IN THE SUPREME COURT OF STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HOSPITAL HOUSEKEEPING SYSTEMS
DBA RUSH FOUNDATION HOSPITAL AND
OLD REPUBLIC INSURANCE COMPANY **APPELLANTS**

V. **CIVIL ACTION NO. 2007-WC-00500**

MARY TOWNSEND **APPELLEE**

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE
CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

ORAL ARGUMENT IS REQUESTED

JAY R. MCLEMORE (Bar No [redacted])
WILKINS, STEPHENS & TIPTON, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road
Post Office Box 13429
Jackson, Mississippi 39236-3429

COUNSEL FOR THE APPELLANTS,
HOSPITAL HOUSEKEEPING SYSTEMS AND
OLD REPUBLIC INSURANCE COMPANY

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REPLY ARGUMENT

I. THE CIRCUIT COURT OF LAUDERDALE COUNTY ERRED IN AFFIRMING THE FULL COMMISSION BECAUSE THE FULL COMMISSION FAILED TO APPLY TO THE CORRECT BURDEN OF PROOF FOR A MENTAL INJURY.

The standard of review for appeals from the Mississippi Workers' Compensation Commission is well settled. A decision of the Commission will be reversed if it is based on an erroneous application of the law. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778(¶6) (Miss.2003) *(citing Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss.1992)). The Court will exercise *de novo* review on matters of law. *KLLM, Inc. v. Fowler*, 589 So. 2d 670, 675 (Miss.1991). The legal effect of the evidence and the conclusions drawn therefrom present questions of law, especially when the facts are undisputed or the overwhelming weight of the evidence reflects them. When an agency has misapprehended a controlling legal principle, no deference is due. *Univ. Miss. Med. Ctr. v. Smith*, 909 So. 2d 1209, 1218 (Miss.Ct.App. 2005) (citations and quotations omitted); *McDowell v. Smith,* 856 So. 2d at 584-585. *See also Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (Miss. 2003).

Not only did the Commission err in applying the correct legal standard or test for compensability of mental injury, but it also erred in finding the claimant met her burden of proof to support her claim that her mental injury was caused by the/an inhalation incident, and that this injury rendered her permanently and totally disabled. Nowhere in the underlying order does the Administrative Judge mention, reference, or analyze the evidence under the "clear evidence/clear and convincing" standard. (Appellant's R. Excerpts[1] 4, pp. 51-66). Rather, the Administrative Judge

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[1]Record excerpts will be from the appellants (HHS, Inc.).

merely uses the preponderance standard. (*Id.* at 65). The Circuit Court erred in affirming the Full Commission's affirmance of the underlying order as the incorrect standard and burden of proof were used. (Appellant's R. Excerpts 2 & 3). As an error of law, the Circuit Court's Order should be reversed and rendered.

II. NO CLEAR EVIDENCE EXISTS TO CONNECT THE CLAIMANT'S MENTAL INJURY TO AN ALLERGIC REACTION OVER A BRAIN TUMOR, A PRIOR STROKE, AND HOST OF OTHER CONDITIONS WHICH WERE IGNORED BY THE CIRCUIT COURT AND THE FULL COMMISSION.

As noted above, a mental injury requires clear evidence of causal connection to the underlying physical injury. *Hemphill Drug Co. v. Mann,* 274 So.2d 117, 120 (Miss. 1973). Claimant argues that a distinction exists between "clear" evidence and "clear and convincing evidence." Such is not the case. As stated in the original brief, the Mississippi Supreme Court uses the terms "clear evidence" and "clear and convincing evidence" as one in the same. *Fought v. Stuart C. Irby Company,* 523 So.2d 314, 317 (Miss. 1988). The distinction is not in "clear" vs. "clear and convincing," but rather whether the alleged mental injury was unaccompanied by physical trauma. If not, then Mississippi Supreme Court requires an extra element of proof. *Fought*, 523 So.2d at 317 (citations omitted). That extra element is that the alleged mental injury be caused by something more than the ordinary incidents of employment, or an unusual or untoward event. *Id.* at 317.

It is undisputed that Ms. Townsend suffers from headaches, low back pain, pituitary adenoma (benign tumor) with elevated prolactin level, an old cerebral stroke, cervical spondylosis, and hypertension, not to mention a low grade glioma/brain lesion. (See Exhibit 2A, December 29, 2003 letter from Dr. Ahmad; R. Excerpt 5, pp. 0004-0005, and Ex.10, October 6, 2003 record of Dr.

