IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. CV 2007-WC-00539

WAL-MART STORES, INC.
AND
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA — APPELLANTS/CROSS-APPELLEES

V.

TERESA G. PATRICK — APPELLEE/CROSS-APPELLANT

ON APPEAL FROM THE ORDER OF THE
CIRCUIT COURT OF TATE COUNTY, MISSISSIPPI

BRIEF FOR THE APPELLEE/CROSS-APPELLANT

LAWRENCE J. HAKIM, ESQ.
MS BAR NO. [redacted]

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AND
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

V.

TERESA G. PATRICK **APPELLEE/CROSS-APPELLANT**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Teresa G. Patrick, Apellee/Cross-Appellant;
2. Wal-Mart, Appellant/Cross-Appellee;
3. National Union Fire Insurance Company of Pittsburg, PA, Appellant/Cross-Appellee;
4. Lawrence J. Hakim, Esq., Attorney for Appellee/Cross-Appellant;
5. Roxanne P. Case, Esq., Attorney for Appellants/Cross-Appellees;

This the 9th day of November, 2007.

LAWRENCE J. HAKIM, ESQ.
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I. STATEMENT OF THE CASE

Appellee/Cross-Appellant, Teresa Patrick, (hereinafter, "Teresa") filed a Petition to Controvert on July 30, 1998, alleging a low back work injury, and a hearing was held in the Panola County Courthouse in Batesville, on August 24, 1999, before Honorable Linda Thompson. By way of her September 14, 1999, Order of Administrative Judge, Judge Thompson found Teresa had suffered a work related injury to her back on July 28, 1997, and as a result had sustained temporary total disability, and a permanent medical 10% impairment to her body as a whole, and further ordered that temporary total disability benefits be paid and medical treatment be provided for said injury. The issues of permanent disability and loss of wage earning capacity were reserved until a later time. The Appellants/Cross-Appellees, Wal-Mart Stores, Inc. and National Union Fire Insurance of Pittsburgh, PA, (hereinafter "Appellants", "Appellant", or "Wal-Mart"), did not appeal Judge Thompson's Order.

On July 14, 2005, a second hearing was held in the Panola County Courthouse in Batesville before Honorable Tammy Harthcock. The issues presented were as follows:

(1) The causal connection between Claimant's work injury and the medical treatment she has received, any temporary disability and/or permanent disability.

(2) Whether Claimant has reached maximum medical improvement, and if so, when.

(3) The existence and extent of temporary disability attributable to Claimant's work injury.

(4) The reasonableness and necessity of the medical treatment Claimant has received since the previous Order, including causal connection and/or change of referral. Particularly, where Dr. Jerry Engleberg, Dr. Harry Friedman, Dr. Rahaul Vohra, and/or Dr. Charles Secrest were within the required change of referral as set forth by Miss. Code Ann. § 71-3-15 (1) (as amended). Further, whether Dr. Pravin Chandra Patel's medical treatment was casually related to her work-injury.

(5) The existence and extent of permanent disability attributable to Claimant's work-injury.

On or about September 6, 2005, Judge Harthcock rendered an Order finding Teresa to be permanently and totally disabled from her work-related back injury due to the following factors:

> "Claimant's age, her tenth grade educational level, her work history, her failed attempts to return to work, her inability to find suitable, sustained work, her continuing pain, the vocational evidence, the medical evidence, the geographical and economical situation, where Claimant resides, the credibility of the witnesses, and the fact Claimant has undergone three back surgeries with unsuccessful results."

(Order of Administrative Judge at p. 14.) The Appellants were ordered to pay permanent total disability benefits of $187.10, beginning July 28, 1997 and continuing for a period of 450 weeks. Judge Harthcock further ordered that the Appellants pay for, furnish and provide to Teresa, all reasonable and necessary medical services and supplies, as the nature of her injury or the process of her recovery may require, in accordance with Miss. Code Ann. §71-3-15 (as amended) and the Medical Fee Schedule.

Additionally, Judge Harthcock stated in her Order:

> "There is insufficient evidence to answer the question of whether Dr. Charles Secrest's treatment was causally connected or medically necessary and reasonable. Dr. Secrest's records were not entered into evidence. Although Dr. Vohra alluded to Claimant's urinary problems after her second surgery, he did not specifically state that there was a connection between Claimant's second surgery and/or back pain and her bladder dysfunction. Therefore, this issue is held in abeyance pending further evidence."

(Order of Administrative Judge at p. 14) The Appellants filed their Petition for Review of Order of Administrative Judge on or about September 23, 2005. Subsequent to the Order of Administrative Judge, Teresa received Dr. Vohra's opinion which causally connected the video urodynamics test Dr. Secrest performed, to the work injury, and that said treatment was medically necessary and reasonable. Teresa therefore filed a Motion for Leave to Admit Additional Evidence, in order to add Dr. Vohra's opinion to the record, on or about October 13, 2005.

On or about March 30, 2006, the Full Commission issued its Order wherein they denied Teresa's Motion for Leave to Admit Additional Evidence, instead remanding that particular matter back to the Administrative Judge, but affirmed all other issues contained in the September 6, 2005, Order of Administrative Judge.

On or about April 26, 2006, the Appellants filed their "Motion to Designate Full Commission Order As Final Judgment" in respect to the affirmed issues.

On or about April 21, 2006, Teresa filed her response to same, and on or about April 26, 2006, the Full Commission rendered a three-page Order denying Appellants' Motion.

On or about April 28, 2006, the Appellants duly filed their Notice of Appeal to Circuit Court. The Circuit Court of Tate County affirmed the decision of the Administrative Judge and the Full Commission on all but one issue: the Circuit Court reversed the Commission's finding that the Appellants were responsible for the medical treatment provided by Drs. Engleberg, Friedman, pursuant to Miss. Code Ann. §71-3-15.[1] Consequently, Appellants filed their Notice of Appeal from the Order of the Tate County Circuit Court and Teresa cross-appealed on the issue of Appellants/Cross-Appellees responsibility for the medical treatment provided by Drs. Engleberg and Friedman, and Vohra.

II. STATEMENT OF THE FACTS

As previously found by the Mississippi Worker's Compensation Commission in this matter, Teresa was born July 2, 1962. (Exhibit Gen. 17 at 2) She only completed the tenth

[1] The Circuit Court discusses in dicta the Appellants lack of responsibility for Dr. Vohra's treatment, due to the fact that Teresa's attorney sent her to Dr. Vohra. However, the Circuit Court does not explicitly reverse the Commission on this point or rule that Appellants are not responsible for Dr. Vohra's treatment as it so ruled with regard to Drs. Engleberg and Friedman's treatment.

grade.[2] (Id.) Teresa has a limited and narrow vocational background. (Id.) Prior to going to work with the Employer herein, Teresa briefly worked as a slot attendee at the Hollywood Casino and worked at Pyroil, a factory, for approximately ten years. (Id. 2-3) Her position at Pyroil required her to do heavy lifting, bending, stooping, drive a forklift, and packing boxes. (Id. at 3)

Teresa began working at Wal-Mart in June, 1997. (Id.) She was hired as a stocker. (Id.) Based upon the Employer's own job description, as well as Claimant's testimony, Teresa was required to lift and move objects weighing from 40 to 80 pounds, and was required to walk, bend, twist, squat, climb, and work above the shoulder and below the waist on a regular basis. (Id.; Exhibit CL-4)

Teresa injured her low back on July 28, 1997, while lifting to stock the shelves. (Exhibit Gen. 14 at 3) The following day she saw the company doctor, Audie Adams, M.D., before coming under the care of her primary treating physician, Dr. Pravin Patel, of Coldwater, Mississippi. (Id. at 4) Dr. Patel first saw Teresa for her work injury on June 10, 1998. (Id.) Due to findings on an MRI he had ordered, Dr. Patel referred Teresa to neurosurgeon, Craig Clark, M.D. (Id.) Dr. Clark first saw Teresa on July 8, 1998, and diagnosed her with a ruptured disc at the L5-S1 level on the left with associated S1 radiculopathy on the left. (Id. at 8) Dr. Clark performed a partial hemilaminectomy with microdiscectomy at the L5 level on July 14, 1998. (Id.; Exhibit 8)

It is apparent from Dr. Clark's notes, which were entered into evidence as a Medical Affidavit, (Exhibit Gen. 8) as well as from Dr. Clark's deposition testimony, (Exhibit CL-1) that Teresa ***never*** received significant symptomatic relief from this first surgery. In fact, Dr. Clark's November 2, 1998, medical report reveals that Teresa was now starting to have bi-lateral pain. (Exhibit 8) Dr. Clark, by way of deposition taken August 9, 1999, testified that Teresa had reached

[2] Teresa's plans to take the GED were derailed by her work injury as the pain producing same would not permit her to complete the test. (R. 64-65)

maximum medical improvement on June 7, 1999, and that she had a 10% impairment rating to the body as a whole. (Exhibit CL-7 at 14-15) Dr. Clark assigned a thirty (30) pound lifting restriction, and recommended that Teresa should avoid bending, and be given the opportunity to sit or stand. (Id. at 15-16) Dr. Clark also acknowledged that an earlier FCE placed a 25 pound lifting restriction on Teresa. (Id. at 18)

The undisputed lay and medical proof adduced at Teresa's second hearing is as follows: On August 23, 2000, Teresa sought additional treatment for increasing pain in her low back and left hip with Dr. Clark. (Exhibit CL-8) He administered trigger point injections and ordered another MRI, which at that time showed no recurrent disc herniation. (Id.) Dr. Clark unsuccessfully treated Teresa with different medications before referring her back to Dr. Patel on November 6, 2000. (Id.) Dr. Clark's final diagnosis was failed laminectomy syndrome and nocturnal spasm. (Id.) On January 6, 2001, Dr. Clark wrote a letter, confirming Teresa's impairment rating, and opined that her restrictions were now *permanent*. (Id.) Dr. Clark further stated, "Chronic complaints remain about the same as they were in June of 1999, with a simple exacerbation of the same pre-consisting complaints." (Id.)

Teresa returned to Dr. Patel with severe back pain on February 18, 2001. (Exhibit CL-12) Dr. Patel again saw Teresa on February 20th and 24th, 2001, administering trigger point injections. (Id.) Teresa continued to treat with Dr. Patel from February 26, 2001, to March 8, 2001. (Id.) The *undisputed proof* is that because Teresa's back pain was severe and intractable, and therefore, Dr. Patel attempted to send her back to Dr. Clark, but the Appellants would not approve same. (R.26-27) The undisputed proof in the instant case is that after the Appellants herein would not approve any further visits with Dr. Clark, Dr. Patel was forced to refer Teresa to Dr. Jerry Engleberg, an

approved neurosurgeon within Teresa's husband's group health network. (Id.; R-82) This is how and why Teresa came to be seen by Dr. Engleberg.

Based upon a March, 2001, MRI report finding a right lumbar L5 disc abnormality, Dr. Engleberg performed a right L5 partial hemilaminectomy and discectomy on Teresa on April 5, 2001. (Exhibit E/C 13 at 10-11) Dr. Engleberg released Teresa on May 11, 2001, on a PRN basis. Dr. Engleberg did not address Teresa's work status, since it was his understanding that she was not working while under his treatment. (Id. at 19) However, Dr. Engleberg stated that he would have kept her off of work for three months following her surgery and that she would have an additional 2% impairment rating due to the second surgery for a total of 12%. (Id. at 15, 25)

Because Teresa's back pain remained severe and intractable following her second surgery, Dr. Patel was forced to refer Teresa to Memphis neurosurgeon, Dr. Harry Friedman, as Dr. Engleberg was no longer in Mr. Patrick's insurance network, but Dr. Friedman was a network provider. (R. 84, 95) Dr. Friedman began treating Teresa on July 22, 2002. (Exhibit CL-11) He diagnosed Teresa with a recurrent herniated nucleus pulpous at L5-S1 on the right and on July 30, 2002, performed a secondary partial hemilaminectomy L5-S1 on the right with removal of ruptured disc and lysis of adhesions. (Id.)

On November 21, 2002, Dr. Friedman referred Teresa to a pain clinic. (R. 54; CL-11) This, of course, was not provided by the Appellants in this matter, a fact documented by Dr. Friedman in his records. (Id.) In March, 2003, Dr. Friedman advised Teresa to seek pain treatment or a referral to another neurosurgeon, as Dr. Friedman was leaving for military duty. (Id.) Teresa returned to Dr. Friedman one year later with chronic back pain. (Id.) Diagnostic testing showed bi-lateral chronic lumbar radiculopathy with changes in the lumbar paraspinal muscles. (Id.) Dr. Friedman reiterated Teresa's need to be seen at a Pain Clinic. (Id.)

