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

HOSPITAL HOUSEKEEPING SYSTEMS, INC. AND CLARENDON NATIONAL INSURANCE COMPANY — **APPELLANTS**

V. — **CASE NO. 2007-WC-00500**

MARY TOWNSEND — **APPELLEE**

BRIEF OF APPELLANTS

(On Appeal from the Order of the Circuit Court of Lauderdale County, Mississippi)

– ORAL ARGUMENT 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
Phone: 601-366-4343
Email: jmclemore@wilkins-law.com

COUNSEL FOR THE APPELLANTS, HOSPITAL HOUSEKEEPING SYSTEMS AND CLARENDON NATIONAL INSURANCE COMPANY

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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 Supreme Court may evaluate possible disqualification or recusal.

1. Ms. Mary Woods Townsend, Claimant/Appellee.
2. Hospital Housekeeping Systems, Inc., Employer/Appellant.
3. Clarendon National Insurance Company, Carrier/Appellant.
4. Douglas Engell, Esquire, and John Moore, Esquire, attorneys for the Claimant/ Appellee.
5. Jay R. McLemore, Esquire, attorney for the Employer-Carrier/Appellants, Hospital Housekeeping Systems, Inc. and Clarendon National Insurance Company.

JAY R. McLEMORE (MSB[redacted]

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I. STATEMENT OF THE ISSUES

1. Whether the Circuit Court of Lauderdale County erred in affirming the Mississippi Workers' Compensation Commission when no clear and convincing evidence exists and no psychiatrist causally relates the claimant's mental illness to the compensable allergic reaction?

2. Whether the Circuit Court of Lauderdale County erred in affirming the Mississippi Workers' Compensation Commission when its holding is based upon self-serving hearsay statements made by the claimant to the doctor during a consultation?

3. Whether the Circuit Court of Lauderdale County erred in affirming the Mississippi Workers' Compensation Commission when the claimant did not complain of mental injuries until two-and-a-half years after the incident?

4. Whether the Circuit Court of Lauderdale County erred in affirming the Mississippi Workers' Compensation Commission when the mental injuries suffered by the claimant are the admitted result of her fear of having surgery to remove a pre-existing unrelated brain tumor?

5. Whether the Circuit Court of Lauderdale County erred in affirming the Mississippi Workers' Compensation Commission's disregard for the testimony offered by Dr. Mark Webb, when Dr. Webb was the only psychiatrist to address the causal relationship of Ms. Townsend's psychiatric claim?

6. Whether the Circuit Court of Lauderdale County erred in affirming the Mississippi Workers' Compensation Commission's determination of permanent and total disability without any medical evidence, job search or impairment rating whatsoever?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

Claimant Mary Townsend filed a Petition to Controvert for workers' compensation benefits based upon an incident that occurred on November 30, 2001, while she was in the employment of Hospital Housekeeping Systems. (R.Vol. 2, p. 1). Ms. Townsend sustained a work-related physical injury, that of an allergic reaction to unidentified chemicals. Several years later, however, the claimant alleged that she also sustained a mental injury from the allergic reaction. Hospital Housekeeping Systems responded admitting the physical injury but denying the compensability of the mental injury claims. (R.Vol. 2, p.8). On August 25, 2005, this matter was heard by an Administrative judge with the Workers' Compensation Commission. The claimant testified in person; the remaining evidence was admitted by affidavit or deposition into the record. On December 29, 2005, the Administrative judge issued his opinion and found the claimant to be permanently totally disabled from a mental injury and found the mental injury to be caused by the November 30, 2001 allergic reaction rather than a documented brain tumor and a host of other factors. (R. Vol. 2, pp. 51-66; R. Excerpt 4, pp. 51-66). The Judge also ordered the claimant to be paid permanent total disability benefits beginning on November 30, 2001, to continue for 450 weeks. (*Id.* at 65-66). From these findings, Hospital Housekeeping Systems timely filed a Petition for Review to the full Workers' Compensation Commission. (R. Vol 2, p. 67).

The appeal of this matter was considered by the full Workers' Compensation Commission without a hearing or oral argument, although it was requested. During the course of the appeal, with the permission of the Workers' Compensation Commission and by an Agreed Order and Stipulation,

Hospital Housekeeping Systems supplemented the appellate record with additional evidence which was inadvertently omitted from one of the claimant's exhibits. (R. Vol 2, pp.79-85; R. Excerpt 5, pp. 0001-0005). On June 29, 2006, the Commission entered its Full Commission Order affirming, without findings of fact or conclusions of law, the Order of the Administrative Judge. (R. Vol 2, p. 87; R. Excerpt 3). On March 3, 2007, the Circuit Court of Lauderdale County affirmed the Mississippi Worker's Compensation Commission. (R. Vol 1, p.72; R. Excerpt 2). It is from this Order that Hospital Housekeeping Systems takes this timely appeal.

B. FACTUAL HISTORY

1. Initial Treatment.

On November 30, 2001, claimant Mary Townsend, in the course of her duties as a housekeeper at Hospital Housekeeping Systems, was splashed by some chemicals she was pouring into a dumpster. (R.Vol. 3, pp. 15-16). This exposure triggered an allergic reaction and swelling in Ms. Townsend's face. (R.Vol. 3, p. 17). After being transferred to the emergency room, Ms. Townsend was initially treated at Rush Foundation Hospital by Dr. Eric Bridges and Larry Shea Hailey. (Ex. 2, November 30, 2001, Consultation Record of Dr. Hailey). By December 2, 2001, most of Ms. Townsend's symptoms from her allergic reaction had resolved. (Ex. 2, handwritten progress record notes from December 2, 2001).

During the initial course of initial treatment for Ms. Townsend's allergic reaction, a magnetic resonance image (MRI) of her brain was performed. (Ex. 2, MRI Report of Ralph E. Williams, M.D., dated 12-03-01). This MRI revealed a pre-existing area of ischemic infarction in the right posterior parietal lobe of Ms. Townsend's brain. (*Id.*). This study, along with other unrelated

conditions diagnosed during her treatment for the allergic reaction such as extremity weakness, cerebral concerns, and a lesion on Ms. Townsend's pituitary gland with symptoms of prolactation, prolonged her stay in the hospital and resulted in referrals to other physicians for treatment for these conditions. (Ex. 2, December 6, 2001, handwritten progress record notes; December 7, 2001, handwritten physician's orders). Ms. Townsend was discharged from Rush Foundation Hospital on December 7, 2001, with instructions to follow up her treatment with Dr. Dennis Simms, a local general practitioner, for treatment related to her allergic reaction, and Dr. Rafique Ahmad, a local neurologist, for treatment for her pre-existing neurological problems. (*Id.*).