Parent). This lesion was diagnosed before Ms. Townsend began complaining of psychiatric problems and was referred to Weems Mental Health. **None of the physicians at Weems were apprised of the claimant's brain tumor!** (Ex. 11, March 3, 2004 Intake/Assessment Form; R. Excerpt 6, pp. 0043). Without a definitive medical opinion, it is impossible to link the claimant's mental problems to an allergic reaction, anymore so than the host of serious physical ailments plaguing the claimant (including a brain lesion) without engaging in gross speculation. Repeated assertions made by the claimant in her treatment sessions are not medical opinions.

The claimant, however, contends that her toxicologist provides the needed diagnosis to clearly and convincingly link hallucinations, anxiety, and severe depression to an allergic reaction, despite the fact that no hallucinations were occurring at that time and despite the fact that she **returned to work for over ten (10) months after Dr. Halsey's visit**. Ironically, the claimant has no problem asserting that a toxicologist, who saw Ms. Townsend one time, took absolutely no psychiatric history, and was not competent to render psychiatric opinions, should be given dispositive weight to causally link Ms. Townsend's psychiatric problems. Dr. Halsey was no more competent to issue psychiatric opinions than Dr. Webb would be competent to issue a toxicology opinion. *Troupe v. McAuley*, 955 So. 2d 848, ¶ 25 (Miss. 2007). Even so, Dr. Halsey uses the term "likely" as opposed to a direct link.

It is undisputed that Halsey was not consulted to render a psychiatric opinion and that Ms. Townsend admits she was very upset over a host of other unrelated physical ailments (including a prior stroke and a pituitary tumor) discovered during the course of her treatment for the allergic reaction. (Ex. 5, p.62:16 - p.63:6). She also admits this in her deposition. *(Id.)*. Dr. Halsey was never competent and was never asked to differentiate these various psychological causal factors.

Further, if the allergic reaction caused all of Ms. Townsend's psychiatric problems, it remains impossible to explain the absence of depression, anxiety, and hallucinations between February 2002 and March 2004. (See Ex. 8, February 11, 2002 record; R. Excerpt 8, p. 0003, and Ex.2A, December 29, 2003 letter from Dr. Ahmad; R. Excerpt 5, pp. 0005, neither record lists psychiatric problems). The reason this is impossible is because the link never existed.

Furthermore, the claimant cannot explain the mysterious timing of her hallucinations with the diagnoses of her brain lesion. Both in her deposition and at the hearing, the claimant admitted she often hallucinated about the operation to remove the brain tumor from her head, and this resulted in much anxiety and consternation. (R.Vol. 3, p. 35-36; Ex. 5, pp. 26:25 - 28:19). None of this was communicated to the staff of Weems. (Ex. 11, March 3, 2004 Intake/Assessment Form; R. Excerpt 6, pp. 0002-0044). As stated in Dunn, ". . . when the mental or emotional disturbance is in no way related to the injury but is due to pre-existing mental disorders, the resulting disability is not made compensable merely *because the employee himself actually relates, in his own mind, all of his difficulty to his physical injury*." Dunn, Vardaman S., MISSISSIPPI WORKMEN'S COMPENSATION LAW, §114 (3rd Ed. 1990).(emphasis added).

More is required than just the possibility of relation, and clear evidence must be presented linking the two. *Mann*, 274 So.2d at 120. The Full Commission ignored the fact that the claimant failed to provide a complete medical history to the psychiatrist at Weems Mental Health Center. In fact, the Commission (through the Administrative Judge) gave credibility to the doctor who never rendered any clear causative diagnosis, was never provided a complete history, and was never asked to render a causative opinion. As she suffered both a brain tumor and previous stroke, the claimant's history is absolutely critical. Dr. Ashish Mishra could not accurately or credibly (even assuming a

causal relation) relate the claimant's mental problems to the allergic reaction without being provided a complete history by the claimant or her attorney.

