casino***, 2003 WL 22598558 (MWCC 2003).

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 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 16th day of July, 2007.



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