Dr. Ahmad originally saw Townsend on a consult referral from Dr. Hailey in the hospital on December 4, 2001. (Ex. 2A, December 4, 2001, treatment note; R. Excerpt 5, pp. 0001-0003). Dr. Ahmad examined Ms. Townsend and found that she had suffered a stroke in 1998. (*Id.*). Dr. Ahmad reviewed the December 3, 2001 MRI and noted that Ms. Townsend had an old right cerebral stroke with subjective parathesia in the left arm and leg since 1998 but found no new evidence of a stroke. (*Id.*). Dr. Ahmad also found an enlarged pituitary gland and wanted to repeat an MRI scan for further analysis of her pituitary problems. (*Id.*). He noted that the Ms. Townsend had been complaining of headaches which had been a chronic problem, and Ms. Townsend had a long history of headaches. (*Id.*)

2. <u>Follow-up Medical Treatment at Rush Medical Group and Return to Work</u>.

After her discharge from Rush Foundation Hospital, Ms. Townsend was treated by Dr. Simms, (Ex. 8, January 16, 2002 record; R. Excerpt 8, p.0004). During her visit on January 16, 2002, Dr. Simms noted Ms. Townsend was continuing in recovery but was being referred to

toxicologist James Halsey in Birmingham, Alabama, regarding the etiology behind her allergic attack and questionable toxic exposure. (*Id.*). Dr. Halsey could not pinpoint the exact cause of her reaction, but found the claimant to be a maximum medical improvement with the inhalation incident but for the exception of multiple symptoms likely attributable to anger and depression from the incident. (Ex. 1, p.3). Three weeks later, the claimant returned to Dr. Dennis Simms. (Ex. 8, February 11, 2002 record; R. Excerpt 8, p. 0003). Dr. Simms found her to be in full work recovery except for generalized weakness and headaches and released her to return to work without restrictions, pending an appointment with Dr. Ahmad. (*Id.*). The employer and carrier stopped paying the claimant workers' compensation benefits on February 14, 2002.

Ms. Townsend returned to work for Hospital Housekeeping Systems on April 1, 2002. (Ex. 6, post injury wage earning history). She continued working for Hospital Housekeeping Systems until February 2003, when she did not report to work and did not notify her employer of her expected absence for four consecutive days. (Ex. 4, deposition of Chance McDonald, pp. 11-14). She was terminated for absenteeism.

3. <u>Referral to Dr. Andrew Parent</u>.

Ms. Townsend was referred to Dr. Andrew Parent, a neurologist at the University of Mississippi Medical Center, by Dr. Ahmad. (Ex. 10, March 25, 2002 treatment note by Dr. Andrew Parent). Dr. Parent noted that Ms. Townsend had elevated levels of prolactin and had been on pharmaceutical treatment for that problem. He performed a repeat MRI scan on March 26, 2002, and noted a left intrasellar pituitary tumor and also a lesion in the right occipital area, which was consistent with either an old infarction/stroke or a low grade glioma. On a follow-up visit in August

of 2002, MRI scans revealed a suspicious lesion in the right parietal lobe. (Ex. 10, August 7, 2002, MRI radiological report). The radiologist reported finding a 3 cm intra-axial mass that did not have the appearance of a cerebrovascular accident (CVA). (*Id.*).

Ms. Townsend continued to treat with Dr. Parent throughout 2002 and 2003. and on September 9, 2003, she filed her Petition to Controvert. By October 6, 2003, Dr. Parent was quite concerned that her headaches might be related to an intercranial lesion which could be a brain tumor. (Ex. 10, October 6, 2003 treatment note). Dr. Parent recommended surgery for a biopsy of this lesion and a possible resection. (*Id.*)

4. <u>Medical Foundation, Inc and Dr. Paul Wilcox</u>.

Also, Ms. Townsend continued treatment with her family physician, Dr. Paul Wilcox, at Medical Foundation, Inc. d/b/a Primary Care Associates during the latter half of 2003 and early 2004. (Gen. Ex. 3, pp.2-11; R. Excerpt 9, pp. 0002-0011). After the claimant had chest pains in January of 2004, Dr. Wilcox referred the claimant for an echo doppler procedure at Jeff Anderson Regional Hospital. (*Id.* at 0002). As noted by Dr. Thomas Plavac, the attending physician, in a discharge summary dated February 3, 2004, Ms. Townsend was diagnosed with a brain tumor, probably meningioma, that appeared on the CT scan taken while she was in the hospital at Jeff Anderson Regional Medical Center. (*Id.*). The remainder of the records from Medical Foundation, Inc. d/b/a Primary Care Associates, contain nothing about any psychiatric complaints by Ms. Townsend to her family doctor. (*Id.* at pp. 0004-0011).

5. Treatment at Weems Mental Health Clinic.

On March 3, 2004, on referral by her attorney, Ms. Townsend was first seen at Weems Mental Health Center. (Ex. 11, March 3, 2004 Intake/Assessment Form; R. Excerpt 6, pp. 0042-0044). In that initial evaluation, Ms. Townsend reported that she "passed out" secondary to inhaling mixed cleaning chemicals while working as a housekeeper. She informed the intake psychologist that her depression and anxiety began since that incident. (*Id.*). This testimony was in contradiction to that given in the hearing and also in her deposition.

In her deposition, Ms. Townsend testified that her anxiety and depression started after she lost her job. (Ex. 5, p. 33; R.Vol. 3, pp. 49-50). By contrast, during the initial interview with the intake psychologist, the claimant reported experiencing anxiety and depression ever since the incident. (Ex. 11, March 3, 2004, Intake/Assessment Form; R. Excerpt 6, pp. 0042-0044). Further, the claimant admitted to a history of two husbands who were verbally and physically abusive. (*Id.*) Significantly, Ms. Townsend omitted telling the intake psychologist at Weems Mental Health Center that she had been diagnosed with a brain tumor, in addition to a pre-existing stroke. (*Id.* in Medical History section). On cross-examination, she admitted that her medical records had never been provided to Weems. (R. Vol. 3, pp. 55-56). After meeting with the claimant and taking her subjective history, the psychologist noted that reports of anxiety may be "physical in origin," but also noted that she had a history of verbal and physical abuse in two marriages as well as early loss of a parent which may contribute to depression. (*Id.*).

