

IN THE SUPREME COURT OF MISSISSIPPI

SIDNEY HILL

APPELLANT

VS.

CIVIL ACTION NO. 2007-WC-00509

MEL, INC. DBA PURE WATER SOLUTIONS

APPELLEE

AND

ROYAL INDEMNITY COMPANY

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT  
OF RANKIN COUNTY, MISSISSIPPI

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BRIEF OF APPELLANT

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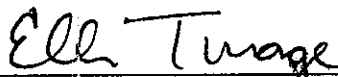
APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal:

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CIRCUIT COURT JUDGE  
Post Office Box 1626  
Canton, Mississippi 39046

This the 7<sup>th</sup> date of August, 2007.

  
\_\_\_\_\_  
ELLIS TURNAGE, MSB # 8131

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## STATEMENT OF ISSUES ON APPEAL

1. Whether PWS' Refusal To Reinstate Or Rehire Claimant Created A Prima Facie Case Of Total Disability?
2. Whether Hill Undertook Reasonable Efforts to Find Comparable Employment?
3. Whether The AJ Committed Reversible Error When He Allowed Edwards To Testify As To Matters Never Supplemented By Employer/Carrier?

### I. STATEMENT OF THE CASE

#### A. Nature of Case, Course of Proceedings and Disposition Below

This is a worker's compensation case. On July 26, 2001, Sidney Hill (Hill) suffered a lumbar and cervical spine injury while in the course and scope of his employment at Pure Water Solution (PWS). Hill filed his petition to controvert on May 17, 2004.

A hearing on the merits of the claim was held on September 5, 2005. At the hearing, the parties stipulated claimant suffered compensable injuries to his cervical spine and lumbar spine in a motor vehicle accident on July 26, 2001; claimant's average weekly wage (AWW) at the time of injury was \$522.59; the compensable cervical injury necessitated surgery by Dr. Patrick Barrett at the C5-6 level on March 5, 2003; and General Exhibits 1-10 were admitted into evidence by stipulation. The parties further stipulated that Hill was entitled to 10 days of TTD benefits from July 26, 2001 to his March 5, 2003 surgery for days he underwent medical treatment.

By decision dated December 9, 2005, Administrative Judge (AJ)

James Homer Best found that Hill reached maximum medical improvement on May 5, 2004 and sustained a permanent disability which resulted in a 20% loss of wage earning capacity as the combined result of his cervical and lumbar injuries and awarded \$69.68 per week for a period of no more than 450 weeks beginning May 6, 2004. By order dated September 21, 2006, the Full Commission denied appellant's motion to supplement the record and affirmed the decision of Administrative Judge Best dated December 19, 2005. By order dated February 16, 2007, the Rankin County Circuit Court affirmed the Full Commission order.

Feeling aggrieved, pursuant to Procedural Rule 10, Hill filed a notice of appeal for a review before the Full Commission from the AJ's decision rendered from the evidentiary hearing.

#### B. Statement of the Facts

Sidney Hill (Hill) is a 36 year old resident of Sandhill, Rankin County; he graduated from Pisgah High School in 1988 and attended one semester of classes in automobile mechanics at Hinds Community College in 1990. Between 1990 and 1992, he was employed by Season All in Pelahatchie and Temp Service in Jackson at minimum wage; thereafter, in 1992, he was employed for 5 years tenure at Cataphote in Flowood, a manufacturer of glass beads used in the production of fluorescent striping for roads and highways. His work at Cataphote as involved loading glass beads into barrels and the moving of the barrels that required him to lift up 50 pounds. Hill began work at PWS in 1997. PWS distributes purified water and related supplies for commercial establishments, residences,