Rahul Vohra, M.D., a Board Certified Specialist in Physical Medicine and Rehabilitation, in Jackson, Mississippi, first saw Teresa on October 15, 2001, at the request of Teresa's attorneys. (Exhibit CL-9 at 3) He diagnosed Teresa with chronic back pain and bi-lateral leg pain. (CL-9 at 7) An MRI Dr. Vohra ordered showed scar encasing the S1 nerve roots bilaterally. (Id. at 8) Because Teresa was complaining of bladder incontinence, Dr. Vohra referred her to Jackson urologist, Charles Secrest, M.D., who performed a video urodynamics test. This test showed that Teresa had an abnormal bladder neck contraction pattern that was most likely secondary to pain. (Id. at 8-10) Dr. Vohra on February 11, 2002, assigned Teresa an additional 5% impairment rating for her bladder neck hyperreflexia. (Id. at 11) Over a year later, Dr. Vohra saw Teresa once again on September 15, 2003. (Id.) This visit was subsequent to Teresa's third back surgery. Dr. Vohra noted that Teresa was still complaining of back and bi-lateral leg pain and found that her condition was essentially unchanged. (Id.) On pages 13 and 14 of his deposition, Dr. Vohra testified as follows on the issue of causation between Teresa's first L5-S1 disc herniation, and the second and third L5-S1 re-herniations:

> "Certainly when someone has surgery at a level, stastically speaking about 15% of those patients re-herniate. . . for several reasons. The first is, you have a disk that by definition is already degenerated, and so that is going to make it more likely to herniate. Secondly, the anatomy of that disk and that level is abnormal after surgery, which can make that level more unstable and lead to further disk degeneration. So did it contribute? More likely than not, yes."
>
> "...it's my feeling that more likely than not [the] subsequent disk herniations were related."
>
> "I think there is clearly no doubt that [Teresa] was more likely to herniate at L5-S1 after she had her first surgery than she not had a disc herniation in the first place. Stastically speaking, that's clear."

(Id. at 14, 20, 22) In response to Teresa's attorney's letter to him, Dr. Vohra did opine that the video urodynamics test, performed by Dr. Secrest, was casually connected to Teresa's work injury, and reasonable and necessary.

Dr. Patel has been Teresa's family physician since 1996, and has seen and treated her throughout the duration of the subject work-injury and subsequent claim. (Exhibit CL-12) On July 25, 2003, Dr. Patel completed a "Lumbar Spine Residual Functional Capacity Questionnaire", (hereinafter "RFC"), for the Social Security Administration. (Id.) On this RFC, Dr. Patel diagnosed Teresa with chronic lumbar pain syndrome secondary to a failed back. (Id.)

Dr. Patel stated that Teresa was not a malingerer and that her impairments were reasonably consistent with the symptoms and functional limitations described in the RFC. (Id.) Dr. Patel further noted that narcotics made Teresa dizzy and drowsy and put her to sleep and that her prognosis was very poor. (Id.) Dr. Patel also noted that Teresa's experience of pain was severe enough to constantly interfere with her attention and concentration. (Id.) Dr. Patel, on the RFC, opined that Teresa could only walk one block without rest or severe pain; continuously sit no more than twenty minutes or continuously stand no more than ten minutes and could only sit, stand, or walk, even with normal breaks for less than two hours in an eight hour day. (Id.) Dr. Patel further opined Teresa needed to walk five times a day for five minutes at a time and stated "I do not believe that this patient would ever be gainfully employed - cannot work." (Id.) Dr. Patel opined that Teresa would need to elevate her legs above the heart fifty percent of an eight hour working day and that she never lift or carry even ten pounds in a competitive work situation; that she had significant limitations in doing repetitive reaching, handling, or fingering, and should not crouch or stoop. (Id.) Dr. Patel noted that Teresa's impairments were likely to produce bad days all of the time and again reiterated that she could not work. (Id.)

The un-contradicted proof is that following her first surgery, Wal-Mart would not allow Teresa to return to work until she was 100%, after she had unsuccessfully worked for only a week in the Appellant's cash office. (R. 24-25) Teresa subsequently and briefly worked at a small secondhand children's clothing store, but that she only worked a couple of days a week and only for about three hours at a time, in an essentially sedentary capacity. (R. 35-36) Teresa also briefly worked with a company called PCA for about four months, working five days a week, but had to quit due to her inability to stand as required in that job. (R. 33-35)

Teresa suffers from disabling pain on a daily basis that radiates from her back to her hips and to her feet. (R. 36-37) Dr. Patel has prescribed Teresa a cane and walker because her legs go out from under her frequently. (R. 56-57) Among the medications he has prescribed for her back, are oxycotin and duragesic patches. (R. 32-33) Teresa has to elevate her legs and she constantly requires heating pads, hot baths and pain medicine for relief. (R. 57-61) Teresa's days consist of sleeping and lying on her couch or recliner for approximately two hours a day. (Id.) This is due to the medications Teresa ***must*** take just to try to control her pain. (R. 32-33) Said medications, along with pain, have also negatively affected Teresa's moods and impaired her memory and concentration. (R. 97-99) Teresa's work injury had also caused marital problems for the Patrick's. It has rendered her essentially unable to keep house and has resulted in embarrassment and humiliation over her greatly diminished state.

At her first hearing, Teresa was receiving training from the Mississippi Department of Vocational Rehabilitation. Teresa's stated goal was to obtain her GED and thus broaden her vocational prospects. However, Teresa was unable to complete the program and obtain her GED due to the severe and disabling nature of her back pain. (R. 64-65) Teresa has made efforts to obtain employment and she even applied to potential employers sent to her by the Appellant's vocational

expert, Mr. Stewart. (R. 43, 46-50) However, Teresa testified that she was never able to find a job, as she did not receive any offers. (Id.) Teresa also testified without rebuttal that some of the potential employers, when informed of her back condition, made it known to her that she couldn't do the job. (R 53; Claimant's Exhibit #18)

On September 6, 2003, Honorable Deborah Davis, Administrative Law Judge, with the Social Security Administration, found Teresa to be fully disabled. (R. 41) Judge Davis' decision was based on the following: Vocational Expert, James Elton Moore's testimony and Teresa's failed back syndrome and radicular pain, secondary to scarring and nerve root compression as supported by radiographic studies, as well as bladder dysfunction and incontinence. (Id.)

At her second hearing, Teresa called Mr. Stewart, Appellant/Cross-Appellee's vocational expert, as an adverse witness. (R. 104) On the basis of Teresa's testimony alone, Mr. Stewart conceded that she was unable to return to gainful employment. (R. 105-106) When questioned about Dr. Patel's RFC, Mr. Stewart again admitted that Teresa is unable to return to gainful employment. (R. 106-107)

Mr. Stewart did contradict himself when he testified for the Appellants/Cross-Appellee's that there were positions that train for sedentary work, and that Teresa could return to work. (R. 164, 167) However, his initial testimony, when questioned by Teresa's counsel, was bolstered by the testimony of vocational expert, Morris Selby. Mr. Selby administered the "Wide Range Achievement Test", which revealed that Teresa was functioning at the fourth grade level in reading and arithmetic, and functioning at the third grade level in spelling. (R.112; Exhibit CL-10) Mr. Selby emphatically testified that Teresa was completely unable to return to the workforce due to her work-injury. (R. 126, 128, 145, and 155) He also testified that the medication alone which Teresa

was on would make it difficult to return to work.[3] (R. 113-115) Mr. Selby agreed that Teresa's other health problems, other than her back, would not preclude her from working. (R. 127)

III. SUMMARY OF THE ARGUMENT

Generally, Appellate Courts must defer to decisions of the Mississippi Workers' Compensation Commission, so long as said decisions are based upon substantial evidence, are not erroneous as a matter of law, and are neither arbitrary nor capricious. Decisions of the Workers' Compensation Commission must not be overturned, even if the Appellate Court would have reached a different conclusion. An Appellate Court is not permitted to reweigh the evidence, but simply to ensure that substantial evidence undergirds the Commission decision.

The Mississippi Workers' Compensation Act is to be applied liberally in order to achieve its beneficent purposes on behalf of and for injured workers in this state. Teresa is only required to prove her case with a preponderance of the evidence and Teresa, in the instant case, has more than met her burden of showing that her original injury and L5-S1 disc rupture found by the Mississippi Workers' Compensation Commission, to be compensable and caused or significantly contributed to her subsequent recurrent herniations.

Moreover, Teresa has shown, by a preponderance of the evidence, that as a result of her original work injury and the sequela of same, she is permanently and totally disabled within the intent and meaning of the Mississippi Workers' Compensation Act.

Finally, all medical treatment provided to Teresa as a result of her failed back syndrome was properly found by the Mississippi Workers' Compensation Commission to be reasonable and necessary, due to her work injury and the sequela of same. Therefore, the Circuit Court erred as a

[3] Teresa exhibited every indication of being in a drug-induced stupor while at her hearing – her speech was sluggish, her demeanor downcast, and she periodically had to rest her head on her arms. This is not surprising given the known side effects of the medications she is prescribed to take as a result of her crippling work injury.

matter of law and fact when it reversed the Commission on this issue.

IV. ARGUMENT

A. STANDARD OF REVIEW

Judicial review of Mississippi Workers' Compensation Commission decisions has consistently been viewed as extremely narrow. Hale v. Ruleville Healthcare Center, 687 So. 2d 1221 (Miss. 1991). As the Supreme Court of Mississippi has declared:

> "[T]his Court and the Circuit Courts will not overturn a Commission decision unless said decision was arbitrary and capricious." Id. at 1225.

The Mississippi Supreme Court further proclaimed that a Circuit Court should only reverse the findings of the Commission in "rather extraordinary cases." Id. at 1224. If there is substantial evidence to support the Commission's finding these findings are conclusive on appeal "even though that evidence would not convince the Court was it the fact finder." R.C. Petroleum, Inc. v. Hernandez, 555 So. 2d 1017, 1021-1022 (Miss. 1990).

In Walters Brother Builders v. Loomis, 187 So. 2d 586 (Miss. 1966), the Court specially noted the applicability of the substantial evidence rule to the Appellate review of Commission rulings. The Court stated:

> In reviewing the factual findings of the Workmen's Compensation Commission, the role of the Circuit Court is appellate and that Court must accept as established all those facts found by the Commission which the evidence proved, or reasonably tended to prove, or which might have been reasonably referred there from.

187 So. 2d at 589.

In Mississippi Workers' Compensation practice "substantial evidence" has been defined; *inter alia* as "something more than a mere scintilla of evidence. . . and that it does not rise to the level of a preponderance of the evidence." Delta CMI v. Speck, 586 So. 2d 768, 773 (Miss. 1991); Babcock and Wilcox v. McClain, 149 So. 2d 523 (Miss. 1991).

B. TERESA PATRICK'S SUBSEQUENT L5-S1 DISC HERNIATIONS WERE CAUSALLY RELATED TO HER ORIGINAL WORK INJURY

To establish entitlement to benefits under workers' compensation, Teresa bears the burden of proving by a preponderance of the evidence each of the following elements of the claim:

1. An accidental injury occurred;

2. Arising out of and in the course of employment, and;

3. A causal connection between the injury and claimed disability.

Hedge v. Leggett & Platt, Inc., 641 So. 2d. 9, 13 (Miss. 1994).

Judge Thompson's original Order resolved the first two elements, leaving the third element for adjudication at Teresa's second hearing. The law in this state on worker's compensation claims is that even though the testimony may be somewhat ambiguous as to causal connection all that is necessary is that the medical findings support a causal connection. Moore v. Ind. Life and Accid. Inc., Co., 788 So. 2d. 106, 112 (Miss. 2001).

Once a compensable injury is proven under workers' compensation law, the employer can "rebut only with evidence that rises above mere speculation or possibility." Spencer v. Tyson Foods, 869 So. 2d 1069, 1075 (Miss. Ct. App. 2004)

Medical evidence is to be given liberal construction, with doubtful cases resolved in favor of compensation, and the Commission is called upon to apply "common knowledge, common experience and common sense", when weighing the evidence. Janssen Pharmaceutical, Inc. v. Stuart, 856 So. 2d. 431 (Miss. Ct. App. 2003).

Unless common knowledge suffices, medical evidence must prove not only the existence of a disability, but also its causal connection to employment. Bradley and Thompson, Workers'

Compensation Law, §76:53 in 9 Ency. Miss. Law, at 182-184. While medical evidence must support the Teresa's incapacity and its extent, the fact of disability need not be proven entirely by medical evidence. Hall of Miss., Inc. v. Green, 467 So. 2d. 935 (Miss. 1985). The Medical evidence is sufficient if it supports, but does not fully prove, a finding of disability. Id.