At the hearing and in her deposition, however, the claimant identifies the primary source of her mental problems as related to her brain tumor, blaming the allergic reaction for causing her brain

tumor. (Ex. 5; pp. 31:19-32:25). The prospect of brain surgery is terrifying to the claimant. (R.Vol.3, pp. 47-48). Even on direct examination, the claimant explained the effects that her fear of brain surgery had on her. She stated "they are treating me to get better . . . because I have hallucinations and I am nervous at times, you know." (R.Vol. 3, p. 34). When describing her problems, she stated "I can't control to come back from them cutting on my head to relaxing enough for it to go away. It gets worse and worse." (R.Vol. 3, p. 35). She describes her hallucinations and dreams, noting "they are cutting - they're standing over me at times, and they are saying things to me that I don't understand what they are saying and I can't answer them." (R.Vol. 3, pp. 35-36). Clarifying the statement, Ms. Townsend stated "it gets - what I was referring to, what the doctor said to me when he told me that he was going to cut my head open." (R.Vol. 3, p. 36). She admitted on cross examination that her hallucinations and nightmares concerned the necessary operation to remove her brain tumor, rather than the chemical allergy. (R.Vol. 3, p. 47).

Ms. Townsend continued treating with Weems Mental Health Center, and on April 28, 2004, she returned to the psychologist obsessing about the chemical inhalation incident and voicing her anger toward the fact that she was treated unfairly by her former employer and doctors. (Ex. 11, April 28, 2004, service record; R. Excerpt 6, p. 0036). At this visit, Ms. Townsend still did not disclose to the psychologist that she had been diagnosed with a brain tumor and that surgery had been recommended to resect and/or explore that lesion. (*Id.*).

Ms. Townsend met with the psychiatrist, Dr. Sonia Ashish-Mishra, on June 30, 2004 wherein she was diagnosed with dysthymia with a note to rule out a psychotic disorder not otherwise specified and to rule out delusions regarding the chemical exposure. (Ex. 11, handwritten June 30,

2004 medical note for medication evaluation and monitoring; R. Excerpt 6, p.0032). Ms. Townsend continued to treat with Weems Mental Health Center and social workers throughout 2004. On September 28, 2004, she was seen by Dr. Ashish-Mishra and again reported having "reflections" of what happened and talked repeatedly of the chemical exposure at Hospital Housekeeping Systems. (*Id.* at 0022). Dr. Ashish-Mishra noted that she persevates around her inability to work. (*Id.*). On the next visit to Dr. Ashish- Mishra, Ms. Townsend came in and was described as "falling apart." (*Id.* at 0017). Ms. Townsend did not explain to Dr. Ashish-Mishra what her difficulties were and seemed exasperated with a dysphoric mood. (*Id.*).

On March 7, 2005, Dr. William Wood, sitting in for Dr. Ashish-Mishra, examined the claimant for 10 minutes and noted that Ms. Townsend once again explained to him that her illness onset was due to an inhalation incident while working at Hospital Housekeeping Systems. (*Id.* at pp. 0011-0012). The claimant reported to Dr. Wood that a doctor told her that she would not be able to work again in the future. (*Id.*). Ms. Townsend returned to Dr. Ashish-Mishra on April 14, 2005 when she again persevated about the chemical incident in Hospital Housekeeping Systems. (*Id.* at p. 0007). Dr. Ashish-Mishra continued her treatment plan and prescription medications. (*Id.*) On June 13, 2005, Dr. Ashish-Mishra saw Ms. Townsend again and noted that she was less tearful but continued to complain with a different mannerism. (*Id.* at pp. 0004).

6. <u>Review by Dr. Mark Webb</u>.

The employer and carrier retained Dr. Mark Webb, a psychiatrist, to perform an evaluation of the medical records and examine Ms. Townsend. Dr. Mark Webb testified by affidavit at the hearing and examined the claimant on February 23, 2005 (Ex. 7, p.2; R. Excerpt 7, p. 0002).

Dr. Webb noted that Ms. Townsend was very afraid of having the brain surgery recommended by Dr. Parent on October 6, 2003. (*Id.* at 0003). Dr. Webb noted that Ms. Townsend was very afraid of this and had nightmares along with visual hallucinations. (*Id.*). Ms. Townsend explained to Dr. Webb that if she had her surgery, she would be "signing her own death certificate." (*Id.*).

In her marital history, Ms. Townsend reported to Dr. Webb that she had previously been married twice and that in her first marriage, she was stabbed by her husband while pregnant and lost the baby. (*Id.* at 0004). Ms. Townsend was also married to an alcoholic for her second marriage which lasted only one and a half years. (*Id.*) Dr. Webb found Ms. Townsend chose to focus on the chemical incident as the main problem and ignored her fear of the recommended brain surgery for her tumor. (*Id.*).

Dr. Webb stated that Ms. Townsend's problems were not related to the chemical inhalation incident and her nightmares and hallucinations of having brain surgery stem from her brain tumor. (*Id.* at pp. 0005-0007). Dr. Webb noted the visual hallucinations were from organic illnesses such as Ms. Townsend's previously identified stroke. (*Id.*). Dr. Webb did believe with medications that Ms. Townsend could return to work from a psychiatric perspective. (*Id.*).

7. <u>HHS Supervisor and Mississippi Employment Security Commission Records</u>.

Chance McDonald was Ms. Townsend's supervisor for Hospital Housekeeping Systems. (Ex. 4, p. 8). Hospital Housekeeping Systems ("HHS") acquired a contract with Rush Hospital to run the housekeeping department. (Ex. 4, p. 8). HHS took over at Rush on November 1, 2001. (Ex. 4, p. 34). After Ms. Townsend returned to work in April of 2002 as a patient advocate, she worked at HHS until February 2003 when Mr. McDonald requested that she return to full duty unless she

could produce a doctor's note that stated otherwise. (Ex. 4, p. 20). Dr. Parent who was treating her for a pituitary tumor, stated that there was no danger working around chemicals related to the pituitary tumor and Mr. McDonald requested medical documentation if she could not return to work as a housekeeper. (Ex. 4, p. 20). After that point, Ms. Townsend did not return to work after four days of "no call/no show," and she was treated as if she had resigned for job abandonment. (Ex. 4, p. 21). In addition, on September 24, 2002, and on November 12, 2002, Ms. Townsend received written warnings for a total of six instances of tardiness. (Ex. 4, exhibits to deposition 7 and 8).

Mississippi Employment Security records were offered by affidavit. These records revealed that Ms. Townsend applied for employment benefits on November 26, 2003. (Ex. 9, p. 6). Ms. Townsend claimed she was absent from work to see Dr. Ahmad due to chronic tension headaches. (Ex. 9, pp. 6, 9, 24). The Mississippi Employment Security Commission rendered a decision that Ms. Townsend was discharged for absenteeism without proper notification which disqualified her from benefits. (Ex. 9, p. 26). The Mississippi Employment Security Commission also found that Ms. Townsend was unable to work due to the tension-type headaches in accordance with Dr. Rafique Ahmad's opinion. (Ex. 9, p. 27).