hospitals, blood banks, kidney dialysis facilities and certain manufacturers. Hill's job title was route driver; he delivered several sized cylinders of water to PWS' customers in Mississippi, Alabama, Arkansas and Tennessee. Hill used a dolly and his truck's lift gate to load and unload the cylinders and supplies; T.21-24. Hill was also required to rebuild tanks which required him to lift bags of carbon and gravel used in purification that weighed 50-100 pounds. T.33-35. On July 26, 2001, Hill was injured on return from a delivery in Natchez when a tire came loose from another vehicle and crashed through his truck's windshield. Prior to the July 26, 2001 injury, Hill had never been involved in a car wreck or bodily injury claim. T.129. Following the July 26, 2001 incident, Hill was taken to University Medical Center (UMC) by American Medical Response; Hill complained of left arm pain. At UMC, Hill was assessed with multiple abrasions and neck strain. On July 27, 2001, at MEA Clinic, Dr. Ellis diagnosed Hill with cervical/thoracic strain and left arm abrasion. General Exhibit 2. Dr. L. Deford prescribed Motrin/Tylenol for pain and was discharged. On a July 30, 2001 followup visit at UMC, Hill was diagnosed with arthralgia and prescribed physical therapy secondary to the motor vehicle incident. Thereafter, on August, 8, 2001, his UMC medical records indicates a diagnosis of left shoulder joint pain. General Exhibit 1.

On August 3, 2001, Hill was treated at Lakeland Family Practice Center and Dr. Liberto ordered light duty work for 2 weeks. On August 20, 2001, Dr. Liberto assigned Hill light duty restrictions. General Exhibit 3.



On September 4, 2001, Hill saw Dr. Barrett. Hill saw Dr. Barrett 14 times from September 4, 2001, to September 4, 2003. On the first visit, Dr. Barrett performed an initial office evaluation and reviewed cervical x-rays. Dr. Barrett's impression was possible cervical ligamentous strain at 3-4 and 4-5 and recommended a MRI scan. Light duty work restrictions were assigned; On September 14, 2001, at Central Mississippi Diagnostics, a MRI was conducted of Hill's cervical spine at the request of Dr. Barrett. Interpreting radiologist indicated the study showed mild reversal lordosis in the cervical spine. General Exhibit 5. On September 18, 2001, Dr. Barrett reviewed Hill's MRI scan. The scan showed significant damage to several discs. Dr. Barrett indicated none of these discs show a natural herniation and he assigned light duty work restrictions followed by regular duty. Daypro, zanaflex, and darvocet were prescribed; On November 12, 2001, Dr. Barrett released Hill to return to full work duty with restrictions. On October, 22, 2002, Dr. Barrett ordered a cervical MRI which showed a pretty large center and slightly to the left herniated disk at 5-6 cervical. On November 27, 2002, at Central Mississippi Diagnostics, a MRI was conducted of the cervical spine at the request of Dr. Barrett. According to interpreting radiologist, Dr. Stephen Crawford, M.D. the study showed (1) no cord abnormality, (2) left recess of osteophyte at C5-6 appeared new since last years study did not produce nerve root compression and (3) mild stable spondylosis at C3-4 and C4-5. General Exhibit 5. Dr. Barrett discussed an interior cervical discectomy and fusion at C-5-6. On July 29, 2003, at the request of Corvel Nurse Case Manager, Lillie

Kendrick, Dr. Winston T. Capel performed a second independent medical exam. In his report, Dr. Capel opined that Hill's symptoms are severe enough that he is requiring medical attention and have been spaced over periods of up to 16 months; (2) Dr. Capel opined that had lumbar strain and sprain from this accident which was most likely superimposed upon degenerative disease; (3) the accident was an aggravational occurrence; and (4) Hill's recent complaints of low back pain on June 5, 2003, were probably related to his accident. Dr. Capel stated that he also has occasional risk factors for low back pain and that he carries out heavy labor. General Exhibit 8. On August 20, 2003, at Central Mississippi Diagnostic, a MRI was conducted of Hill's lumbar spine at the request of Dr. Barrett. According to interpreting radiologist, Dr. Stephen Crawford, M.D., the study showed early L4-L5-S1 facet degeneration. General Exhibit 5. On March 5, 2003, Hill was admitted to St. Dominic Hospital for an anterior cervical fusion at C5-6. On September 4, 2003, a lumbar MRI scan showed minor wear and tear of the 4-5 and 5-1 discs, but with no herniation and no stenosis. Dr. Barrett recommended strengthening and rehabilitation for the back would be appropriate. General Exhibit 4.