The Commission properly analyzed the first issue to find a causal connection between Claimant's work injury, which caused her original L5-S1 disc rupture, and the L5-S1 re-herniations and surgeries for same. Dr. Patel's Affidavit and Dr. Vohra's deposition make it clear that Teresa's re-herniations and her second and third back surgeries in 2001 and 2002 are causally related to the 1997 injury. Dr. Patel records that Teresa continuously and consistently complained of severe back pain since 1998. Teresa's complaints of pain documented in Dr. Patel's records verify the disabling nature of Teresa's work injury related back problems at the ***same*** disc level, both before and after the 1998 surgery. Dr. Patel is Teresa's family doctor whom she has seen extensively since 1998. His abundant documentation of Teresa's problems establishes conclusive proof of the continuous and disabling nature of her back pain since her 1998 surgery by Dr. Clark. Simply, Dr. Patel's records, combined with common sense and common knowledge causally relate the 1997 injury to the subsequent L5-S1 disc ruptures, and to the surgeries performed by Drs. Engelberg and Friedman.

Even Dr. Clark's records support this. After Teresa's first surgery, Dr. Clark noted Teresa was having bilateral problems and her symptoms were not caused by any new injury.

Dr. Vohra expressly related Teresa's 1997 injury to the second and third L5-S1 re-herniations. Dr. Vohra testified that statistically 15% of back surgery patients re-herniate at the same level. Dr. Vohra's basis for his opinions is that a.) The disk is already degenerated, and b.) The anatomy of that disk at that level is abnormal after surgery which can make that level more

unstable. In short, Dr. Vohra's opinion ***by itself*** establishes causal connection. Teresa was operated on the L5-S1 level by Dr. Clark and according to Dr. Vohra that in of itself could make that level unstable. Teresa testified without rebuttal that she did not re-injure herself, and again this would be supported by Dr. Vohra as he stated that almost anything could have caused a re-herniation, none of which would have caused her problems had Teresa not had the first back surgery. If Dr. Vohra's testimony had ended there, that would have been enough to establish the requisite causal connection. However, he went even further, and testified that ***more likely than not*** the 1997 injury contributed to the two subsequent disk ruptures at the L5-S1 level.

The Appellants seem to take issue with the words used by Dr. Vohra in his deposition testimony. However,

> "[t]he compensation process is not a game of say the magic word, in which the rights of injured workers should stand or fall on whether a witness happens to choose a form of words prescribed by court or legislature, ... What counts is the real substance of what the witness intended to convey."

Airtran, Inc. v. Byrd, 953 So. 2d 296, 299 (Miss. Ct. App. 2007) (Quoting, Dixie Contractors, Inc. v. Ashmore, 349 So. 2d 532, 534 (Miss. 1977)). Thus, the question is "From the *whole* of the doctor's testimony, what is the real substance he stated concerning causal connection." Id. (emphasis added)

Accordingly, the Mississippi Workers' Compensation Commission had far more than substantial evidence to base its determination that Teresa's second and third L5-S1 disc ruptures were related to her first L5-S1 disc rupture.

The Appellants unsuccessfully rely on the "opinion" of Dr. Engelberg to argue there is no causal connection between the 1997 injury and subsequent medical treatment, including, but not limited to, the L5-S1 surgeries he and Dr. Friedman performed. ***However, Dr. Engelberg did***

not take a stand on the issue. He simply stated that he did not have an opinion. He could not say to a reasonable degree of medical certainty there was a causal relation, but at the same time, he could not say to a reasonable degree of medical certainty there was not a causal relation. His "opinion" (or lack of opinion) is so equivocal as to be utterly useless and without any probative value whatsoever. His noncommittal response cannot be used to rebut Dr. Vohra, who unequivocally relates the 1997 injury to the subsequent L5-S1 re-herniations, which necessitated the medical treatment that Teresa required after Dr. Clark released her.

In a reported decision analogous to the instant case, an unanimous Mississippi Court of Appeals found that a recurrent disc rupture was causally connected to Teresa's initial work injury (and initial disc rupture), where the Claimant's doctor opined that the Claimant's disc re-herniation was caused by the initial disc herniation, because, a.) the disc had become weakened after the surgery, b.) in 10-15% of cases an initial herniation leads to recurrent herniation, and c.) a re-herniation can occur in the absence of a specific injury. United Methodist Senior Services v. Ice, 749 So. 2d 1227, 1234 (Miss. Ct. App. 1999)

All that must be shown is that the subsequent back problems Teresa encountered after the 1998 surgery were ***more likely than not*** related to the 1997 injury. A. F. Leis Company v. Harrell, 743 So. 2d 1059, 1061 (Miss. Ct. App. 1999) Through the testimony of Teresa, Dr. Vohra and the medical records of Dr. Patel that standard is easily met.

C. THE LAST INJURIOUS EXPOSURE RULE IS INAPPLICABLE TO THE INSTANT CASE

The Appellants argue that the instant case somehow comes under the last injurious exposure rule. The Court stated this rule as follows: "When a *disability* develops gradually, or when it comes as the result of a *succession of accidents*, the insurance carrier covering the risk at

the time of the most recent injury or exposure bearing a causal relation of the disability is usually liable for the entire compensation period." United Methodist Senior Services v. Ice, 749 So. 2d at 1230 (emphasis added).

A review of the facts demonstrates that not only is the last injurious exposure rule **inapplicable** to the instant case, but that the Ice decision, as well as Cedeno v. Moran Hauling, 769 So. 2d 203 (Miss. Ct. App. 2000), cited by the Appellants actually support the Commission's decision that Teresa is permanently and totally disabled as a direct result of her original work injury, without any subsequent injury or superceding intervening cause, and that therefore, Appellants bear sole liability for Teresa's permanent disability.

In the instant case, Administrative Judge, Linda Thompson, found as a matter of law and fact that Teresa had sustained *temporary total disability and a permanent medical 10% impairment to her body as a whole, as a result of her original work injury.* Following the first Order of the Administrative Judge, the medical records of Dr. Clark and Dr. Patel thoroughly demonstrate that Teresa remained in significant pain following the first surgery performed by Dr. Clark. The medical records and reports of Dr. Patel and Teresa's unrebutted testimony also demonstrate that she was already under a disability and had been so at the time when she was last employed with the Appellant; moreover, the medical records and reports of her treating physician during the relevant time frame, as well as Teresa's unrebutted testimony, finally demonstrate that she did not experience any new injuries or accidents while employed with "Elemopea." Indeed, Teresa's short lived position with "Elemopea" was *sedentary* in nature.

> "Finally, we note that even if Cedeno had a back problem that he brought with him to his employment at Moran, there is authority that the *occurrence of an aggravating injury* at Moran had independently contributed to the final disability would give Moran liability for the entire claim."

> However, if the Claimant continues to suffer pain while working for the new employer, *but there is no incident that independently contributes to the disabling injury, liability does not arise.*
> This Court recently determined that this was a correct view of the relevant legal principal and adopted them.
> ...The Supreme Court has not yet made an explicit pronouncement on these principals. Until that Court determines otherwise, *these are the controlling rules.*

Cedeno v. Moran Hauling, 769 So. 2d at 207, (citing, 4 LARSON WORKMENS' COMPENSATION §95.20, 23 and United Methodist Senior Services v. Ice) (emphasis added). Accordingly, the Appellant/Cross Appellees argument has no merit, and the last injurious exposure rule does not apply to the instant case.

D. TERESA PATRICK IS PERMANENTLY AND TOTALLY DISABLED WITHIN THE MEANING AND INTENT OF THE MISSISSIPPI WORKERS' COMPENSATION ACT.

The issue of whether a claimant's permanent disability is partial or total is a fact question to be determined from the evidence as a whole, including both medical and lay testimony. McGowan v. Orleans Furn. Inc., 586 So. 2d., 167 (quoting Modern Laundry, Inc. v. Williams, 224 Miss. 174, 179-180, 79 So. 2d. 829, 832 (1955)). A "claimant is competent to prove his own claim and his testimony may be accepted without corroboration." Penrod Drilling Co. v. Etheridge, 487 So. 2d. 1330, 1333 (Miss. 1986). The undisputed testimony of a "claimant which is not so unreasonable as to be unbelievable, given the factual setting of the claim, generally ought to be accepted as true." White v. Superior Products, 515 So 2d. 924, 927 (Miss. 1987).

Disability is defined as incapacity due to injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment. Moore v. Ind. Life and Accid. Inc., Co., 788 So. 2d. 106, 114 (Miss. Ct. App. 1991). "When there is a finding of

permanent partial disability, the 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." (Id.)

> "The factors to consider in deciding whether the claimant has made an attempt to find employment (in a *prima facie* case of disability) is:
>
> 1. Economic and industrial aspects of the local community;
> 2. The jobs available in the community, and;
> 3. The claimant's general education background, including work skills and the particular nature of the disability for which compensation is sought."

(Id.) After the claimant makes out a *prima facie* case of disability, the burden of proof shifts to the employer, and the employer must present evidence that the claimant's efforts to obtain other employment were a sham or less than reasonable. Id.

The testimony of Teresa, Mr. Selby, and even the Appellant's/Cross-Appellees expert, Mr. Stewart establishes permanent and total disability. The medical evidence further establishes that Teresa's 1997 work injury has caused her permanent and total disability.

Teresa gave a graphic picture of the excruciating pain she experiences on a daily basis and the dehumanizing effects, said pain has had on her, her home life, and her relationship with her husband. She stated the pain went down from her back, to her hip, to her tailbone all the way down to her feet. Teresa must elevate her legs when sitting and she must use a cane or walker when she walks, because her legs go out frequently.

Teresa is unable to function normally in her house because of her condition, and much of her time is spent sleeping due to the side effects of her medication. The testimony of Teresa's pain and her struggles through daily life were not only never disputed, but were corroborated by her husband; the pain, on its own would show that Teresa is unable to work, but Teresa also gave credible testimony concerning her extensive and unsuccessful job search. Teresa put in a diligent effort, but was unable to find anyone that was willing to hire her. Coupling the fact no

one would hire Teresa to her testimony of her daily pain and struggles, it is obvious that with her limited education and work experience, the 1997 injury has taken away any chance she may have to be gainfully employed.

Dr. Patel, Teresa's treating physician, also opined that Teresa ***could no longer work due to her failed back condition.*** The RFC he executed for the Social Security Administration on July 25, 2003 verifies that Teresa has a failed back, that she is not a malinger, that she has abnormal gait, has sensory loss, reflex changes, tenderness, swelling, muscle spasms, muscle weakness, impaired appetite, impaired sleep, that her pain constantly interferes with attention and concentration, her prognosis is very poor, and most importantly it states "I do not believe that this patient would ever be gainfully employed." Dr. Patel who sees Teresa on a constant basis and more frequently than all of her other doctors has opined that Teresa is permanently and totally disabled due to her failed back.

Vocational experts, Mr. Stewart and Mr. Selby, both opined that Teresa could not work again. Mr. Selby was by far the more consistent in his testimony as he stated over and over again that Teresa would be unable to find a job in the work force. Mr. Selby testified that the medication ***alone*** would prevent Teresa from re-entering the work force. Mr. Selby further testified that absent her back problems, Teresa could be working and that her other medical problems would not prevent her from working.

Even if Teresa had not done a job search, she would still be considered permanently and totally disabled by virtue of Dr. Patel's records and RFC. In Stewart v. Singing River Hospital System, Inc., 928 So. 2d 176 (Miss. Ct. App. 2005) cert. denied, May 4, 2006, a unanimous Court of Appeals held:

> "When a Claimant has been removed from work and declared totally disabled based on competent medical evaluation, there is no requirement

> that the Claimant go against medical advice and seek employment. If the employer seeks to challenge the claim of total occupational disability, then the employer must come forward with testimony that the claim is invalid."

908 So. 2d at 185. In the instant case, the undisputed proof is that Teresa's treating physician, Dr. Patel, has unequivocally stated:

> I do not believe that [Teresa] would ever be gainfully employed . . .[she] can not work.

The long standing rule in Workers' Compensation claims is that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purposes of the Workers' Compensation Act. Marshall Durbin Co. v. Warren, 633 So. 2d 1007, 1010 (Miss. 2000). Significantly, even interpreting the facts, lay and medical testimony in a light favorable to the employer and carrier, the inescapable conclusion is that Teresa is still permanently and totally disabled within the meaning and intent of the Act.