III. SUMMARY OF THE ARGUMENT

As this Court is aware, claims for mental injury arising under the Workers' Compensation Act must be supported by "clear and convincing evidence." *Miles v. Rockwell Intern.*, 445 So. 2d 528, 537 (Miss. 1983) and *Fought v. Stuart C. Irby Company*, 523 So. 2d 314, 317 (Miss. 1988). Quoting the Mississippi Supreme Court, "The test of causal connection between a work related accident and a psychoneurosis subsequent to that accident is a test of 'clear evidence'." *Miles,* 445

So. 2d at 537. The claimant must prove more than the fact that a mental injury "may" be aggravated or caused by some physical ailment. *Janice Kirk v. K-Mart*, MWCC No. 96-09498-G-3039 at 7 (August 20, 2001), affirmed *Kirk v. K-Mart Corp.*, 838 So. 2d 1007 (¶1) (Miss. App. 2003). The Mississippi Supreme Court uses the terms "clear evidence" and "clear and convincing" as one in the same. *Fought v. Stuart C. Irby Company*, 523 So. 2d 314, 317 (Miss. 1988). If unaccompanied by physical trauma, a purely mental injury must be caused by something more than the ordinary incidents of employment. *Fought*, 523 So. 2d at 317 (citations omitted).

The Lauderdale County Circuit Court's Order affirming the Mississippi Workers' Compensation Commission should be reversed due to the simple fact that Ms. Townsend provided no clear and convincing evidence that an allergic reaction caused her mental disability, depression, delusions, and hallucinations *which occurred two-and-a-half years after the allergic reaction.* Her diagnosis, which never changed, was "dysthymia" without any causation listed. Her treating psychiatrists never clearly or conclusively attributed Ms. Townsend's mental illness to the allergic reaction. The claimant certainly did. She was, in fact, referred to Weems Mental Health Center by her workers' compensation lawyer. Ms. Townsend told the intake psychologist that her problems were all related to her allergic reaction, but omitted critical information about her brain tumor and pre-existing stroke. (Ex. 11, March 3, 2004, Intake/Assessment Form; R. Excerpt 6, pp. 0042-0044). Ms. Townsend suffered from a host of unrelated serious physical ailments including high blood pressure, prolactemia, pituitary tumor, brain tumor, chronic tension headaches, and a pre-existing stroke. (Exhibit 2A, December 29, 2003 letter from Dr. Ahmad, R. Excerpt 5, p. 0005 and Ex.10, October 6, 2003 record of Dr. Parent). 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).

The Mississippi Workers' Compensation Commission incorporated the wrong standard in determining the causation for Ms. Townsend's mental illness. As noted above, the Mississippi Supreme Court has long held that the standard for mental injuries requires "clear evidence/clear and convincing" of casual connection. Reviewing the medical evidence and testimony, it is certainly not clear, nor by any stretch convincing. An allergic reaction did not cause Ms. Townsend's problems, but it did serve as the tool of discovery for the claimant to discover the host of other health problems that were found while in the hospital. The loss of her job, financial problems, combined with her impending brain tumor surgery and pre-existing stroke have caused Ms. Townsend's problems. The Commission based its findings of the self-serving statements of the claimant and completely ignored the opinion of Dr. Mark Webb, who was the only psychiatrist who took a comprehensive history, examined the medical records and offered unrebutted testimony as to the causal relation of Ms. Townsend's mental illnesses.

Furthermore, the Commission erred as a matter of law in finding Ms. Townsend permanently and totally disabled when Ms. Townsend failed to offer any medical evidence in support of permanent total disability. This is especially true in light of the fact that an impairment rating or opinion of disability was never even issued by her physicians. This Court requires specific medical findings to support permanent total disability. *Mid-Delta Home Health, Inc. v. Robertson*, 749 So. 2d 379, 386 (Miss. App. 1999) and Dunn, Vardaman S., MISSISSIPPI WORKMEN'S COMPENSATION LAW, §282 (3rd Ed. 1990 Suppl.). As such, the Mississippi Workers' Compensation Commission's

findings that Ms. Townsend's mental illness was related to an allergic reaction and a subsequent finding that she is permanently and totally disabled due to her psychiatric illness should be reversed and rendered. The Commission's findings as to Ms. Townsend's allergic reaction and subsequent treatment for recovery are not in dispute.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The standard of review for appeals from the Mississippi Workers' Compensation Commission is well settled. A decision of the Commission will be reversed only if it is not supported by substantial evidence, is arbitrary or capricious, or 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)). "If the Commission's decision and findings of fact are supported by substantial evidence, then we are bound by them even if we as fact finder would have been convinced otherwise." *Spann v. Wal-Mart Stores*, 700 So. 2d 308, 311(12) (Miss.1997) (*citing Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss.1988)). 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,* 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. The employer and carrier do not contest the findings of the Commission as to the compensable allergic reaction.

A heightened standard applies to mental injury cases whether arising out of physical injury or a purely mental injury. The test of causal connection between a work related accident and a psychoneuroses subsequent to that accident is a test of "clear and convincing evidence." *Miles v. Rockwell Intern.*, 445 So. 2d 528, 537 (Miss.1983); *Fought v. Stuart C. Irby Company*, 523 So. 2d 314, 317 (Miss. 1988). It is also insufficient that a mental injury "may" be aggravated or caused by some physical ailment. *Janice Kirk v. K-Mart*, MWCC No. 96-09498-G-3039 at 7 (August 20, 2001), *affirmed, Kirk v. K-Mart Corp.*, 838 So. 2d 1007 (¶ 1) (Miss. App. 2003).

B. NO CLEAR AND CONVINCING EVIDENCE EXISTS WHICH CAUSALLY RELATES THE CLAIMANT'S MENTAL ILLNESS TO THE COMPENSABLE ALLERGIC REACTION.

There is no clear and convincing proof of a causal link between Townsend's mental injury and the physical injury. The claimant had the burden of proof to establish this link by clear evidence, not guesswork and surmise, or even a preponderance standard. In fact, nowhere in the underlying administrative judge's opinion is the correct standard for a mental/physical injury ever even mentioned. The administrative judge and consequently, the Full Commission, used a preponderance standard. This is evidenced by not only the complete lack of reference to the "clear and convincing evidence" standard in the underlying order, by also by the statement of the administrative judge that,

"Dr. Ashish Mishra, and the other providers at Weems related Ms. Townsend's depression and anxiety - at least in part - to the chemical exposure." This is error. Dr. Ashish-Mishra never stated this. The administrative judge did not one cite to the particular medical record where this statement occurred because it does not exist. Moreover, the actual diagnosis rendered at Weems Mental Health Center is misquoted in the underlying Order.