Hill testified he was not given a follow-up appointment and was not released to return to work. Further, Hill never went to strengthening and rehabilitation for his back as recommended by Dr. Barrett on the September 4, 2003 visit. The September 4, 2003 office notes states:

This patient returns, and his MRI scan shows some minor wear and tear of the 4-5 and 5-1 discs, but no herniation and no stenosis. It

would appear that we are left with lumbar strain, which in all probability is connected to his injury. Based on this, I do think strengthening and rehabilitation for his back would be appropriate, and we will try to set him up for this as soon as possible. I will see him back in about four weeks. I also discussed his being able to go back to work as soon as we can determine his back status.

General Exhibit 4.

Hill did not see Dr. Barrett from September 4, 2003 to May 4, 2004 because the carrier would not pay for further visits after September 4, 2003. T.64-66. By letter dated October 20, 2003, PWS terminated Hill's employment. The letter, in pertinent part, reads:

[D]ue to changes in our organization we must terminate your employment effective immediately. When you are released to return to work please contact us so that we may examine our needs at that time.

Claimant's Exhibit 11.

On February 25, 2004, at the request of the Employer/Carrier, Dr. Moses C. Jones performed a consultation on Hill. Dr. Jones' impression was:

Have reviewed the patient's MRI from August 20, 2003, in the lumbar region. I have also reviewed cervical spine x-rays from June 5, 2003. His cervical spine x-rays show a very solid fusion and no obvious abnormality. Also, his lumbar spine MRI is absolutely normal without any abnormality. At this point, it would appear to me that there is no contraindication to the patient resuming all normal activities as he appears to have a very good post-surgical result. However, since I do not have the benefit of any definitive studies of his cervical region, my recommendation would be to proceed with a cervical MRI to check his postoperative status completely. If indeed this does not show significant abnormalities, I feel that the patient has reached the maximum medical improvement and would have a 5% permanent partial impairment

to the body as a whole and would be able to resume all normal activities.

General Exhibit 6.

On March 18, 2004, Hill completed an initial claim for benefits with MESC. Employer/Carrier's Exhibit 16 at page 1. Thereafter, on March 29, 2004, the MESC Non-Monetary Report of Investigation reveals:

Employer Statement: Rob Simmons, CFO, was interviewed March 26, 2004 and stated claimant's employment was terminated with the company because he did not return to work after being released by his doctor. A tire hit the truck that claimant was driving on March 5, 2003 and claimant was injured. Mr. Simmons stated that a delivery position had been held for claimant and the position was not filled until December, 2003.

Claimant Statement: Claimant was interviewed March 29, 2004 and stated he was discharged from his job while out on a medical leave. Claimant stated he was involved in a car accident while on the job and had to take a leave of absence. Claimant stated his doctor did not release him until September 4, 2003 because he continued to have medical problems. Claimant did not contact the employer at all until September, 2003 to return to work.

Rebuttal: Mr. Simmons stated Claimant would have been placed in another delivery position if he had contacted the office after being released by his doctor.

Other: A copy of Claimant's doctor statement is being forwarded. R2312

Employer/Carrier Exhibit 16, page 5. By letter dated March 29, 2004 from Robert H. Simmons, Jr. Vice-President at PWS to MSEC, Simmons wrote:

During Mr. Hill's absence we found it necessary to employ an additional driver to meet our needs until his return. This employee

initially worked on a part time basis. Since his termination, we have had to change the new employee's status to full time employment.

Only recently have we learned that Mr. Hill was released to return to work on August 12, 2003. From the time Mr. Hill was released to return to work until October 20<sup>th</sup>, when his employment was terminated, Mr. Hill abandoned his job. As such Pure Water Solutions, Inc. should not be chargeable related to this claim.

Employer/Carrier Exhibit 16, page 7.