E. THE MEDICAL TREATMENT TERESA PATRICK RECEIVED FROM DRS. PATEL, FRIEDMAN, AND VOHRA, WAS CAUSALLY CONNECTED TO HER ORIGINAL WORK INJURY, AND WAS REASONABLE AND NECESSARY

Miss. Code Ann. §71-3-15 (1972) states in part:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, artificial members, and other apparatus for such period as the nature of the injury or the process of recovery may require.

Teresa's choice of physician was Dr. Pravin Patel who initially referred her to neurosurgeon, Dr. Craig Clark for her back problems. The Appellants provided this treatment, (albeit temporarily), only after being ordered to so by the Commission, as mandated by the statute, but the Appellants, in violation of Judge Thompson's Order effectively cut Teresa off in 2000, when they would not approve any further visits with Dr. Clark despite her continued back

problems. Dr. Patel stated Teresa needed to see a specialist. Her need became critical on March 8, 2001 when Dr. Patel found a recurrent L5-S1 disc rupture on the MRI. Dr. Patel had to set up an appointment for Teresa with Dr. Jerry Engelberg of Memphis, Tennessee, because, a.) the Appellants would not approve a return to Dr. Clark, and, b.) Dr. Engelberg was within the network under Teresa's husbands' insurance. This fact is supported by the following evidence of record: Dr. Patel's medical reports, and Teresa's unrebutted and uncontradicted testimony[4]. Dr. Engelberg performed surgery on Teresa April 5, 2001.

Because Teresa's severe back pain still remained intractable, and a third L5-S1 re-herniation showed up on MRI, Dr. Patel had to set up an appointment with Dr. Friedman because the Appellants were still refusing to fulfill their statutory obligation, and Teresa's husband's insurance had changed and would not allow Teresa to see Dr. Engelberg anymore. Dr. Friedman did the third surgery on July 31, 2002, and *his* records also document Appellants refusal to provide medical treatment he was recommending for Teresa.

During this terrible ordeal, Teresa also saw Dr. Vohra in an attempt to find long term relief for her back problems. Teresa first visited Dr. Vohra on October 15, 2001, between her second and third surgeries. During her initial visit, Teresa informed Dr. Vohra of the problems with incontinence of the bladder, and the increase in leg pain she was having. Dr. Vohra subsequently referred Teresa to a urologist, Dr. Secrest due to her incontinence of the bladder. Dr. Vohra also saw Teresa on two more occasions, February 11, 2002 and September 15, 2003. In his records, and his deposition, Dr. Vohra considered the referral to Dr. Secrest, and Dr. Secrest's test to be reasonable and necessary and causally related to Teresa's work related

[4] Neither the Administrative Judge, the Commission, nor Circuit Court ever called into question the absolute credibility and trustworthiness of both, Dr. Patel's Medical Affidavit, and Teresa's testimony. Indeed, the Commission relied, in part, on Dr. Patel's records, and Teresa's testimony to find her permanently and totally disabled, which the Circuit Court affirmed on appeal.

injury.[5]

It is obvious that Teresa's medical care and treatment since 2000, is both reasonable and necessary, and causally related to her work injury. This is the rare case where the medical records and doctors' opinions are fully consistent. Even Dr. Engleberg conceded he couldn't rule our Teresa's work injury and first disc rupture as contributing causes for the subsequent re-herniations. Teresa saw doctors only when necessary and any problem the Appellants may have with whom she treated with was caused by their improper refusal to furnish medical treatment.

F. THE CIRCUIT COURT COMMITTED ERROR AS A MATTER OF LAW AND FACT WHEN IT REVERSED THE FULL COMMISSION'S FINDING THAT THE APPELLANTS/CROSS-APPELLEES WERE RESPONSIBLE FOR MEDICAL TREATMENT PROVIDED BY DRS. ENGLEBERG AND FRIEDMAN

In the instant case, the Administrative Judge, Full Commission, and Circuit Court all properly agreed that the medical treatment provided by Drs. Engleberg and Friedman was reasonable and necessary. Where the Circuit Court broke rank with the Commission is the Appellants responsibility for that treatment.

In reversing the Full Commission's Order, holding that the Appellants responsible for the medical treatment and surgeries provided by Drs. Engelberg and Friedman, the Tate County Circuit Court stated:

> "The Court finds that there is no record in the file where Patrick sought help with the Commission in getting the Employer to allow the treatment, although during the time which Patrick was being treated by the new doctors, her claim was still being disputed with the Commission. There is testimony that Dr. Clark did refer Patrick back to Dr. Patel and Dr. Patel did refer Patrick to Dr. Friedman and Dr. Engleberg."

[5] The issue of the reasonableness and necessity of Dr. Secrest's treatment was reserved for later determination by the Administrative Judge.

> Although Patrick did testify that she was sent by Dr. Patel to the other doctors because her Employer had denied coverage and because these doctors were covered by her husband's insurance provider, Patrick presented no other proof to verify her allegation.

The Circuit Court therefore concluded (erroneously) that because Teresa allegedly did not first seek approval from the Appellants pursuant to §71-3-15(1), or first seek an Order from the Commission compelling medical treatment, the Appellants are not responsible for same. Interestingly, however, the Circuit Court Order does correctly note, "As Dr. Patel was Patrick's physician of choice, his treatment would not be subject to the requirements of chain of referral requirement of Miss. Code Ann. §71-3-15(1). The Court makes these findings based on the *technical* requirements of the statute." (Order of Tate County Circuit Court at Pg. 4) (emphasis added).

Miss. Code Ann. §71-3-15(1) actually says in pertinent part:

> Referrals by the chosen physician, [in this case Dr. Patel], shall be limited to one (1) physician within a specialty or sub-specialty area. *Except in an emergency requiring immediate medical attention*, any *additional* selections of physicians of the injured employer or *further* referrals must be approved by the employer, if self-insured, or the carrier prior to obtaining the services of the physician at the expense of the employer or carrier."
>
> If denied, the injured employee *may* apply to the Commission for approval of the additional selection of referral, and if the Commission determines that such request is reasonable, the employee by be authorized to obtain such treatment at the expense of the employer or carrier.

(emphasis added) Neither the Workers' Compensation Act, the General or Procedural rules of the Commission, or the Fee Schedule require Commission intervention as a prerequisite to obtaining reasonable and necessary medical treatment for which an Employer/Carrier will later be held responsible for when the Employer/Carrier has in violation of the Act, as well as *in violation of a standing Commission Order* to provide said medical treatment refused to provide same.

The reasoning of the Circuit Court is also erroneous in so far as it failed to recognize the seriousness and emergency nature of Teresa's medical condition, (which was fully set forth at both of her hearings), and also makes an erroneous conclusion of fact when it states that Teresa's testimony was unsupported. In fact, the Medical Records Affidavit of Dr. Patel demonstrated that the Appellants violated Mississippi Statute by not authorizing Teresa to return back to Dr. Clark after the MRI disclosed the second disc rupture. Secondly, a plain reading of §71-3-15(1) indicates that prior approval to send Teresa to Dr. Engleberg, (and later Dr. Friedman), was not even necessary or required, in so far as a.) both Drs. Engleberg and Friedman may be deemed an "initial specialist" as contemplated by the statute, due to Appellants refusal to authorize Teresa's re-referral back to Dr. Clark, and b.) under the statute an initial specialist referral can be made without prior authorization.[6]

The Circuit Court appears to have based its rationale for reversing the Commission on Wesson v. Freds, Inc., 811 So. 2d 464 (Miss. App. 2002). However, Wesson is thoroughly distinguishable from the instant case. In Wesson, the claimant sought payment for treatment that was obtained outside the proper chain of referral, as well as payment for a test that was done many months after it had originally been authorized. 811 So. 2d at 467-468. Moreover, the Commission in Wesson, found that the said treatment for which the claimant was seeking payment for was not reasonable or necessary. Id. In the instant case the record is clear that Teresa consistently and faithfully treated with Dr. Patel and that all referrals Dr. Patel made were found by the Commission to be reasonable and necessary.

The Circuit Court also erred when it stated: "...although during the time which Patrick was being treated by the new doctors, *her claim was being disputed with the Commission.*"

[6] The record makes it clear and there is no dispute that Dr. Patel started out as Teresa's primary "physician of choice" and that Dr. Clark ultimately referred Teresa back to Dr. Patel, wherein he resumed his role as Teresa's primary physician of choice. The Circuit Court also explicitly accepted this fact.

(emphasis added) To the contrary the reverse is true: the Commission completely resolved the existence and compensability of Teresa's underlying work injury and further ordered the Appellants/Cross-Appellees to "provide medical services and supplies as required by the nature of the Claimant's injury and the process of her recovery therefrom pursuant to Mississippi Code Annotated §71-3-15 (1995), General Rule 12, and the Medical Fee Schedule." (Order of Administrative Judge at Page 11, (R. 36)). As previously stated in Teresa's Brief, Appellants did not appeal from this Order of Administrative Judge. Accordingly, same became final and binding upon the Appellants and they were accordingly under an absolute duty, as ordered by Judge Thompson, to provide ongoing medical treatment to Teresa. It should also be noted that the Appellants never moved to controvert Drs. Engleberg and Friedman's medical treatment. Therefore, there was no "dispute with the Commission." It is with the utmost respect that Teresa submits that the Circuit Court simply did not fully understand either the posture of the instant case from its inception, or all of the subtleties and nuances of the underlying litigation, and that the Circuit Court applied an overly rigid and technical reading of §71-3-15(1).

However, even if Teresa's "claim was being disputed with the Commission", the Appellants would still be responsible for the subject medical treatment under the facts of the instant case. As a general rule, an employer will be liable to the employee for medical services selected by the employee where the employer has knowledge that the claimant has sustained a disabling injury, but the employer fails to provide medical services. Roberts v. Jr. Food Mart, 308 So. 2d 232 (Miss. 1975); an employer's failure to provide medical treatment for a known and disabling injury, amounts to a breach of the Statute. Central Electric & Machinery Co. v. Shelton, 220 So. 2d 320 (Miss. 1969)

No less, an authority than Larson states:

> The central rule defining the circumstances under which a claimant may on his or her own initiative incur compensable medical expense may be put as follows: If the employer has sufficient knowledge of the injury to be aware that medical treatment is necessary, it has the affirmative and *continuing* duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice doctors, and adequate; if the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense... the employer need not actually have refused medical services; it is enough that it has neglected to provide them.

LARSON'S WORKMEN'S COMPENSATION LAW, §94.02[4][a] (emphasis added) Dunn also contains an enlightening discussion of this issue:

> "Medical services is to be furnished and paid for by the employer. In 1982, the Act was amended to allow the employee to select a physician for accidents which occur after July 1, 1982. Prior to this date, an initial selection by the employer was not sanctioned, except in cases: (1) where the employer fails or refuses to provide the service after requests by the employee, or (2) of emergency, or (3) where the employer has knowledge of the injury and the nature of the injury requires the services and the employer neglects to provide the medical service needed.
>
> "[T]he statutory obligation imposed upon the employer is said to be mandatory. Even prior to the 1982 amendment, the statute had been given a liberal interpretation, and in later decisions, consideration such as the absence of an emergency and the absence of a request medical attention and the absence of any actual knowledge by the employer, that the seriousness of an injury was such as to require medical attention had been de-emphasized and knowledge by the employer that a disabling injury, or even an illness had occurred, followed by failure to provide medical services, had been found to be sufficient to impose liability upon the employer for medical services selected by the employee. The fact that the seriousness or the compensable status of the injury, or illness, was not appreciated, or was controverted by the employer, did not change the result. Emphasis was upon knowledge of an injury and the duty of the employer to ascertain the present, or later need, for medical attention and to instruct the employee in reference thereto."

Dunn, MISSISSIPPI WORKMEN'S COMPENSATION 3rd Ed. §341 (Citations omitted)

Teresa's supervisor, John Cothren, knew she had suffered a work injury and he himself notified Wal-Mart of same. However, as noted earlier, Appellants refused to provide medical treatment or indemnity benefits until the Commission ordered them to do so, following a hearing

on the merits, whereby the Commission found as a matter of law and fact that Teresa had sustained a disabling work related injury. Therefore, Appellants were certainly on notice of Teresa's injury, and its disabling nature, especially after being ***ordered*** to provide medical and temporary benefits for same by the Commission. There is no serious dispute that the Appellants failed to provide neurosurgical care as required under the statute, *throughout the life of the instant claim*. The medical records and reports of Dr. Patel bear this out, as does the unrebutted testimony of Teresa, herself. In fact, it is highly significant that the Appellants provided no witness testimony or documentary evidence to rebut Teresa's claims, or show that the Appellants, a.) were never made aware by Dr. Patel's office of the need to send Teresa back to Dr. Clark, or b.) that they, being made aware of same, did not refuse to allow Teresa to return to Dr. Clark.