What exists are numerous visits where Ms. Townsend attributes all of her problems to this one incident, three years after it happened. A patient's obsession with a particular incident that she believes caused all of her problems does equate to the cause in fact of her mental trauma. This Court will not find any record in the Weems Mental Health Center Records where a physician clearly links the allergic reaction to causing Ms. Townsend's depression over the host of other problems that she is experiencing. Moreover, her physician at Weems, Dr. Mishra was not advised of her brain tumor.

A complete review of all of the doctor's notes from the Weems Mental Health Center reveals nothing that clearly links Ms. Townsend's depressive disorder, suspected psychosis, and/or anxiety to the inhalation incident, other than the claimant's own subjective history and assertions. In his June 30, 2004 record, Dr. Ashish-Mishra diagnoses "Dysthmia, R/O[1] psychotic D/O[2] NOS (R/O delusion D/O - regarding chemical exposure)." (Ex. 11, p. 32, June 30, 2004, R. Excerpt 6, p.0032). In the underlying administrative order, the administrative judge omits "NOS" from the diagnosis. (R.Vol. 2, p. 64 - the abbreviation "NOS" is omitted). Significant is "NOS," because it is an abbreviation for "not otherwise specified." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1380

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[1]"R/O" is an abbreviation for "Rule Out." (R.Excerpt 7, p.0005)

[2]"D/O" is an abbreviation for "Disorder." (R.Excerpt 7, p.0005)

(9th ed. 1986). Furthermore, it is clear from the first visit with the claimant and the resulting diagnosis that Dr. Ashish-Mishra suspected that Ms. Townsend was under delusions about this incident. Finding the subject of the delusion to be the cause of the delusion, as the Commission did, is error without a underlying medical testimony.

Dr. Ashish-Mishra never links the diagnoses of dysthymia to one particular medical problem over another at all, much less especially with clear evidence. Ms. Townsend suffered a previous stroke, a pituitary tumor, a brain lesion, prolactemia, chronic tension headaches, high blood pressure, a traumatic family history, job loss, financial problems, and other maladies for which Dr. Ashish-Mishra did not associate with any particular cause. The Commission, via the underlying administrative order, counted Ms. Townsend's social workers as medical physicians. (R.Vol 2, p. 63) (noting, "the providers at Weems . . ."). This too was error. This Court has long held that social workers and therapists are not medical doctors. *See Leatherwood v. State*, 548 So. 2d 389 (Miss.1989)(in commenting on hearsay statements, the Court noted that a social worker "was not a physician nor may the services she rendered be stretched into the world of the medical.")

The only mention of depression associated with this incident was made by Dr. James Halsey, the consulting toxicologist, who diagnosed the claimant with "multiple symptoms *likely* due to depression and anger referable to inhalation incident." (Ex. 1, p. 3 at #4; emphasis added). Dr. Halsey is a toxicologist, not psychiatrist. Dr. Halsey took no psychiatric history and was not consulted for a psychiatric opinion, nor was he competent to give a psychiatric opinion.

In the recent case of *Troupe v. McAuley*, the Mississippi Supreme Court held, "[w]e have consistently stated that when considering Miss. R. Evid. 702 issues, our trial judges are placed in the

role of gatekeepers, 'ensuring that expert testimony is both relevant and reliable.'" 955 So. 2d 848, ¶ 25 (Miss. 2007). In *Troupe* the court held that a neurosurgeon was not qualified to testify as an expert in malpractice action against neuro-otolaryngologist. *Id.* at ¶ 24-26. The court noted that the expert, Dr. Rawlings, was board certified in a different specialty (neurosurgery instead of otolaryngology), he had no special training or experience in the field of otolaryngology or neuro-otolaryngology; he had never conducted middle ear surgery, had never had privileges at any hospital to conduct middle ear surgery, and was not qualified to conduct middle ear surgery. *Id.* And Dr. Rawlings did not hold himself out to be an expert in otolaryngology or neuro-otolaryngology. Likewise, neither does Dr. Halsey, nor did the claimant ever offer him to be an expert in psychiatry.

Even if one ignores the holding of *Troupe* and accepts a toxicologist's findings in the psychiatric field, Dr. Halsey used the term 'likely' as an explanation for the claimant's multi-factorial symptoms. (Ex. 1, p. 3). This is hardly clear and convincing proof. Moreover, after the claimant saw Dr. Halsey, she returned to Dr. Dennis Simms, her primary treating physician, who released her back to work three weeks later without restrictions. (Ex. 8, February 11, 2002 note, at p. 3; "Plan"; R. Excerpt 8, p. 0003). Furthermore, the claimant returned to work for ten-and-a-half months and did not complain of any mental problems (and did not have any hallucinations) until March 2004, over a year after she left her job, and two-and-one-half years after the actual incident. (R.Vol. 3, pp. 29-32; 34-36). With the long lapse of time before the hallucinations began and the overlapping severe medical problems, no clear evidence exists to link Ms. Townsend's anxiety, depression, hallucinations and other problems to this one particular incident.

In fact, in his treatise, Dunn examines this type of injury and states:

> While a psychoneurosis under some circumstances may present a compensable injury, the door is not to be opened for indiscriminate allowance of compensation on this score simply because a neurosis follows an accident; and when the medical evidence of casual connection is couched in somewhat equivocal language and is less than convincing, it need not be accepted as the basis for an award. **The better reasoned cases require proof that (1) an actual physical injury occurred, and (2) that the neurosis was the direct *and immediate* result of such injury.**
>
> . . . Also, when an injury occurs but the resulting organic physical effects disappear, imagined incapacity and symptoms of pain without physical basis are not compensable, since incapacity due to a mental condition not resulting from work connected injury is not within the coverage of the Act.
>
> . . . 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.* (emphasis added)

Dunn, Vardaman S., MISSISSIPPI WORKMEN'S COMPENSATION LAW, §114 (3rd Ed. 1990).

This is exactly what has occurred in the case before this Court. The Full Commission, engaged in speculation to link all of these problems to Townsend's allergic reaction, over and above her brain tumor, adenoma (pituitary lesion), recommended brain surgery and/or prior stroke, not to mention her traumatic past, financial problems and the loss of her job. When a claimant leaves the elements of proximate cause to surmise, conjecture or speculation, she has failed to meet her burden of proof. *Mid-Delta Home Health, Inc., v. Robertson*, 749 So. 2d 379, 385-86 (Miss.Ct.App. 1999) (citing *Flintkote Co. v. Jackson*, 192 So. 2d 395 (Miss. 1966)). A causal link between a physical injury and a mental injury cannot be left to speculation. *Id.* at 385.