On March 30, 2004, MESC received a Doctor's Certificate (General) from Dr. Barrett's office dated March 19, 2004 which indicates Hill was treated by Dr. Barrett from September 4, 2001 to September 4, 2003; that Hill became able to work on September 4, 2003. Employer/Carrier Exhibit 16, page 8. By Notice of Non-Monetary Decision mailed April 2, 2004, MESC determined Hill "separated from [his] employment with [PWS] on September 4, 2003. Investigation reveals you effectively quit when you failed to return to work or contact your employment when released by your doctor following an on the job injury." Employer/Carrier Exhibit 16, page 9. Hill appealed the MESC decision. By Decision of the Appeal Referee dated April 29, 2004, MESC's initial denial of Hill's claim was affirmed. Employer/Carrier Exhibit 16, page 10-11.

On April 23, 2004, an "Addendum" to Dr. Barrett's office notes was made which stated "This patient failed to return for his scheduled appointments and was allowed back to full duty without restrictions on September 4, 2003. " General Exhibit 4. Dr. Barrett's May 4, 2004 office visit notes reveals, as follows:

05-04-04 OFFICE VISIT

This patient returns after a significant absence. Apparently his workers' comp would not allow him to have the physical therapy. At this point I simply think we should probably do the FCE and let him settle up with his workers' comp carrier. At this point, he should be able to return to light duty with a 20 pound lifting restriction. We will give him new prescriptions for Darvocet, Soma, and Naprosyn and see him back after the FCE is done.

General Exhibit 4.

On June 18, 2004, Wayne Jimenez, P.T., Physical Therapist, conducted a Functional Capacity Evaluation for Hill at the Industrial Therapy Center. Jimenez's opinion was that Hill was capable of performing physical work at the medium level of work as defined by the U.S. Department of Labor in the Dictionary of Occupational Titles. General Exhibit 9.

Jimenez commented in the dynamic strength and positional tolerance and mobility sections of the study that the patient was limited due to right shoulder pain, low back pain and neck pain. General Exhibit 9.

On July 2, 2004, after review of Hill's FCE performed on June 18, 2004, Dr. Barrett stated: This patient did get his functional capacity evaluation on June 18<sup>th</sup>, 2004; he tested at a medium work level and has floor-to-waist lifting restrictions of 35 pounds, waist-to-eye level 30 pounds, two-hand carry 35 pounds, one-hand carry of 25 pounds. He should be able to hand pushing and pulling at 40 pounds. He should be able to work sitting frequently, standing occasionally, arms overhead occasionally, work bent over in the standing or stooping position frequently, work kneeling frequently. He should be able to climb stairs, repetitive squat,

walk, crawl, or climb a ladder without difficulty. His balance appears to be normal. His manual dexterity appears to be normal. On the March 3, 2005 office visit, Dr. Barrett noted Hill's continued complaints of lumbar pain and leg pain and set him up for MRI scan of the low back. General Exhibit 4.

On March 7, 2005, Dr. Barrett made an addendum to Hill's office chart which states Mr. Sidney Hill had an MRI scan done early on, showing only mild facet degeneration after his original injury and had no evidence of damage. Based on this, the assumption is that he sustained only a minimal lumbar strain at that time. It is my opinion that this patient has probable reached maximum medical improvement from this minimal injury. It is, therefore, quite probable that the patient's ongoing lumbar symptoms are not related to his injury. This would, in all probability, mean that his ongoing treatment for his lumbar spine should not be related to the injury in 2001. General Exhibit 4.

On April 11, 2005, Dr. Barrett made an Addendum to Hill's office chart which states Mr. Hill has a five percent permanent partial impairment of the whole man based on the work injury. It is my opinion that the July 26, 2001 accident did lead to his need for surgery. General Exhibit 4.

At some point after Dr. Barrett released Hill, he registered for employment at the MESC job service office on Northside Drive in Jackson, but was never contacted by MESC. T.73

By letter dated February 25, 2005, in response to a February 21, 2005 inquiry by Hill's counsel regarding the availability of job positions for Hill at PWS, through its counsel, PWS stated all

positions there within Hill's restrictions, per the FCE, were presently filled. Claimant's Exhibit 12.