Finally, the Administrative Judge and Commission found that Teresa's second and third L5-S1 disc re-herniations were causally connected to her original work injury and that treatment for same was reasonable and necessary. Even the Circuit Court affirmed on the issue of causal connection. Accordingly, the facts demonstrate that the Appellants absolutely *breached* their statutory duty to provide the additional neurosurgical treatment to Teresa and, therefore are responsible for said treatment.

From the very beginning, Wal-Mart has engaged in a willful pattern of bad faith when it failed to accept this as a compensable claim even though Teresa timely provided notice of the injury. In fact, Teresa's injury was witnessed by her supervisor, who originally notified Wal-Mart that Teresa had in fact been injured.[7]

---

[7] Wal-Mart has demonstrated an unfortunate pattern of delay and denial of reasonable and necessary medical treatment in cases other than Teresa's. See, e.g. Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308 (Miss. 1997) and Wal-Mart Stores, Inc. v. Towery, 2004-WC-00059, (Mandate dismissing Wal-Mart and America Home Insurance Co.'s appeal and granting Towery's request for attorneys fees. See attached, Exhibit "A")

When it comes to Teresa's medical treatment ordeal, the Appellants have consistently breached their statutory duty, and have acted in a dilatory manner, protracting and intensifying Teresa's suffering. To let the Appellants "off the hook" after such egregious conduct, would be a gross abrogation of §71-3-15 (1972) and a further slap in the face to Teresa, who was already made disabled by her work injury.

By its overly rigid and technical reading of §71-3-15(1), the Circuit Court would place the full onus on Teresa, (and future workers' compensation claimants). However, this was not, and never has been the intent of Act. Forcing a Claimant to give the Commission a chance to "work it out" is not a prerequisite to a later finding the Employer/Carrier responsible for payment of same. As the law makes clear, all that is required is notice to the Employer/Carrier. By the logic of the Circuit Court, the Commission would have been remiss making Appellants responsible for Teresa's first surgery.

Finally, there is a policy consideration involved. It is a desirable goal to allow medical treatment to be provided as seamlessly and as expeditiously as possible. To inject attorneys and cumulative litigation into the medical treatment process every time an employer refuses to provide treatment, despite its clear statutory mandate would bog down the Administrative process, delay the necessary medical treatment, result in greater inefficiency, and generally emasculate §71-5-15.[8]

[8] For instance, it took claimant, Jessie Spann approximately **seven years** from the date of his initial work injury to the date the Mississippi Supreme Court ruled that he could receive the surgery previously recommended by neurosurgeon, Dr. John Frenz, M.D., *a physician Mr. Spann had seen on his own*. Spann v. Wal-Mart Stores, Inc., 700 So. 2d at 310, 315.

V. CONCLUSION

Based upon the totality of the facts in evidence, including the lay, medical, expert testimony, and evidence, Teresa Patrick is permanently and totally disabled within the meaning of the Mississippi Workers' Compensation Act as a direct result of her June, 1997 work injury, and the medical treatment provided by Drs. Patel, Engleberg, Friedman, and Vohra, was reasonable, necessary and causally related to her original work injury, and the Appellants/Cross-Appellees as originally found by the Commission are responsible for same.

Accordingly, Appellee/Cross-Appellant respectfully prays that the Order of the Circuit Court's be affirmed on direct appeal, and reversed on cross-appeal, and the Order of the Mississippi Workers' Compensation Commission reinstated.

RESPECTFULLY submitted, this the 9th day of November, 2007.

TERESA PATRICK
APPELLEE/CROSS-APPELLANT

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ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

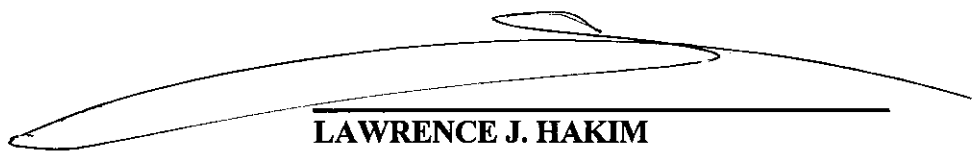
CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, Attorney for the Claimant/Appellee herein, do hereby certify that I have this day forwarded regular mail, a true and correct copy of the above and foregoing Brief of the Appellee/Cross-Appellant to:

1. Honorable Ann Hannaford Lamar
   Supreme Court of Mississippi
   P. O. Box 117
   Jackson, MS 39205

2. Honorable Roxanne P. Case
   Wilkins, Stephens & Tipton, P.A.
   Post Office Box 13429
   Jackson, Mississippi 39235-3429
   ATTORNEY FOR APPELLANTS/CROSS-APPELLEES

Respectfully submitted, this the 9th day of November, 2007.



LAWRENCE J. HAKIM

EXHIBIT "A"

FOR

BRIEF OF THE APPELLEE/CROSS-APPELLANT

MANDATE
SUPREME COURT OF MISSISSIPPI

To the Union County Circuit Court - GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a judgment as follows:

Supreme Court Case # 2004-WC-00059
Trial Court Case #U2003-096

Wal-Mart Stores, Inc. and American Home Insurance Company v. Ricky Towery

Thursday, 17th day of June, 2004
Appellee Ricky Towery's Motion for Dismissal of Appeal brought by Appellant Wal-Mart Stores, Inc. is granted. This matter is hereby remanded to the Mississippi Workers' Compensation Commission to proceed pursuant to the full commission order dated March 6, 2003. Appellee's request for reasonable attorney's fees for having to defend these improper appeals is granted. The amount of the attorneys' fee award shall be calculated by the Mississippi Workers' Compensation Commission pursuant to Miss. Code Ann., Sections 11-55-5(1) and 71-3- 59. Costs of the appeal are assessed to appellants. Diaz, J., not participating. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, Betty W. Sephton, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on July 8, 2004, A.D.

Betty W. Sephton
CLERK

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

WAL-MART and AMERICAN HOME INSURANCE COMPANY — **EMPLOYER-CARRIER/APPELLANT**

VS. — **CAUSE NO.: U2003-096**

RICKY TOWERY — **CLAIMANT/APPELLEE**

ORDER AND OPINION

This matter came on to be heard before the Court upon the Motion to Dismiss by the Claimant/Appellee Ricky Towery, ("Towery") and the Court upon review of the file, hearing argument of counsel and after giving mature consideration to same, does now hereby find, order, determine and adjudicate as follows:

This action arose out of a Workers' Compensation claim filed by Ricky Towery which alleged that he suffered a job-related injury on October 11, 1999, while he was employed by Wal-Mart. On May 28, 2002, the Administrative Judge entered an order denying and dismissing Towery's claim for insufficient proof to support his claim for benefits. Towery appealed the decision of the Administrative Judge to the Mississippi Workers' Compensation Commission ("the Commission") who then reversed the May 28, 2002, order by the Administrative Judge on March 6, 2003. Wal-Mart filed its Notice of Appeal to the Circuit Court on or about March 28, 2003.

The dispute in this cause involves the issue of whether or not the order entered on March 6, 2003, by the Commission is an interlocutory order or a final order. The pertinent portion of the order is as follows:

> This matter is hereby remanded to the Administrative Judge for such further proceedings as the Judge may determine are necessary to fix the date of maximum medical improvement, the nature and extent of permanent disability, and any other issues which, in the opinion of the Judge, are appropriate.

Pursuant to Mississippi Code Ann. Section 71-3-51, appeals from the Mississippi Workers' Compensation Commission to the circuit courts of the State of Mississippi shall be made within thirty (30) days from the date of the filing of the Commission's *final order* in its office and notification of the parties. The right to such appeal is statutory and may not be judicially created by a circuit court. *Bickham v. Department of Mental Health*, 592 So.2d 96 (Miss. 1991).

When a question arises as to whether or not an order is final or interlocutory, the court must determine if the "substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action." *Blankenship v. Delta Pride Catfish, Inc.*, 676 So.2d 914 (Miss. 1996). In the present case, the Commission specifically remanded the case to the Administrative Judge for further proceedings and to determine a date of maximum medical improvement, the nature and extent of permanent disability, and any other issues which need to be determined. As the Claimant/Appellee's medical condition and rights evolving from such condition, if any, remain substantially undetermined, the Court finds that the Order entered by the Workers' Compensation Commission is not a final order,

but an interlocutory order which is not properly before this Court.

The Court finds the Motion to Dismiss by the Claimant/Appellee is well taken, as the order entered by the Mississippi Workers' Compensation Commission is not a final order, but an interlocutory order, which is not proper for appeal pursuant to Mississippi Code Ann. Section 71-3-51.

IT IS THEREFORE ORDERED that the Motion to Dismiss by the Claimant/Appellee Ricky Towery is hereby GRANTED. The clerk is directed to provide a copy of this Order to all counsel of record.

SO ORDERED and ADJUDGED, this the 23rd day of October, 2003.

ANDREW K. HOWORTH
CIRCUIT COURT JUDGE 51-522-524

FILED THIS THE 25th DAY
OF October 2003
BILLY STANFORD
CIRCUIT CLERK
Rhonda Dandy D.C.

MISSISSIPPI WORKERS' COMPENSATION COMMISSION

MWCC NO. 00 11955-G-9483

RICKY TOWERY CLAIMANT

VS

WAL-MART DISTRIBUTION CENTER EMPLOYER

AND

AMERICAN HOME ASSURANCE COMPANY CARRIER

REPRESENTING CLAIMANT:

Robert Quentin Whitwell, Esquire, Ashland, Mississippi

REPRESENTING EMPLOYER AND CARRIER:

Roxanne P. Case, Esquire, Jackson, Mississippi

ORDER OF THE ADMINISTRATIVE JUDGE

Because the parties disagreed about whether Ricky Towery sustained a work-related injury on October 11, 1999, a hearing was held at the Union County Courthouse in New Albany, Mississippi, on January 17, 2002. (The record remained open until February 18, 2002.) Considering all of the facts, the Administrative Judge finds that Mr. Towery did not meet his burden of proving that he sustained a work-related injury.

Stipulations

The parties stipulated to these facts:

1. On October 11, 1999, Mr. Towery's average weekly wage was $461.20;
2. The Employer/Carrier did not pay Mr. Towery any disability benefits; and,
3. The Employer/Carrier did not provide Mr. Towery with any medical services.

Issues

The parties identified these issues:

1. Whether Mr. Towery sustained a work-related injury on October 11, 1999;
2. The existence and extent of temporary disability attributable to the injury;
3. The date Mr. Towery reached maximum medical improvement;
4. The existence and extent of permanent disability attributable to the injury;
5. The reasonableness and necessity of certain medical treatment; and,
6. Whether Mr. Towery gave the required notice of injury.

Summary of Relevant Evidence

1. Ricky Towery

Ricky Towery finished the ninth grade but does not read very well. On July 1, 1996, he started work as a forklift operator at the Wal-Mart Distribution Center in New Albany. He is forty-two years old.

On Monday, October 11, 1999, Mr. Towery attempted to straighten a stock of pallets. As he did so, a sixty-five pound pallet shifted against his head and left arm. Thinking that he had a crick in his neck, Mr. Towery continued working.

The next day, Tuesday, October 12, Mr. Towery told his co-worker, Varshawn Cook, how he had hurt his neck and left arm. Then on Wednesday or Thursday, Mr. Towery told his area coach, Frank West, and Mr. Cook that he needed to go to the doctor because his arm was numb. Although he was in pain, Mr. Towery worked the rest of the week because the Employer discouraged employees from going to the emergency room and adversely affecting the competition among facilities for accident-free work hours.

On Monday, October 19, Mr. Towery worked two hours and then told Messrs. West and Cook that he was going to the doctor because he could not grip with his left hand and had pain and numbness in that arm. (Mr. Towery did not tell them that he had a testicular problem because he did not have such a condition.)

Mr. Towery went to Dr. Creekmore who took him off work and referred him to Dr. Assaf (whom Mr. Towery could not understand), who in turn referred him to Dr. Feler. During that process Mr. Towery told Mr. West and Lane Smith that the doctors had instructed him not to work; and, he signed what he thought were workers' compensation forms but were actually medical leave requests[1].

After Dr. Feler operated on November 17, 1999, Mr. Towery requested a workers' compensation form from Linda Baukman, but he later learned that he had been given the wrong form. Dr. Feler operated again in April 2000.

In July 2000 Dr. Carro gave Mr. Towery work restrictions. Later when Mr. Towery talked with Ms. Smith about returning to work, she did not offer him a job.