Townsend failed to meet her burden of proof. The Full Commission not only used the wrong evidentiary standard, but erroneously engaged in speculation as to the source of Townsend's mental

injury, and the Circuit Court committed the same error by affirming the Full Commission. The finding of the Commission that Townsend's treating physicians causally linked Townsend's mental injury to the compensable allergic reaction is against the substantial evidence and clearly erroneous. A review of the Weems Mental Health Center records reveals not one competent medical record in which a psychiatrist clearly links the cause of Townsend's mental complaints to the allergic reaction. (Ex. 11; R. Excerpts 6). The underlying administrative order simply and conclusorily states, "Ms. Townsend was diagnosed as suffering from an Axis I depressive disorder and moderate anxiety disorder that were related to the chemical inhalation incident and to the abuse she had received from her two husbands." (R.Vol. 2, p.58). This statement is taken directly from the narrative intake summary that was given by Ms. Townsend without any information on her pre-existing stroke or brain tumor. A review of these records will show this Court that no doctor ever states her mental problems stem from the allergic reaction. The claimant alone believes her allergic reaction is the cause of all her woes. She even testified she believed the reaction caused her brain tumor and the host of other problems she has. (Ex. 5, pp. 63:25 - 64:5). The medical evidence, however, does not support this speculation. This is not clear and convincing evidence by any stretch of the imagination. The Order of the Full Commission must be reversed and judgment rendered in favor of Hospital Housekeeping Systems.

C. THE OPINION OF THE FULL COMMISSION IS BASED UPON SELF-SERVING HEARSAY STATEMENTS MADE BY THE CLAIMANT TO THE DOCTOR DURING A CONSULTATION.

The only testimony linking Townsend's allergic reaction with her subsequent mental difficulties is her own. This testimony conflicts with other testimony from Townsend that her

problems began after she left work (R.Vol. 3, p. 51; Ex. 5, p. 33:1-6). Conflicting evidence from the same witness can hardly be described as "clear and convincing" for the purpose of proving a mental injury. Furthermore, her hallucinations did not start until after she left her job and was told she would need brain surgery. (R.Vol. 3, pp. 30, 31). Despite the fact that she is extremely afraid of her brain tumor and surgery to remove the same, and despite the fact that she admits hallucinations about these problems, Ms. Townsend blames all of her mental problems on her allergic reaction on November 30, 2001. (R.Vol. 3, pp. 56-58). None of the medical doctors treating her for the mental conditions, however, have made this connection. In fact, the intake psychologist notes that the anxiety "may" be physical in origin and not psychogenic. (Ex. 11, Initial Intake Assessment dated March 3, 2004; R. Excerpt 6, pp. 0042-0044). The psychologist also notes a history of verbal and physical abuse in two marriages as well as the early loss of a parent which also "may" contribute to her depression. In fact, one of Ms. Townsend's unborn children was killed by her first husband, when he stabbed her. (R. Excerpt 7, p. 0004). Furthermore, she did not report these problems or seek treatment until March 3, 2004, on the referral of her attorney, two-and-one-half years after the incident, and eleven months after Ms. Townsend left her employment. The claimant even blames her hair loss on this inhalation incident. (R.Vol. 3, pp. 56-58).

These multi-factorial causes are further aggravated by the fact that Ms. Townsend did not inform the intake psychologist of the fact that she had been diagnosed with a brain tumor at that time, nor that she had incurred a stroke as diagnosed by Dr. Rafique Ahmad. (Ex. 10, October 6, 2003 treatment note; Ex. 2A, December 4, 2001 consultation note of Dr. Rafique Ahmad; R. Excerpt 5, p. 0005). The fact that Townsend provided inconsistent testimony under oath, an incomplete and

misleading history to her treating physician, and failed to apprise Dr. Mishra of her brain tumor destroys any clear evidence of a causal connection. The doctors upon which she relies do not even have an accurate picture of her underlying physical condition. *Johnson*, 435 So. 2d at 1196.

D. THE CLAIMANT DID NOT COMPLAIN OF MENTAL INJURES ASSOCIATED WITH HER COMPENSABLE EVENT UNTIL TWO-AND-A-HALF YEARS AFTER THE INCIDENT.

Common sense dictates that Ms. Townsend's mental problems are unrelated to this allergic reaction. It is undisputed that Ms. Townsend returned to work for ten months after she was released for complications arising out of her pituitary tumor and prolactemia. Ms. Townsend returned to work for Hospital Housekeeping Systems on April 1, 2002, and worked through February 15, 2003 (Ex. 6, First Injury Wage Earning History). **The claimant worked for over ten months for Hospital Housekeeping Systems and admitted in the hearing and in her deposition that her anxiety and depression problems did not begin until she lost her job over unexcused absences** (Ex. 5, p. 33:1-7; R.Vol. 3, pp. 49-50). Ms. Townsend did not seek any treatment for these problems until March 3, 2004 at the behest of her attorney (Ex. 11, Initial Assessment dated March 3, 2004; R. Excerpt 6, p. 0042). While Ms. Townsend did not experience any of these problems until after the inhalation incident, she was also not diagnosed with a pituitary tumor or suspected brain tumor until after this incident, nor was she aware that she has a pre-existing stroke. Without competent medical evidence, the administrative judge (and subsequently the Commission) erroneously "cherry picked" the cause of the claimant's mental illness. No explanation exists as to how the allergic reaction caused all of her psychiatric problems when the reaction occurred on November 30, 2001,

she returned to work April 2002, left her job in February 2003, only to wait and seek psychiatric treatment in March 2004, two and one half years after the allergic reaction.

The substantial evidence, therefore, demonstrates that the onset of Townsend's mental injury occurred after her diagnosis with unrelated brain injuries. The timing of Townsend's treatment for her mental injuries, when compared with her work history and history of complaints and diagnoses, do not establish by clear evidence her mental injury was caused by the allergic reaction. On the contrary, the substantial evidence indicates otherwise. The Commission's Order must be reversed and judgment rendered in favor of Hospital Housekeeping Systems.

E. THE MENTAL INJURIES SUFFERED BY THE CLAIMANT ARE THE ADMITTED RESULT OF HER FEAR HAVING SURGERY TO EXPLORE AND POSSIBLY REMOVE A PRE-EXISTING UNRELATED BRAIN TUMOR.

Both at her deposition and at the hearing, Ms. Townsend became extremely emotional, crying and even wailing, she discussed the fact that she needs brain surgery and also when she discussed the incident involving her first husband in which he killed her unborn child. (R.Vol. 3, pp. 53-55). The parties had to go off the record to allow her to compose herself. (Ex. 5, pp. 53, 56; R.Vol. 3, pp. 54-55). In fact, in her deposition, Ms. Townsend admitted that the discussions regarding her brain tumor were very disturbing to her and caused her both anxiety and depression. (Ex. 5, pp. 56-57). Ms. Townsend admits that she has disturbing hallucinations about, "taking out dogs" from her head regarding her needed brain surgery. (Ex. 5, p. 58). At the hearing, she described her hallucinations about the surgery as taking out parts that become "animals like a dog or sheep." (R.Vol. 3, p. 47). Clearly, the claimant's neurological problems are very traumatizing to her and have caused

hallucinations, not an allergic reaction over two years prior. If so, why did these hallucinations not start immediately after the incident in 2001, instead of 2004?