Pursuant to *Johnson v. H.K. Ferguson*, 435 So. 2d 1191, 1196 (Miss. 1983), this is a fatal error and must be reversed. In *Johnson*, the Mississippi Supreme Court reversed the Full Commission after finding the Commission relied on an expert medical opinion which was lacking a critical diagnostic tool (myelogram) over another expert's opinion who incorporated the same in his opinion. The Court held, "[w]hen an expert's opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight and has little probative value when compared to the opinion of an expert that has made a thorough and adequate examination." *Johnson*, 435 So.2d at 1196. This is not a situation where the Commission evaluated two different opinions and is allowed discretion to do so, for *Dr. Ashish-Mishra never rendered any causative opinion.* In fact, Dr. Webb and Dr. Mishra's opinions do not conflict, despite perfunctory claims of the opposite.

Expert medical opinions are required to establish such causation and none exists in this case. *Mann*, 274 So. 2d at 119-120. The only expert opinion specifically addressing the psychiatric causation issue was rendered by Dr. Mark Webb. Dr. Webb found the claimant's problems to be non-work-related organic illnesses associated with a pre-existing cerebral infarct/stroke and tumor.

Even if one disregards Dr. Mark Webb's opinion, as the Administrative Judge did, there is still no clear, consistent link to explain how the claimant suffered an allergic reaction on November 30, 2001, returned to work in April 2002, and left in February 2003, only to seek psychiatric treatment two and one half years after the allergic reaction, in March of 2004. Common sense also dictates that an allergic reaction in November 2001 would not cause hallucinations years later.

In fact, Claimant's counsel admits that clear evidence and medical causation are lacking on page 13 of their brief when they state, "Rather, clear evidence exists that Ms. Townsend has mental problems because of her consistent complaints." Chronic complaints made by the claimant to a doctor seen at the behest of her lawyer, the lawyer who is representing her to collect benefits for the very injury complained of, is not clear evidence. If the claimant's assertions and subjective history (coupled with an grossly inaccurate medical history) constitute "clear evidence" that a mental illness is causally related to a physical injury, then no there is simply no point for the Mississippi Supreme Court to require a higher burden of proof for mental injuries.

The Circuit Court Order, affirming the Full Commission Order, must be reversed as a matter of law and for the failure of any clear evidence establishing a clear casual connection between Ms. Townsend's allergic reaction and her hallucinations, depression and anxiety two and a half years later.

III. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN AFFIRMING, WITHOUT ANY JOB SEARCH OR MEDICAL RATING, THAT THE CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED DUE TO HER MENTAL INJURY.

Medical evidence must support the claimant's incapacity and its extent. *Univ. of Miss. Med. Ctr. v. Smith,* 909 So.2d 1209, 1218 (citations and quotations omitted). See also *Meridian Professional Baseball Club v. Jensen*, 828 So.2d 740 (Miss. 2002) and *McGowan v. Orleans Furniture Inc.*, 546 So. 2d 163 (Miss. 1991). It is undisputed that no medical opinion whatsoever exists in the record delineating any restrictions, limitations, or impairment with regard to Ms. Townsend's mental injury. No permanent impairment was assigned with regard to her allergic reaction, either. In fact, the Commission, via Administrative Judge, even noted that the records "do

not indicate that any doctor opined as to whether Ms. Townsend could work." (R.Vol.2, pp. 58-59). On page 9 of the Administrative Order, the judge noted that in a March 7, 2005 medical record from Weems Mental Health Center, Dr. William Wood reviewed the file and noted that the claimant told him, "[she[i.e. Ms. Townsend]] reports that she has made concerted efforts to obtain disability and adds that doctor said, she would not be able to work again in the future." (R.Vol.2, p. 59). That is the only medical record cited in the entire opinion for which the Administrative Judge could base a finding of total disability. The Administrative Judge cites the Weems records containing this statement in page 15 of the Order as a basis for permanent total disability. (R. Vol. 2, p. 65). This is blatant hearsay and this finding is error. The assertion that the employer and carrier waived this objection because it was not asserted at the hearing (before Administrative Judge wrote an order incorporating the hearsay statement) is without any merit. This issue has been raised throughout these proceedings.

It is further undisputed that Ms. Townsend returned to work for ten months until her excessive absences resulted in the loss of her job. This Court must ask itself how the Commission found a claimant permanently and totally disabled from November 30, 2001 without one single medical record in support of that finding and with the claimant returning to work for ten months after the injury. Claimant's counsel contends the Commission considered the totality of the circumstances. That totality, however, did not have a basis in medical evidence. No Mississippi authority exists holding that medical findings are not necessary for permanent total disability. While other factors can be considered, medical findings must be the foundation for any award for permanent total disability. *Smith,* 909 So.2d at 1218. None exist here and without restrictions, limitations, or an impairment rating to form the basis of an award, the finding of the Administrative

Judge, and its subsequent adoption by the Full Commission and affirmance by the Circuit Court, is an error of law.