From April 5-13, 2005, Hill submitted nine (9) employment applications to prospective employers. Hill was not offered employment by any of the nine employers. On August 10, 2005, Hill accepted employment with the Rankin County School District (RCSD) as a bus driver. Hill was not offered the bus driving job when he initially applied in April of 2005, but he reapplied in July of 2005 when a friend told him of an opening, and he was hired after taking a class, passing a driving test and obtaining an additional endorsement to his existing commercial drivers license (CDL). A copy of his first pay check itemization, covering the period from August 10-31, 2005 indicates a gross pay of \$556.54 for that period, thus indicating a weekly wage of \$185.51. Claimant's Exhibit 14.

Hill received copies of three letters addressed to his attorney, dated August 1, August 23 and September 7, 2005, wherein prospective employers were identified by vocational expert Todd D. Edwards. Subsequently, Hill contacted or attempted to contact and completed employment applications, but was not offered employment by any of the prospective employer as of the September 12, 2005 hearing. T. 105-129. Hill did not respond to an offer of an interview by one of the identified Domino's Pizza stores because of Hurricane Katrina. T. 121. Hill continues to experience pain in his neck and back and continues to take the muscle relaxant medication Flexeril. T. 131-32. Hill presently has a CDL with passenger, hazardous materials and school bus endorsements. T.135. Hill has



held no other jobs between his surgery date and the Rankin County School job; he has worked as a self employed automobile mechanic for family members since the summer of 2004 replacing alternators, radiators, brake pads and other parts using a hydraulic jack and air-powered tools, which work sometimes requires him to go under vehicles; and he hauled a few junked vehicles using a truck and trailer. Between June of 2004 and August of 2005 Hill contacted on his own the nine prospective employers set out in Claimant Exhibit 13 during that nine-day period in April of 2005.

Employer/Carrier Exhibit 17 consists of a June 16, 2005 eleven (11) page medical records summary signed by Edwards, a June 20, 2005 twelve (12) page Vocational Rehabilitation Summary signed by Edwards, a July 28, 2005 five (5) page Vocational Progress Report signed by Edwards, an August 1, 2005 four (4) page letter identifying eight (8) job opportunities, an August 23, 2005 two (2) page letter identifying three (3) job opportunities, an August 24, 2005 six (6) page Vocational Progress Report signed by Edwards, an August 31, 2005 five (5) page Vocational Progress Report signed by Edwards and a September 7, 2005 three (3) page letter from Edwards to Ellis Turnage identifying four (4) job opportunities. Employer/Carrier's Exhibit 17 was admitted over objection by Hill's attorney. T. 101-104. Exhibit 17 is a composite of reports and letters prepared by Edwards. The essence of Edwards's testimony and documentary evidence is that there were jobs available within the claimant's range of education and experience and within the restrictions set out by Dr. Barrett after the FCE, in the Rankin County area that would pay Hill an average of \$10.20 per hour for

a 40-hour week, and that Hill had not made a reasonable job search since being released by Dr. Barrett, as he had only spent that one week in April looking for work on his own. Todd opined that an earnest search for work requires a sustained effort. T. 172-174.

## II. Summary of Argument

In Nissan North America v. Short, 942 So. 2d 276, 281 (Miss. Ct. App. 2006), the Court noted that a prima facie presumption may be applied in cases where post-injury earnings are lower than pre-injury wages. Hill's pre-injury average weekly wage was \$522.59. His post-injury average weekly wage with the Rankin County School District as a bus driver is \$185.51. Hill sustained a loss of wage earning capacity greater than the \$69.68 he was awarded. To establish entitlement to workers' compensation benefits under Miss. Code Ann. § 71-3-17(c)(25)(1972), the claimant bears the burden of proving by a preponderance of the evidence each element of the claim of disability. Hedge v. Leggett & Platt, Inc., 641 So.2d 9, 13 (Miss.1994). Therefore, claimant must prove that: (1) an accidental injury occurred, (2) arising out of and in the course of employment, and (3) a casual connection between the injury and the claimed disability. Id. at 13. Disability is defined as incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which capacity and the extent thereof must be supported by medical findings. Miss. Code Ann. § 71-3-3(i) (Rev.2000) provides that claimant bears the burden of making a prima facie showing that he has sought and been unable to find work "in the same or other employment". Whirlpool Corp. v. Wilson, 952 So. 2d 267, 272 (Miss.