None of this was ever discussed or delineated by Dr. Mishra at Weems Mental Health Center. In short, it defies common sense to single out one incident which occurred 2-1/2 years before Ms. Townsend began seeking treatment from Weems Mental Health Center to be the cause of Ms. Townsend's mental illnesses. The discovery of her pituitary problems and her brain lesion all occurred after this incident. There is no evidence that this inhalation incident caused her brain tumor or pituitary tumor. Furthermore, Ms. Townsend had a pre-existing stroke. With all of these overlapping conditions, and with no definitive causal relation to the diagnosis given by Dr. Mishra, the administrative judge had no clear evidence on which to base his opinion, used the wrong standard, and resorted to speculation. The Commission order affirming this opinion must be reversed and judgment entered in favor of Hospital Housekeeping Systems.

F. THE MEDICAL EXAMINATION OF DR. MARK WEBB WAS ERRONEOUSLY EXCLUDED AND IGNORED BY THE FULL COMMISSION.

Furthermore, the administrative judge erroneously discarded the professional medical opinion of Dr. Mark Webb, whose opinion conclusively establishes that Ms. Townsend's mental problems are not due to an allergic reaction. On February 3, 2005, Ms. Townsend was examined by Dr. Mark Webb. (Ex. 7, p.2; R. Excerpt 7, p. 0002). Dr. Webb found Ms. Townsend's problems were not due to her allergic reaction but due to other factors such as her history of stroke, her fear over her brain lesion/tumor and fear of having surgery to explore and remove the tumor. (*Id.* at p.0004). Dr. Webb cited details in her history including the fact that her first husband stabbed her which resulted in the loss of her unborn child, and an abusive alcoholic second husband and the death of a parent at an

early age. (*Id.*). Furthermore, Dr. Webb found that with appropriate medication, Ms. Townsend was capable of working. (*Id.* at p. 0007).

First, the administrative judge questioned the credibility of Dr. Webb and his opinion. (R. Vol. 2, p. 63). The administrative judge noted that, "no other doctor in the record stated that Ms. Townsend had a stroke and a brain tumor." (*Id.* at 64; emphasis in original). This is error and a pointless distinction. Dr. Rafique Ahmad, on December 4, 2001, was consulted during Ms. Townsend's hospital stay. Dr. Ahmad found evidence of a stroke in 1998 and *noted actual hemiparesis suffered by Ms. Townsend during that stroke*. (Ex. 2A, p.1, Consultation note dated 12/04/01 at "History of Present Illness"; R. Excerpt 5, pp. 0001-0003 and 0005). Furthermore, the Administrative Judge may have overlooked the history taken by Dr. James Halsey in which he notes, "Mild hemiparesis onset about 3 years ago (1999)[3] associated with MRI scan. . ." (Ex. 1; p. 2, patient history dated January 18, 2002, at "Past History"). In the first MRI scan taken on March 6, 2002, Dr. Parent notes either a suspected old infarct/stroke or glioma, but discounts the possibility of a glioma. (Ex. 10, March 6, 2002 MRI and treatment note). By October of 2003, Dr. Parent feels strongly that Ms. Townsend has a brain tumor/lesion and recommends surgery. (Ex. 10, October 2003 records). Obviously, the claimant suffered from some type of brain lesion and incurred some type of stroke in 1998. Otherwise, the hemiparesis is unexplainable. While there is debate as to when exactly her stroke occurred and how it appears on MRI scans, there is no debate that one occurred and that a subsequent lesion was noted by Dr. Parent. The CT scan performed in January

[3]This Court should note that Dr. Ahmad referred to a 1998 stroke while Dr. Halsey referenced the same stroke as a 1999 stroke. Dr. Webb used the date given by Dr. Halsey's notes.

2004 at the Jeff Anderson Regional Medical Center conclusively establishes a brain tumor. (Ex. 3, p. 1; R. Excerpt 9, p. 0002). The record unquestionably confirms the claimant had both.

Second, the Commission, through the administrative judge, embarked on a tortured analysis, misreading Dr. Webb's opinion, to create a conflict with Dr. Mishra that did not exist. The administrative judge erroneously interpreted certain statements from Dr. Mark Webb. The administrative judge noted that, "Dr. Webb seemed to think Dr. Ashish Mishra ruled out the possibility of a psychotic disorder on June 30, 2004." (R.Vol. 2, p. 64). What was actually stated in Dr. Webb's report, page 4, is "[f]rom 6/30/04 she is given a diagnosis of rule out psychotic disorder. She was found to be delusional regarding her chemical exposure". (Ex. 7, p. 5; R. Excerpt 7, p. 0005). The claimant was given a diagnosis of rule out psychotic disorder. (*Id.*). Dr. Webb never stated that Ashish Mishra ruled out the possibility of a psychotic disorder. While seemingly similar, these two things are not the same. The administrative judge should not have subjectively interpreted the opinion by attempting to guess at what Dr. Webb "seemed to think." (See R.Vol. 2, p. 64 at second paragraph).

This tortured analysis continued in the underlying opinion when the administrative judge noted that, "the Administrative judge simply does not interpret that brief note to mean that Dr. Ashish Mishra on June 30, 2004 excludes any possibility that Ms. Townsend had a psychotic disorder . . ." (*Id.*). *Neither did Dr. Mark Webb.* After reading certain statements by Dr. Webb in a particular light, the administrative judge then consults his dictionary and the definition of "dysthymia" and notes that the word means, "any disorder or mental depression or despondency." The administrative judge then found that the claimant experienced depression. Lastly, the

administrative judge found Dr. Webb stated that Ms. Townsend suffered from depression and psychosis. With this analysis the Commission determined that Dr. Webb's opinion is based on false findings and should be thrown out. (*Id.* at 65). This logic is unintelligible, obtuse and clearly erroneous.

Dr. Webb noted that Dr. Ashish-Mishra was in the process of ruling out a psychotic disorder. Dr. Webb himself diagnosed Ms. Townsend with psychosis. How could Dr. Webb "seem to" read Dr. Ashish-Mishra as ruling out a condition for which he himself finds? The bottom line is that the administrative judge substituted his judgment (after noting he would not do so) for the judgment of Dr. Mark Webb by misreading statements contained in his report. While the Commission is certainly free to weigh the evidence, pre-textual reasons for exclusion are error and the Commission must fairly analyze Dr. Webb's opinion. *Johnson v. H.K. Ferguson*, 435 So. 2d 1191, 1196 (Miss. 1983).