In fact, the only medical opinion addressing the claimant's work status was that of Dr. Webb. The Administrative Judge worked hard to disregard his opinion. Pursuant to MISS. CODE ANN. §71-3-3(i) (disability must be supported by medical findings), the Commission's opinion on this issue is deficient as a matter of law because no medical findings support the award.

Furthermore, as no impairment, restrictions or disability status were contained in the medical records, and Ms. Townsend returned to work for ten months after her temporary disability, she was required to conduct some type of job search to prove her incapacity. *Piper Industries, Inc. v. Herod*, 560 So. 2d 732, 734 (Miss. 1990). As stated in the original brief, this is axiomatic under Mississippi law to prove industrial loss of wage-earning capacity. The claimant has made absolutely no effort to look for a job whatsoever, and Commission erred as a matter of law not requiring the same.

The claimant continues to assert that she was "fired" as a result of her allergic reaction, but cites not one reference in the record to support that bold assertion. The reason is that record does not support her contention. (See MESC Records, Ex. 9, p. 26). Ms. Townsend applied for unemployment benefits. She was denied these benefits due to her unexcused absenteeism and her chronic pre-existing, unrelated headaches. (Ex. 9, p. 26-27). She did not appeal this decision regarding the merits of her discharge, and cannot now assert a different position on this issue due to the doctrine of collateral estoppel. *Dunaway v. W.H. Hopper and Associates, Inc.*, 422 So.2d 749 (Miss.1982).

Regardless of the compensability issue, the Circuit Court Order affirming the Full Commission's findings as to permanent total disability should be reversed.

CONCLUSION

Hospital Housekeeping Systems should not be held responsible for Ms. Townsend's 2004 mental illness. Claimant contends that her constant complaints are clear evidence that her mental injury is related. The claimant failed to provide an accurate history to her own physicians at Weems. Even if Dr. Ashish-Mishra had actually rendered a causation opinion, without knowledge of an existing brain tumor and pre-existing stroke, the opinion would not be accurate. Subjective complaints by the claimant do not establish a causal connection. Dr. Halsey took no psychiatric history and was not competent to render a psychiatric opinion. Moreover, three weeks later, she was returned to work and did so for 10 months without any symptoms or treatment. Dr. Mark Webb has examined the claimant, reviewed her records and found that her condition is unrelated to this incident. Dr. Webb's opinion was erroneously disregarded and was the only dispositive finding in the record concerning the etiology of Ms. Townsend's illness. No medical basis exists to award permanent total disability when the medical records contained no restrictions, limitations or impairment rating. No job search exists as is required. To base permanent total disability on nothing more is plain error. The Administrative Judge's Opinion regarding Ms. Townsend's mental injuries is based upon mere speculation. The Commission's Opinion and Order affirming the Administrative Judge's Order without additional findings of fact is, therefore, likewise speculation, erroneous as a matter of law, and against the substantial weight of the evidence. The Lauderdale County Circuit Court's Order affirming the same must be reversed and judgment rendered in favor of Hospital Housekeeping Systems.

Respectfully submitted, this the 12th day of December, 2007.

HOSPITAL HOUSEKEEPING SYSTEMS AND
OLD REPUBLIC INSURANCE COMPANY,
Appellants

BY: _____
JAY R. MCLEMORE (MS BAR NO. [redacted])

WILKINS, STEPHENS & TIPTON, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road
Post Office Box 13429
Jackson, Mississippi 39236-3429
Telephone: (601) 366-4343
Facsimile: (601) 981-7608
Email: jmclemore@wilkins-law.com
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, JAY R. MCLEMORE, attorney for the appellants, do hereby certify that I have this day served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***REPLY BRIEF OF APPELLANTS*** to:

Doug Engell, Esquire
Post Office Box 309
Marion, Mississippi 39342

The Honorable Robert W. Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, Mississippi 39302

John D. Moore, Esquire
Post Office Box 3344
Ridgeland, Mississippi 39158-3344
Attorneys for Appellee

THIS, the 12th day of December, 2007.

_____
JAY R. MCLEMORE