Ct. App. 2006) (citing Hale v. Ruleville Healthcare Clinic, 687 So. 2d 1221, 1226 (Miss. 1997)). The injury to Hill's back is not a scheduled injury. Compensation for a non-scheduled injury is measured by loss of wage-earning capacity. Georgia Pacific Corp v. Taplin, 586 So. 2d 823, 828 (Miss. 1991). Loss of wage-earning capacity takes into account training, education, inability to work, not being hired by other employers, continuance of pain, and other related circumstances, and the decision should be made only after the evidence is considered as a whole. Piney Woods County Life School v. Young, 946 So. 2d 805, 808 (Miss. 2006) (quoting DeLaughter v. South Cent. Tractor Parts, 642 So. 2d 375, 379 (Miss. 1994)). When Hill reached MMI from his compensable injury and reported back to work and PWS refuses to reinstate or rehire him, he established a prima facie case of total disability. Jordan v. Hercules, Inc., 600 So. 2d 179, 183 (Miss. 1992). Once the prima facie case has been made "the burden then shifts to the employer to prove a partial disability or that the employee has suffered no loss of wage earning capacity." Jordan, 600 So. 2d at 183. The employer also has the burden to prove that the claimant's efforts to find "similar or other jobs" constituted a mere sham or unreasonable effort. Taplin, 586, So. 2d at 828.

The December 20, 2005 AJ Order, the September 21, 2006 Full Commission order and the February 16, 2007 Circuit Court order do not mention Jordan or the prima facie presumption of total disability. This Court should apply the presumption.

### III. ARGUMENTS

1. Whether PWS' Refusal To Reinstate Or Rehire Claimant Created A Prima Facie

### Case Of Total Disability?

The Full Commission and the Rankin County Circuit Court committed reversible legal error by their failure to apply the prima facie presumption of total disability under Thompson v. Wells-Lamont Corp., 362 So. 2d 638 (Miss.1978) and Jordan, 600 So. 2d at 183; see also Marshall Dublin v. Hall, 490 So. 2d 877, 800 (Miss. 1986). It is undisputed that PWS did not reinstate or rehire Hill after he reached MMI and requested work. Claimant's Exhibit 11. The AJ, the Full Commission and the Rankin County Circuit Court failed to apply the Jordan presumption and applied an incorrect legal standard to analyze Hill's loss of wage earning capacity claim and made findings of fact predicated upon those erroneous legal standards. Under Thompson and Jordan, the employer/carrier failed to prove a partial disability, or that claimant suffered no loss of wage earning capacity or to present evidence showing that the claimant's efforts to obtain other employment was a mere sham, or less than reasonable or without proper diligence. Whirlpool, 952 So. 2d at 272. If an injured worker cannot obtain and/or maintain post-injury employment at the same rate of pay as earned before, this is a relevant fact and the injured worker is entitled to compensation benefits. Jordan, 600 So. 2d at 183 (disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment); McNeese v. Cooper Tire and Rubber Company, 627 So.2d 321, 324 (1993) (same). Moreover, an injured employee is entitled to compensation to the extent he has been incapacitated to earn wages; Richey v. City of Tupelo, 361 So. 2d 995, 998 (Miss. 1978). The

Jordan rule creates a presumption that a permanent injury is totally disabling. Wesson v. Fred's Inc., 811 So. 2d 464, 471 (Miss. Ct. App. 2002).