Wal-Mart terminated Mr. Towery on October 31, 2000, and he has not worked since. He did, however, unsuccessfully search for work at Barclay Furniture, Albany Industries, the Job Service, and the Oaks Country Club.

Today Mr. Towery cannot work because of the pain medication and because he loses the grip in his left hand. He cannot raise his left arm above his head; his left hand shakes; he cannot pick up his four-year-old daughter; he cannot hunt or fish; he cannot play sports; and, he cannot do woodwork.

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[1] See Employer/Carrier's Exhibit 14, Requests for leave of Absence.

According to Mr. Towery's cross-examination testimony, Mr. West did not let Mr. Towery off work to go to the doctor the week of the accident. Everyone was very busy at work, and Mr. Towery did not want to affect the safety hours competition. On October 18, 1999, when Mr. Towery informed Mr. West that he had to go to the doctor, Mr. Towery added that he had jock itch, not a testicular problem.

The note[2] in Dr. Creekmore's October 18, 1999, records reflecting that Mr. Towery had experienced numbness and weakness in his left arm for three or four weeks was incorrect. That statement should have referred to the onset of the jock itch.

Dr. Creekmore referred Mr. Towery to Dr. Assaf who examined Mr. Towery on October 27, 1999. The statement in Dr. Assaf's records[3] that Mr. Towery denied any neck injury was incorrect because Mr. Towery told him about the pallet incident. Dr. Assaf then referred Mr. Towery to Dr. Feler, but Dr. Feler's records[4] for the initial visit on November 4, 1999, do not mention a work-related injury.

Later Dr. Carro imposed a ten-pound lifting restriction, but no doctor told Mr. Towery that he could not perform any work. Mr. Towery conducted his job search in 2000.

According to Mr. Towery's redirect testimony, when he signed the first request for leave of absence[5] dated October 27, 1999, the form was blank, and the signature on the

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2 Claimant's Exhibit 2, Medical Records of Dr. S. J. Creekmore, p. 37.

3 Claimant's Exhibit 4, Medical Records of Dr. Mohammad Assaf, p. 2.

4 Claimant's Exhibit 3, Medical Records of Dr. Claudio Feler, p. 7.

5 Employer/Carrier's Exhibit 14, p 1.

second request,[6] dated November 11, 1999, is not his. Although the requests state that Mr. Towery's condition is not a workers' compensation matter, Mr. Towery never intended to sign any form making such a statement.

2. Wanda Towery

Wanda Towery is Ricky Towery's wife. She was not aware of any injury before October 11, 1999. On that day, however, Mr. Towery complained to her about getting a crick in his neck when some pallets fell at work. That night the pain got worse and Mr. Towery's hand began shaking. Over the weekend Mr. Towery experienced trouble gripping with his left hand.

By the time of the appointment with Dr. Assaf, Mr. Towery's pain was so great that he could not drive, so Mrs. Towery accompanied him on that visit. She heard Mr. Towery tell Dr. Assaf's receptionist that the injury was work-related. Unfortunately, Mr. and Mrs Towery and Dr. Assaf could not understand each other.

Later Mrs. Towery went with Mr. Towery to see Dr. Feler. In her presence Mr. Towery told Dr. Feler about the accident at work, and Dr. Feler replied that the force of Mr. Towery's jerked arm had ruptured a disc.

Earlier when Dr. Creekmore scheduled Mr. Towery for an MRI, Mrs. Towery called Ms. Baukman about the paperwork and told her that Mr. Towery's injury was work-related.

Then in November 1999 Dr. Feler's nurse requested Mrs. Towery to obtain from Wal-Mart the forms for filing the medical expenses as a workers' compensation matter. Mrs. Towery again talked with Ms. Baukman, who gave her some forms, but those documents

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[6] Id. at 2.

turned out to be the health insurance forms for submitting medical expenses.

Mrs. Towery mailed Dr. Carro's work restrictions to Wal-Mart, but the letter was returned. Then Mrs. Towery called Lane Smith and hand-delivered the restrictions to the Wal-Mart personnel office.

Mrs. Towery had never seen the requests for leave of absence before, and the signature on the November 11, 1999, request was not Mr. Towery's.

3. Varshawn Cook

Varshawn Cook has worked for Wal-Mart for over five years. Mr. Towery told Mr. Cook that he had problems with his arm and testicles but did not say what had caused those conditions. Mr. Towery did not ask to go to the doctor, did not say that Mr. West would not allow him to go to the doctor, and did not mention any accident at work. If he had reported a work-related injury, Mr. Cook would have prepared an accident report.

About two months before the hearing, Mr. Towery called Mr. Cook several times and stated that he needed Mr. Cook's help. Each time Mr. Cook replied that he could not talk with him about this claim.

According to Mr. Cook's cross-examination testimony, Mr. Towery told him about his poor grip and testicular problem on October 12, 1999. Mr. Cook did not recall whether Mr. Towery asked Mr. West about leaving or whether Mr. Towery told him on October 18, 1999, that he was leaving work to go to the doctor.

According to Mr. Cook's redirect testimony, Mr. Towery never said that he had been injured at work but he did tell Mr. Cook that the testicular problem caused the pain in his arm.

4. Frank West

During 1999 Frank West was Mr. Towery's supervisor and Varshawn Cook was the assistant supervisor. Mr. Towery told Mr. West that he had a stiff neck and problems with his grip, but he never said that he had injured himself at work or that he needed to go to the doctor. Later Mr. Towery told Mr. West in private that he had a growth on a testicle but did not mention any work-related injury. Mr. Towery's productivity did not decline after the date of the alleged injury. In fact, Mr. Towery's productivity was exceptional that week. Later while Mr. Towery was on a leave of absence, Mr. West called him twice at home to see how he was doing, Mr. Towery did not state that he had been injured at work.

According to his cross-examination testimony, Mr. West could not recall when Mr. Towery had informed him about his stiff neck and weak grip. In addition, there was a bonus system for employees based on the number of safety hours.

According to Mr. West's redirect testimony, his conversations with Mr. Towery occurred before he gave a statement[7] to Wal-Mart on December 21, 1999.

5. Linda Baukman

Linda Baukman, the Wal-Mart Distribution Center benefits administrator for the past four years, handled health insurance and workers' compensation matters. Mr. Towery asked her for the leave of absence forms. Those forms could be used for both work-related and non-work-related conditions. The usual practice was that the employee took the form to the doctor and then returned the form to Ms. Baukman.

Neither Mr. Towery nor his wife told Ms. Baukman that Mr. Towery had been injured

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[7] Claimant's Exhibit 13, Statement of Frank West.

at work, so Ms. Baukman filed the medical bills with Mr. Towery's health insurance carrier. Ms. Baukman first learned that this matter involved a workers' compensation claim when she received a letter from Mr. Towery's attorney.[8]

According to her cross-examination testimony, Ms. Baukman did not investigate to determine whether Mr. Towery's condition was a workers' compensation matter, and she did not know whether Mr. Towery had signed either of the leave of absence forms. In addition, Mrs. Towery did not tell her that Mr. Towery had a testicular problem.

Ms. Baukman never saw Dr. Carro's work restriction. It was the Employer's policy that if an employee was off work for a year, he was terminated.

According to her redirect testimony, Ms. Baukman's job responsibilities did not include investigating whether an accident occurred at work. The doctor completed the health care provider's certification on the leave of absence form.

6. Lane Smith

From May 1999 until recently, Lane Smith was the assistant personnel manager at the New Albany distribution center. (She was still employed by Wal-Mart but now worked in Arkansas.) As part of her duties, she was responsible for workers' compensation claims. Mr. Towery never reported to Ms. Smith that he had been hurt at work, and no other employee ever said that Mr. Towery had sustained a work-related injury.

In 1999 there was no competition among distribution centers for safety hours, but there was an safety incentive system for the employees.

On October 21, 1999, Mr. Towery told Ms. Lane that he had pain in his back and arm

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[8] General Exhibit 7, Letter of December 14, 1999.

and was concerned about keeping his job. Mr. Towery added that he had been to Dr. Creekmore, so Ms. Lane asked Mr. Towery if the doctor had commented on the cause of the pain. Mr. Towery replied that Dr. Creekmore had said that his condition sometimes just happened as part of the aging process. Ms. Smith then took Mr. Towery to Ms. Baukman to get the leave of absence request forms.

When Ms. Smith reviewed the completed forms, she saw that both Dr. Assaf and Dr. Creekmore had indicated that Mr. Towery's condition was not a workers' compensation matter, so Ms. Smith did not investigate whether there had been a work-related injury. Later, however, when Ms. Smith received the December 14, 1999, letter from Mr. Towery's lawyer, she did investigate, but no employee said that Mr. Towery had been injured at work.

Later Mr. Towery called Ms. Smith and said that the doctor had given him work restrictions and that he wanted to return to work. Ms. Smith reviewed the work restrictions and concluded that Mr. Towery could not return to his pre-injury job. Ms. Smith did not offer him light duty because it was Wal-Mart policy that light duty was made available to only employees with work-related injuries. For those reasons, Mr. Towery was terminated after he had been off work for a year.

According to Mr. Towery's attendance records,[9] from Monday, October 11, through Friday, October 15, 1999, he worked 40.5 hours. On Monday, October 18, he worked 2.53 hours and took 5.46 hours of personal leave. On Tuesday, October 19, he took 5.46 hours of sick leave and 2.53 hours of personal leave. On each of the next three days, he took 8.0

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[9] Employer/Carrier's Exhibit 10, Attendance Report for the Weeks Ending October 15 and 22, 1999.

hours of sick leave.

According to Ms. Smith's cross-examination testimony, in November or December 1999 she received a call from Dr. Feler's office requesting the paperwork to file the bill as a workers' compensation matter, but she did not then ask Mr. Towery whether his condition was work-related.

Ms. Smith never received a leave of absence form from Drs. Feler, Richey, Carro, or Mitias, and she never request leave of absence forms form Drs. Carro or Mitias.

If an employee sustained a work-related injury and it was determined that the accident could have been prevented, the employee could lose safety hours under the incentive system.

7. Dr. Sam J. Creekmore

Dr. Sam J. Creekmore testified through his medical records.[10] On October 18, 1999, Mr. Towery complained of "numbness and weakness in his left arm for the past three to four weeks.[11] Dr. Creekmore noted that Mr. Towery "works as a lift operator and does a lot of turning with that arm."[12] Mr. Towery also complained of "a rash on his genitalia for two years."[13] Dr. Creekmore ordered an MRI of Mr. Towery's cervical spine and referred him to Dr. Assaf.

The MRI was performed on October 19, 1999. The clinical history noted that Mr. Towery had "numbness and weakness to the right arm and hand. No known history of injury.

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10 Claimant's Exhibit 2, Medical Records of Dr. S. J. Creekmore.

11 Id. at 37.

12 Id.

13 Id.

Patient also complains of neck, left shoulder and arm pain."[14] The MRI showed "a left lateral HNP at C5-6 [and] degenerative changes from C4 inferiorly."[15]

8. Dr. Mohammad Assaf

Dr. Mohammad Assaf, a neurologist, testified through his medical records.[16] On October 27, 1999, Dr. Assaf examined Mr. Towery and reviewed the recent MRI. Mr. Towery complained of "numbness and weakness in the left upper extremity and neck and left shoulder, of three weeks duration."[17] Mr. Towery "denies any neck injury...[or] any similar attack."[18]

Dr. Assaf diagnosed Mr. Towery's condition as "cervical disc disease and cervical paraspinous muscle spasms with cervical radiculopathy."[19] Dr. Assaf prescribed pain medication and referred Mr. Towery to a neurosurgeon.

9. Dr. Claudio A. Feler

Dr. Claudio A. Feler, a neurosurgeon, testified through his medical records.[20] Dr. Feler examined Mr. Towery on November 4, 1999, and diagnosed his condition as left C-6 radiculopathy. (Dr. Feler's history did not recount an injury or other cause for Mr. Towery's

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14 Id. at 4.

15 Id.

16 Claimant's Exhibit 4, Medical Records of Dr. Mohammad Assaf.

17 Id. at 2.

18 Id.

19 Id. at 3.

20 Claimant's Exhibit 3, Medical Records of Dr. Claudio Feler.

condition.)

On November 17, 1999, Dr. Feler performed an anterior cervical discectomy and fusion at the C5-6 level. Later on April 17, 2000, Dr. Feler performed a left posterior laminotomy and foraminotomy with diskectomy at the C7-T1 level.