Despite a perfunctory claim of conflicting opinions, Dr. Webb and Dr. Mishra do not conflict in their opinions. *Dr. Mishra never addressed causation in his records.* A rational basis must exist for exclusion, and the later opinion by Dr. Webb should have been addressed by Dr. Mishra. It was not. *Davis v. Scotch Plywood Co. of Mississippi*, 505 So. 2d 1192, 1196-1197 (Miss. 1987)(error to reject testimony of secondary physician when no actual conflict exists). Dr. Webb was the only physician who specifically addressed causation. The claimant never deposed Dr. Mishra to obtain his opinion and to clarify causation. The administrative judge did not point to any specific diagnosis by Dr. Ashish-Mishra which linked Townsend's mental illness to her allergic reaction, as opposed to a host of other conditions, to constitute clear and convincing evidence as required by the law.

Moreover, Dr. Mishra did not even know that claimant was suffering from a brain tumor! The psychiatrist must be provided with the relevant critical information to form an accurate opinion. The Mississippi Supreme Court has held that reports based on inadequate medical history or examination should not outweigh that based on accurate observation. *Johnson*, 435 So. 2d at 1196. The reasons for excluding the testimony of Dr. Webb hold no merit. The Commission erred in excluding the testimony of Dr. Webb. *Davis*, 505 So. 2d at 1196-1197 (Miss. 1987). Dr. Webb's opinion was not improbable, incredible or unreasonable, especially as he was informed of the claimant's pre-existing strokes and brain tumor. Without that information, there is simply no way a competent opinion could be rendered by a medical doctor.

This conclusion of law, made by the administrative judge, predicated upon mistaken facts, and reaching an clearly erroneous conclusion, was affirmed by the Commission without further support and in spite of the substantial contrary evidence. The Order of the Circuit Court affirming the Full Commission must, therefore, be reversed.

G. THE LAUDERDALE COUNTY CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S DETERMINATION THAT THE CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED DUE TO HER MENTAL INJURY WITHOUT ANY MEDICAL EVIDENCE, IMPAIRMENT RATING OR JOB SEARCH.

The concept of disability comprises a physical injury coupled with a loss of wage earning capacity. The claimant bears the burden of proof and the extent thereof. Medical evidence must support the claimant's incapacity and its extent. *Univ. of Miss. Med. Ctr. v. Smith,* 909 So. 2d at 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). This Court requires specific findings of medical evidence to support permanent total

disability. *Mid-Delta Home Health, Inc. v. Robertson*, 749 So. 2d 379, 386 (Miss. App. 1999). In fact, this Court reversed the Circuit Court and Full Commission in *Robertson* for this exact reason: no medical evidence was presented by the claimant that she was permanently disabled.

Likewise, no medical opinion whatsoever exists in the record delineating any restrictions or impairment with regard to Ms. Townsend's mental injury. In fact, the 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 Commission could base a finding of total disability. The administrative judge cited 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 plain error.

A hearsay statement by Ms. Townsend that a doctor told her that she was not able to work was not only unreliable, but inadmissible as numerous other conditions could be the cause of that inability to work. MISS. R. EVID. 802. In fact, the Administrative judge admitted on page 12 of the Order that Ms. Townsend is plagued by a host of physical ailments. (R. Vol. 2, p. 62). There is no other evidence in the record that delineates any restriction or impairment on Ms. Townsend other than Dr. Webb's evaluation in which he states that with medication, Ms. Townsend can work. (Ex. 7, p.6-7; R. Excerpt 7, pp. 0006-0007). Furthermore, there is no basis contained within the footnotes

of the Order that Ms. Townsend's uncontrollable itching is due to this incident more so than her other medical problems. (R. Vol.2, p. 65, and 55 at footnote 1). Ms. Townsend's emotional outburst regarding raising her children fails to be demonstrative of a mental injury which could form the basis of permanent total disability. (*Id.* at 65, and 55 at footnote 2).

Furthermore, despite the ignored opinion of Dr. Webb, no impairment, restrictions or disability status are contained in the record. As such, Ms. Townsend 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). 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.

In short, the Full Commission had no basis for awarding permanent total disability, especially in light of the fact that even after this inhalation incident, Ms. Townsend returned to work for ten months until her excessive absences resulted in the loss of her job. Pursuant to MISS. CODE ANN. §71-3-3(i)(disability must be supported by medical findings), the Administrative judge's opinion on this issue is deficient as a matter of law because no medical findings support his award. Regardless of the outcome of the compensability issue, the claimant has failed to provide any medical evidence addressing permanent total disability, whatsoever. Therefore, the Order of Circuit Court affirming the Full Commission should be reversed and rendered on this issue of permanent total disability.

V. CONCLUSION

While the numerous physical ailments plaguing Ms. Townsend are lamentable, Hospital Housekeeping Systems should not be held responsible for her mental illness. No clear and convincing evidence exists to clearly link her mental injury to the allergic reaction. Dr. Halsey is not competent to offer a psychiatric opinion, took no psychiatric history, and was not consulted for a psychiatric opinion. Neither Dr. Ashish-Mishra nor any of the other medical treatment providers at Weems Mental Health Center have ever related depression to the allergic incident over a host of pre-existing and contributory factors. The claimant's subjective history and complaints are not tantamount to a medical opinion, nor are they clear evidence of causation supported by the substantial evidence. Furthermore, Dr. Mark Webb has examined the claimant, reviewed her records and found that her condition is unrelated to this incident. Dr. Webb relates her condition to a brain tumor and previous stroke. Dr. Webb's opinion was erroneously disregarded, and was the only dispositive finding in the record concerning the etiology of Ms. Townsend's illness. Furthermore, there was simply no basis to award permanent total disability when the medical records contained no restrictions, limitations or impairment rating, and no job search was conducted. To base permanent total disability on a hearsay statement made by the claimant to a substituting physician is error. The Commission's affirmance of the administrative judge's order without additional findings of fact is, therefore, speculative and against the substantial weight of the evidence and clearly erroneous. The Lauderdale County Circuit Court's Order should be reversed and judgment rendered in favor of Hospital Housekeeping Systems.

Respectfully submitted, this the 28th day of August, 2007.

HOSPITAL HOUSEKEEPING SYSTEMS, INC. AND CLARENDON NATIONAL INSURANCE COMPANY, Appellants

BY: _____
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
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 ***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 28th day of August, 2007.

_____
JAY R. MCLEMORE