The employer/carrier did not sustain its legal burden to successfully rebut claimant's prima facie case by producing affirmative evidence that other jobs existed in the relevant job market for which claimant was at least facially qualified and that claimant made no reasonable legitimate efforts to pursue such employment. The Full Commission and the Rankin County Circuit Court's failure to apply the prima facie presumption under Thompson and Jordan is reversible error.

2. Whether Hill Undertook Reasonable Efforts  
To Find Comparable Employment?

Hill registered with the MESC for employment. T.73. By letter dated February 25, 2005, PWS did not rehire Hill after he reached MMI, but advised Hill that they had no job openings. Claimant's Exhibit 12. Hill submitted 9 jobs applications from April 5-13, 2005. Claimant's Exhibit 13. On August 10, 2005, he was hired by the RCSD at \$185.51 per week. T. 94-95. Hill contacted and submitted employment applications to the six (6) employers identified in Edwards' August 1, 2005 letter, T.107, and to the employers identified in the August 23 and September 7, 2005 letters. T. 124-129. A claimant must have some effort to secure employment in another or different trade, and once that effort have been made, "the focus shifts to the question whether that effort was reasonable under the prevailing circumstances." Dunn, Mississippi Workmen's Compensation § 72.1. In Stuart's Inc. v. Brown, 543 So. 2d 649, 652 (Miss. 1989), the Mississippi Supreme

Court found that "close questions of compensability should be resolved in favor of the worker" and that "that act should be liberally construed to carry out its beneficent remedial propose." Id. at 652 (citing Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 889 (Miss. 1980); Pontotoc Wire Products Co. v. Ferguson, 384 So. 2d 601, 603 (Miss. 1980)). In Marshall Durbin, the Mississippi Supreme Court in addressing the issue of whether the claimant's efforts to secure the same or other employment stated:

Hall on two occasions offered un rebutted evidence, first, that he had attempted to secure reemployment with Marshall Durbin but had been rejected; second, that he had sought employment at other places in the Tupelo area and been rejected; third, that he had filled out an application at the local employment office; and fourth, that he had even applied for work at a furniture plant in a adjoining county without success. Such un rebutted proof is sufficient unto the day. See Thompson v. Wells-Lamont Corp., 362 So 2d 638, 641 (Miss. 1978).

Id. at 880. The decision in Sherwin Williams v. Brown, 877 So. 2d 556, 558-559 (Miss. Ct. App. 2004) held that claimant's submission of applications and inquiries to fourteen (14) different locations "made a prime case of a good faith search for employment ...." Id. at 558-59. In Merit Distribution Services, Inc. v. Hudson, 883 So. 2d 134, 137 (Miss. Ct. App. 2004), the Court held that where claimant had "applied for work at five companies" were reasonable attempts to find employment. Id. at 137. See also, Alumax Extrusions, Inc. v. Henkins, 902 So. 2d 586, 591-592 (Miss. Ct. App. 2005) (4 attempts to find other employment were reasonable). In this case, after PWS refused to re-hire claimant, Hill found and accepted employment as a school bus driver with the Rankin County

School District at \$185.51 per week. In Whirlpool, the Court held that whether the claimant contacted eleven (11) different businesses seeking employment and registered with the Mississippi Employment Security Commission were sufficient to support a loss of wage earning capacity. 952 So. 2d at 272. To establish disability, the injured employee bears the burden of showing that he has sought and been unable to work "in similar or other jobs." Taplin, 586 So. 2d at 828. The law is clear that once the claimant has made a prima facie case, the burden shifts to the employer to show that his efforts were not reasonable or constituted a mere sham. Id.; Pontotoc Wire 384 So. 2d at 603. A determination of the "reasonableness" of the claimant's efforts in seeking employment includes "consideration of job availability and economics in the community, the claimant's skills and background, as well as the subject of disability itself. Taplin, 586 So. 2d at 828. A review of the complete record and the medical evidence presented within the record in light of the factors listed in Taplin, the burden to prove "reasonableness" in seeking employment is shifted to the employer. In this case, after his July 26, 2001 injury, Hill continued working at PWS until his March 5, 2003 neck surgery.