About six weeks later Dr. Feler ordered a functional capacity evaluation, which was performed on June 14, 2000, by Dr. Manuel F. Carro, a specialist in physical medicine and rehabilitation. In his report Dr. Carro noted that Mr. Towery had reported sustaining an on-the-job injury in October 1999 "picking up some pallets."[21] In addition, Dr. Carro assigned Mr. Towery a twenty-five percent whole body impairment rating, opined that Mr. Towery was unable to return to his pre-injury job as a forklift operator, and imposed these permanent work restrictions: "He should have a sedentary work position exerting up to 10 lbs. of force occasionally and/or negligible amount force frequently or constantly to left, carry, push, pull, or otherwise move objects including the human body."[22]

Mr. Towery continued to complain of pain, so Dr. Feler ordered an MRI, which was performed on July 7, 2000, and was essentially normal. Dr. Feler then referred Mr. Towery to a pain specialist.

10. Robin Sansing

Ms. Robin Sansing, a physical therapist, testified through her records.[23] On January 31, 2000, when Ms. Sansing saw Mr. Towery for the first time, she noted that he had injured

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21 Id. at 16.

22 Id. at 18.

23 Claimant's Exhibit 6, Medical Records of Robin Sansing.

his neck at work in October 1999 while lifting a pallet. Mr. Towery continued in physical therapy until March 22, 2000.

11. Dr. Johnny Mitias

Dr. Johnny Mitias testified through his medical records.[24] When Dr. Mitias examined Mr. Towery on March 2, 2000, Mr. Towery stated that he had been injured at work while catching a falling pallet and complained of left shoulder pain. After conservative treatment failed, Dr. Mitias on March 23, 2000, sent Mr. Towery back to Dr. Feler for an evaluation.

12. Dr. Steve Richey

Dr. Steve Richey, a board certified family physician specializing in pain management, testified through his April 24, 2001, deposition.[25] Dr. Richey first examined Mr. Towery on August 2, 2000, on a referral from Dr. Feler. At that time Mr. Towery stated that he had been injured at work in 1999 while lifting pallets, and he complained a pain in his neck and left arm and numbness in his right arm. Dr. Richey diagnosed Mr. Towery's condition as failed back syndrome, with a large emotional component to the pain. Dr. Richey pursued conservative treatment, including pain medication, cervical epidural block and anti-depressant medicine, through January 10, 2002. Dr. Richey also thought that a psychiatrist should evaluate Mr. Towery.

Dr. Richey opined that Mr. Towery's pain was consistent with the work-related injury reported by Mr. Towery; that Mr. Towery reached maximum medical improvement

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[24] Claimant's Exhibit 5, Medical Records of Dr. Johnny Mitias.

[25] Claimant's Exhibit 1, Deposition of Dr. Steve Richey. Some of Dr. Richey's records were included with his deposition. While the record was still open after the hearing, the Claimant submitted additional medical records from Dr. Richey, which the Administrative Judge attached to the deposition.

"probably about six months after" his last surgery; that Mr. Towery continued to need medical care; and that he could not return to his pre-injury job. In addition, Dr. Richey assigned an impairment rating of twenty-five percent to Mr. Towery's whole body and imposed these work restrictions: exerting up to ten pounds of force occasionally, or a negligible amount of force frequently or constantly, to lift, carry, push, or pull. (However, Dr. Richey stated that he would defer to a neurosurgeon concerning work restrictions.)

According to Dr. Richey's cross-examination, Mr. Towery's cervical condition could have been caused by something other than the history of a work-related injury given by Mr. Towery. Dr. Richey never reviewed the medical records of Drs. Mitias, Assaf, or Creekmore. In drafting his work restrictions, Dr. Richey largely deferred to Dr. Carro's functional capacity evaluation.

According to his redirect testimony, Dr. Richey had no reason to disbelieve the history related by Mr. Towery.

13. Dr. John D. Brophy

Dr. John D. Brophy, a board certified neurosurgeon, testified through his November 29, 2001, deposition.[26] Dr. Brophy conducted an independent medical examination of Mr. Towery on June 4, 2001. At that time Mr. Towery stated he strained his neck and left arm at work on October 11, 1999, and that night experienced increasing pain in his left arm.

Dr. Brophy found that Mr. Towery suffered from residual neck and arm pain following the two operations, and opined that "the bilateral foraminal narrowing at [C] 6-7

[26] Employer/Carrier's Exhibit 12, Deposition of Dr. John D. Brophy. The Employer/Carrier separately introduced Dr. Brophy's records as Employer/Carrier's Exhibit 11, although the same records were attached to the deposition.

could be contributing to his current pain syndrome; however, this is difficult to assess due to some evidence of exaggeration on physical examination."[27] In addition, Dr. Brophy considered "the restrictions recommended by Dr. Carro as arbitrary and without objective basis."[28]

Dr. Brophy recommended that Mr. Towery have a cervical myelogram/CT scan to rule out residual nerve root compression, if Mr. Towery was willing to consider another surgery; or, a functional capacity evaluation, if Mr. Towery was unwilling to consider a third operation. Dr. Brophy added that Mr. Towery's injury could have been caused by something other than the history related by Mr. Towery.

According to his cross-examination testimony, Dr. Brophy was not aware of any facts indicating that Mr. Towery's condition had been caused by something other than the work-related injury described by Mr. Towery, and Dr. Brophy had no reason to disbelieve Mr. Towery's account. Finally Dr. Brophy assigned Mr. Towery a whole body impairment rating of fifteen percent.

Findings of Fact and Conclusions of Law

The threshold issue is whether Mr. Towery sustained a work-related injury on or about October 11, 1999. On that question Mr. Towery bears the burden of proving by a preponderance of the credible evidence that he suffered a compensable injury.

Concerning that issue Mr. Towery testified that he was injured at work while performing his duties and that the next day he reported that injury to his co-worker, Mr. Cook; that two or three days

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27 Id. at 20.

28 Exhibit 12 at 21.

after the injury he informed his supervisor, Mr. West, that he needed to go to the doctor for numbness in his left arm; and, that the week after the injury he told Messrs. Cook and West that he was leaving work to see the doctor about loss of grip in his left hand and pain and weakness in his arm. On the other hand, Messrs. Cook and West testified that Mr. Towery did not mention a word to them about a work-related injury.

In addition, Mr. Towery testified that Dr. Creekmore's records for October 18, 1999, incorrectly stated Mr. Towery had experienced problems with his left arm for three or four weeks; that Dr. Assaf's October 27, 1999, records incorrectly stated that Mr. Towery had denied any neck injury (Dr. Assaf's records also mentioned arm problems for three weeks); and, that on November 4, 1999, he told Dr. Feler about the work injury, even though Dr. Feler's notes as silent as to the cause of Mr. Towery's condition.

Concerning this issue, the first medical record that specifically recounted a work-related injury was for Ms. Sansing's initial examination on January 31, 2000. By that time, Mr. Towery's attorney had written the Employer on December 14, 1999, about a work-related injury on October 11, 1999. Finally, Mrs. Towery's testimony tended to corroborate her husband's account.

Simply put, the evidence contains fundament and irreconcilable contradictions concerning the issue of whether Mr. Towery's condition is work-related and compensable. After carefully considering the evidence, the Administrative Judge is struck by the fact that not one of the first three doctors Mr. Towery saw - Dr. Creekmore, who was Mr. Towery's family physician; Dr. Assaf; and Dr. Feler - recorded a work-related injury as part of Mr. Towery's history. Indeed, the records of Drs. Creekmore and Assaf indicated that Mr. Towery's pain had started several weeks before October 11, 1999. In addition, Mr. Towery's co-workers denied having any knowledge of

a work-related injury before receiving the December 14, 1999, letter from Mr. Towery's attorney.

Considering all of the facts the Administrative Judge finds that Mr. Towery did not meet his burden of proving that he sustained a work-related injury on or about October 11, 1999. See Nosser v. First American Credit Corp., 2001-WC-00509-COA (Miss. Ct. App. April 16, 2002). His claim for workers' compensation benefits is, therefore, denied.

Order

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Claimant's claim for benefits is denied and dismissed.

SO ORDERED this the 24th day of May, 2002.

MARK HENRY
ADMINISTRATIVE JUDGE

ATTEST:
Jo Ann McDonald

Jo Ann McDonald, Commission Secretary
MWCC NO. 00 11955-G-9483

MISSISSIPPI WORKERS' COMPENSATION COMMISSION

MWCC NO. 000-11955-G-9483

RICKY TOWERY CLAIMANT

VS.

WAL MART DISTRIBUTION CENTER EMPLOYER

AND

AMERICAN HOME ASSURANCE COMPANY CARRIER

Representing Claimant:

Robert Quentin Whitwell, Esquire, Ashland, MS

Representing Employer/Carrier:

Roxanne P. Case, Esquire, Jackson, MS

FULL COMMISSION ORDER

This matter was heard by the Commission on February 3, 2003 pursuant to the Claimant's Petition for Appeal. The Claimant is appealing from an Order of the Administrative Judge entered on May 28, 2002 which found the proof offered by the Claimant insufficient to support his claim for benefits. The claim of Ricky Towery was denied and dismissed accordingly.

I.

Undoubtedly, Ricky Don Towery has sustained a serious injury to his neck as evidenced in large part by an anterior cervical discectomy and fusion at his fifth and sixth cervical vertebrae (C5-6) performed on November 17, 1999, and a left posterior laminotomy and foraminotomy with discectomy at his seventh cervical vertebra and first thoracic vertebra (C7-T1) performed on April 17, 2000. The key question is whether this injury arose out of and in the course his employment with Wal Mart?

Mr. Towery has a ninth grade education and started work at the Wal-Mart Distribution Center on July 1, 1996 as a forklift operator. In this job he was responsible for moving pallets into designated pallet racks in the warehouse. Oftentimes this required that he first empty pallet racks, or move and rearrange pallets that other operators had carelessly placed in the pallets returns. Mr. Towery claims his injury occurred on or about October 11, 1999 when, while attempting to straighten a stack of pallets, he was struck in the head by a stack of pallets that had suddenly shifted. He immediately felt a "shock" type sensation in his neck. He also lost his balance and jerked his left arm trying to hold on to the pallets and maintain his balance. Mr. Towery testified that he thought he had "pulled a crick" in his neck so he continued to work that day.

Mr. Towery also reported to work on Tuesday October 12, 1999 but he began to develop a numbing sensation in his left hand and arm. He claims he spoke with Vershawn Cook, his assistant coach, that morning and informed him of the incident on the day before, to which Mr. Cook allegedly replied, "you could have a pinched nerve or something like that." Despite a gradual worsening of his symptoms, Mr. Towery worked a full day on October 12, 1999. He reported for work on Wednesday October 13, 1999 as well, and allegedly informed his area coach, Mr. Frank West, that he was having arm problems and needed to see a doctor. He did not, however, tell Mr. West that he hurt himself moving pallets. According to Mr. Towery, Frank West did not give him a yes or no answer. Vershawn Cook was also no help, according to Mr. Towery, even though he told him again after meeting with Mr. West that he needed to see a doctor.

Having failed to get approval from his immediate supervisors to see a doctor, Mr. Towery continued to work the remainder of the week of October 11, 1999. Mr. Towery suffered through the weekend and reported to work on Monday, October 18, 1999. According to Mr. Towery, he talked

to Vershawn Cook and to Frank West again and told them both he had to see a doctor, with or without their permission. True to his word, Mr. Towery went to see Dr. Creekmoore and reported weakness and numbness in his left arm which had existed for about one week prior. According to Mr. Towery, Dr. Creekmoore restricted him from work and later referred him to Dr. Mohammad Asef who, in turn, referred him to Dr. Claudio Feler, a neurosurgeon. Mr. Towery claims that sometime before seeing Dr. Feler, that he went to see Lane Smith, a fellow employee with Wal Mart, to complete the paperwork for workers' compensation benefits, or so he thought. As it turned out, Ms. Smith had Mr. Towery sign a leave of absence form which she said was required of anyone needing more than three days medical leave.

Mr. Towery testified that he and wife again sought the proper workers' compensation papers before seeing Dr. Feler in November 1999, at the request of Dr. Feler's office. According to Mr. Towery, however, Wal Mart never furnished any workers' compensation information to Dr. Feler.

Mr. Towery went on to have surgery in November, 1999 and again in April, 2000. He sought re-employment with Wal Mart beginning in July 2000 but Wal Mart was not able to accommodate his restrictions. Mr. Towery was eventually terminated effective October 31, 2000.

Mr. Towery's wife largely corroborated her husband's historical account of his accident, treatment, and dealings with officials from Wal Mart. She confirmed that Mr. Towery came home the evening of October 11, 1999 complaining of neck and arm pain, and related to her how he had injured himself moving pallets at work. Mrs. Towery also testified that her husband said he told Vershawn Cook about this incident.