3. Whether The Full Committed Reversible  
Error By Denying Hill's Motion To  
Supplement Appeal Record?

The hearing on the merits of Hill's work-related injury was held on September 5, 2005. By decision dated December 9, 2005, Administrative Judge James Homer Best found that Hill reached maximum medical improvement on May 5, 2004 and sustained a permanent disability which resulted in a 20% loss of wage earning

capacity as the combined result of his cervical and lumbar injuries and awarded \$69.68 per week for a period of no more than 450 weeks beginning May 6, 2004. By order dated September 21, 2006, the Full Commission denied appellant's motion to supplement the record and affirmed the decision of Administrative Judge Best dated December 19, 2005.

Pursuant to Miss. Code Ann. § 71-3-51 (1972), Hill filed a notice of appeal for a review by the Circuit Court of the Full Commission order dated September 21, 2006.

On September 10 and September 19, claimant filed his first motion and second motion to supplement the appeal record to introduce additional medical evidence set forth in Dr. J. Patrick Barrett's medical records and the medical records of MEA Clinic, Southern Diagnostic and the Trinity Pain Clinic.

These medical records were properly authenticated by the medical records custodian affidavits attached thereto. The office notes of Dr. J. Patrick Barrett of the Mississippi Clinic indicated claimant was seen on July 25, and December 11, 2006 with documented ongoing pain. He was prescribed a drawstring brace and noted to be a candidate for fusion in the L5 area. In December, Dr. Barrett noted continued back pain, right hip pain, and numbness down the leg, a spondylitis defeat caused by the July 26, 2001 worker's comp injury. Dr. Barrett order a myleogram and post myleogram and CT Scan.

The MEA and Trinity Pain Clinic records indicate claimant underwent a MRI on March 1, 2006 that revealed mild lower lumbar facet arthropthy. Hill underwent three SI joint injections.

In Kemper Nat'l Ins. Co. v. Coleman, 812 So.2d 1119, 1125



(Miss.Ct.App.2002), the noted the ACT allows a party to have the Full Commission to review additional evidence. Further, Procedural Rule 9 allows additional evidence to be offered on review before the Full Commission in the discretion of the Commission. The additional medical evidence which claimant sought to introduce was new evidence based on medical treatment after the September 5, 2005 hearing. The Full Commission abused its discretion. The denial of claimant's motions to supplement the appeal record was based on an erroneous view of the law or on clearly erroneous assessment of the additional evidence. This Court should reverse the Full Commission order and the Rankin County Circuit Court order denying claimant to supplement the appeal record.

#### IV. CONCLUSION

This Court should apply the prima facie case of total disability under Jordan that his efforts to find comparable employment were reasonable, that the employer carrier failed to successfully rebut the claimant's prima facie case, and that the Full Commission and the Rankin County Circuit Court committed reversible error by denying claimant's motions to supplement appeal record.

SO BRIEFED, this the 7<sup>th</sup> day of August, 2007.

Respectfully submitted,

SIDNEY HILL, Appellant

By: Ellis Turnage  
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Appellant

OF COUNSEL: /

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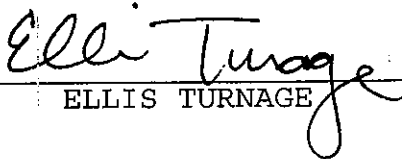
CERTIFICATE OF SERVICE

I, Ellis Turnage, Attorney for the Appellant do hereby certify  
that I have this mailed a true and correct copy of BRIEF OF  
APPELLANT to:

Honorable W. Robert Coleman, Jr.  
SCOTT, SULLIVAN, STREETMAN, FOX  
Post Office Box 13847  
Jackson, Mississippi 39236-3847

Honorable William E. Chapman, III  
CIRCUIT COURT JUDGE  
Post Office Box 1626  
Canton, Mississippi 39046

This, the 7<sup>th</sup> day of August, 2007.

  
\_\_\_\_\_  
ELLIS TURNAGE