Mrs. Towery is the person who first contacted Dr. Creekmoore's office about getting her husband in for an evaluation, and she was told that October 18 or 19 would be the earliest he could

be seen. However, Mrs. Towery's husband called her Monday morning, October 18, and stated that he needed to see a doctor immediately due to the pain. She contacted Dr. Creekmoore's office and told them her husband was on his way.

Mrs. Towery did not go with her husband to see Dr. Creekmoore, but she did allegedly contact Linda Baukman at Wal Mart on her husbands' behalf in order to get approval for an MRI that Dr. Creekmoore recommended. According to Mrs. Towery, she told Baukman that her husband needed an MRI because of the injury he sustained moving pallets. Baukman allegedly told Mrs. Towery that Wal Mart needed some documentation from Creekmoore justifying her husband's absence, which Mrs. Towery got and delivered to Wal Mart.

Mrs. Towery accompanied her husband when he went to see Dr. Asef on referral from Dr. Creekmoore. Mrs. Towery testified that she specifically recalled her husband telling someone in Dr. Asef's office that he had recently hurt his neck when a pallet fell on him at work. She did not know why this would not have been reflected in Dr. Asef's notes, but she, along with Mr. Towery, stated that there was an insurmountable language barrier between them and Dr. Asef. All they were able to gather from Dr. Asef was that Mr. Towery needed to see a neurosurgeon.

The neurosurgeon to which her husband was referred was Dr. Feler, and Mrs. Towery testified that her husband told Dr. Feler too that he hurt himself moving pallets at work. Dr. Feler recommended a steroid treatment, and failing that, surgery. Surgery was eventually carried out on November 17, 1999.

Mrs. Towery stated that upon their admission to the hospital for surgery, they were asked by the admitting clerk if they had a workers' compensation file number since Mr. Towery had reported this as a work injury. The Towery's responded that they had not been given a workers' compensation

file number. The admitting clerk asked for Mr. Towery's health insurance card instead, but assured them that the hospital would file the claim through workers' compensation if and when they got the necessary information.

Mrs. Towery testified that after the surgery, a nurse in Dr. Feler's office informed her they had requested workers' compensation billing information from Wal Mart but that Wal Mart had sent them health insurance information instead. She asked Mr. and Mrs. Towery if they would get this information from Wal Mart and bring it on their return visit. Mrs. Towery and her husband went by the Wal Mart facility at their first opportunity, which was about one week after the surgery as they were on their way back to Dr. Feler for a follow up visit. She specifically remembered her husband exchanging brief greetings with Frank West and Vershawn Cook, and she specifically recalled talking to Linda Baukman herself and asking for workers' compensation papers as per the request of Dr. Feler. Mrs. Towery says she reiterated to Baukman that her husband's injury occurred at work while moving some pallets, and that Baukman gave her some papers which she delivered to Dr. Feler's office. Mrs. Towery says that, after delivering the papers to Dr. Feler's nurse, they were told the papers were health insurance papers which Dr. Feler's office already had, and not workers' compensation papers. According to Mrs. Towery, Dr. Feler's nurse said she would call Linda Baukman and request the workers' compensation information again.

Vershawn Cook testified that he worked as Ricky Towery's assistance coach (supervisor) at the time of the alleged injury. He specifically recalled Mr. Towery coming to him on or about October 12, 1999 and complaining that he was losing grip strength in his arm and that his hand was hurting. Mr. Cook claims Mr. Towery did not indicate how he hurt his arm, and Cook did not press the issue any further, even though this occurred during working hours. Mr. Cook also admitted that

it was obvious Mr. Towery had some kind of injury and was hurting, but still he did not press the issue because Mr. Towery did not specifically tell him he suffered a work place injury. He did, however, tell Mr. Towery to talk to Frank West, the supervisor in charge, about his condition. Mr. Cook stated that he would have filed an accident investigation report if Mr. Towery had indicated to him this was a job related accident. Mr. Cook also testified that, within a couple of weeks after Mr. Towery's alleged injury on October 11, 1999, his superiors asked him to provide a written account of the previous conversation he had with Mr. Towery regarding his arm, and to describe exactly what happened that day.

Frank West also testified that Mr. Towery never specifically reported a work related injury, or else Mr. West would have referred him to the loss control department and would have filed an accident investigation report. Mr. West did admit that Mr. Towery complained in a morning "start up" meeting that he had problems with his grip and neck, but Mr. Towery did not link these problems to an incident at work and did not request medical treatment. Mr. West says Mr. Towery also told him privately about an unrelated problem he was having with jock itch. Mr. West stated that his superiors later ask him to provide a written statement detailing his personal knowledge about Mr. Towery's injury, if any. This was on December 21, 1999, after the company was notified by Mr. Towery's attorney that his injury was work related. Mr. West stated that, before this time, no one ever inquired why Mr. Towery needed an MRI, or why he needed neck surgery.

Linda Baukman testified that she is the benefits coordinator for the Wal Mart facility where Mr. Towery was employed. She recalled Mr. Towery requesting forms from her for a leave of absence which she provided. She explained that the company's leave of absence form is used for any absence, whether due to work related or non work related injury or illness, and that the employee is

responsible for getting their doctor to complete part of this form to justify the absence. Ms. Baukman remembered that Mr. or Mrs. Towery returned two leave of absence forms sometime prior to October 27, 1999, one completed in part by Dr. Creekmoore and one completed in part by Dr. Asef. Ms. Baukman said these forms did not indicate a work related injury as the reason for Mr. Towery's absence, and that neither Mr. nor Mrs. Towery told her that Mr. Towery had been injured at work. Ms. Baukman said her first notification of a work related injury came when Mr. Towery's attorney notified the company in December 1999. Ms. Baukman acknowledged that a First Report of Injury Form, which is the standard reporting form for workers' compensation injuries, was completed by someone in the Wal Mart command on December 18, 1999.

Lane Smith testified that she worked as personnel manager at the Wal Mart facility where Mr. Towery claims he sustained an injury on October 11, 1999. Like her co-workers, she too denied that Mr. Towery ever reported a work related accident or injury to her from and after October 11, 1999. She recalled talking with Mr. Towery on October 21, 1999 about problems he was having with his neck and arm, and about seeing Dr. Creekmoore. Ms. Smith testified that she asked Mr. Towery what Dr. Creekmoore said about his condition. According to Ms. Smith, Mr. Towery said that he was told these things just happen with age. Smith denied that Mr. Towery told her his injury was work related. Ms. Smith says she gave Mr. Towery a leave of absence form for Dr. Creekmoore to fill out so that his absences would be excused. Like Ms. Baukman, Ms. Smith says she was first made aware of Mr. Towery's workers' compensation claim when she saw the letter from Mr. Towery's attorney dated December 14, 1999. However, she admitted that someone from Dr. Feler's office called after Mr. Towery's surgery seeking workers' compensation information, and Ms. Smith advised the caller that it was not a workers' compensation claim. This would have been in

November, 1999, and Ms. Smith did not investigate the matter any further.

The leave request forms which Mr. Towery took to Dr. Creekmoore and Dr. Asef were introduced into evidence. These forms merely reflect that Mr. Towery needs medical leave from work because of what Dr. Creekmoore described as a "ruptured disk" and "cervical neuropathy," and what Dr. Asef described as "cervical disc disease." These forms are used for any leave away from work due to injury or illness, including work related conditions. Each indicates that he needed "medical leave" which could include leave covered by workers' compensation. However, these forms do not specifically ask whether the condition for which leave is requested is work related or not, so they are of little probative value.

Dr. Creekmoore's records were introduced into evidence, but they too are of little probative value. One set Dr. Creekmoore's records from the October 19, 1999 visit by Mr. Towery note very briefly that Mr. Towery complains of numbness and weakness in his right arm[1], and recommends Mr. Towery undergo an MRI.. There is no history reflected in these records, and it appears there was no attempt to obtain any history. Another computer generated record of the October 19, 1999 visit states, however, that Mr. Towery presented "with numbness and weakness in his left arm for the past three to four weeks. Works as a forklift operator and does a lot of turning with that arm. Also, has had a rash on his genitalia for two years, with itching."[2] There is nothing in this record that either includes or excludes the possibility of Mr. Towery's injury being work connected. If anything, this record suggests the injury is possibly work related because it refers to the fact that Mr. Towery works

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[1] Mr. Towery's injury actually involves his left arm.

[2] Mr. Towery testified that he told Dr. Creekmoore that the rash had been bothering him for three to four weeks, not his arm, and that Creekmoore must have misunderstood.

as a forklift operator and does a lot of turning with his injured arm.

The radiology report of the MRI that was carried out on October 19, 1999 states there was "no known history of injury" but this statement is of questionable significance. Mr. Towery testified that he was asked if he had been in a car accident, to which he replied that he had not. He allegedly stated that he thought he had "pulled a crick" in his neck. In any event, the MRI showed a "central left lateral HNP at C5-6", and "generalized degenerative changes from C4 inferiorly." These findings prompted Dr. Creekmoore to refer Mr. Towery to Dr. Asef, a neurologist.

The records of Dr. Asef show that he saw Mr. Towery on October 27, 1999. His findings are documented in a letter he wrote to Dr. Creekmoore on November 11, 1999. In this letter, Dr. Asef notes that Mr. Towery presented with weakness and numbness of the left arm, left shoulder and neck, "of three weeks duration."[3] Dr. Asef also stated in this letter that the patient "denies any neck injury." However, this statement does not necessarily contradict Mr. Towery's claim that he hurt his neck and arm while moving pallets on October 11, 1999. Given that Mr. Towery's symptoms were concentrated in his left arm and shoulder, he easily could have concluded he had not suffered a "neck" injury. We also can't discount the significant language barrier that he and his wife both testified was a problem in their dealings with Dr. Asef. We simply can't draw any meaningful conclusions from Dr. Asef's report other than that Dr. Asef felt Mr. Towery needed a neurosurgical evaluation.

Dr. Claudio Feler is the neurosurgeon who saw Mr. Towery after Dr. Asef. His first visit with Mr. Towery was on October 4, 1999. His notes from this day state that Mr. Towery "works as

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[3] Whether Dr. Asef's point of reference is October 27 or November 11, his statement that Mr. Towery's complaints originated three weeks prior is more accurate than the history recorded by Dr. Creekmoore, and more consistent with the onset claimed by Mr. Towery himself.

a forklift operator at Wal-Mart, [and] developed paresthesia and pain in the left upper extremity and neck." While this history does not document the pallet moving incident which Mr. Towery points to as the source of his claim, this history is still not necessarily inconsistent with Mr. Towery's claim that he developed these symptoms while performing his work as a fork-lift operator at Wal-Mart. Dr. Feler prescribed steroid treatment and asked Mr. Towery to return in one week. He cautioned that if steroid treatment failed to yield improvement, consideration should be given to surgery.

The next office visit record from Dr. Feler is for November 24, 1999, a week after Mr. Towery underwent neck surgery. This record is uninformative, as are the remainder of Dr. Feler's post operative records. Dr. Feler continued to treat Mr. Towery, and performed additional neck surgery on April 17, 2000.

In the interim, on March 2, 2000, Mr. Towery was seen by Dr. Johnny Mitias. The history recorded by Dr. Mitias states that Mr. Towery's injury was caused when "he was at work trying to catch a palate [sic] that was falling, jerked his arms and he felt a pain in his neck which he dismissed as a crick but later was found to be a ruptured disc." Dr. Mitias prescribed physical therapy but referred Mr. Towery back to Dr. Feler on March 23 because of pain radiating from the neck into the arm. As mentioned above, Dr. Feler performed a second neck surgery on April 17, 2000.

In June of 2000 Dr. Feler recommended a functional capacity evaluation which Mr. Towery underwent on June 14, 2000. This evaluation was performed by Dr. Manuel Carro and his notes from this evaluation state that Mr. Towery had been under the care of Dr. Feler for an on-the-job injury that occurred in October 1999 when Mr. Towery was picking up some pallets at Wal-Mart. Dr. Carro rated Mr. Towery's impairment at 25% and restricted him to sedentary, light duty employment.

Dr. Steve Richey is with the Methodist Pain Institute in Memphis, TN, and he treated Mr. Towery on referral from Dr. Feler. When he first saw Mr. Towery in August 2000, he documented a history of injury in October 1999 as the result of lifting pallets. Dr. Richey testified by deposition that Mr. Towery's injury and subsequent surgeries and complaints were consistent with the history he gave.

II.

This is one of those typically difficult claims where the Commission must make some sense out of facts that are not as telling as we might prefer, and which are conflicting in certain respects. We are reminded that Mr. Towery bears the burden of proving by a preponderance of credible evidence that he sustained a work related injury on October 11, 1999 as he has alleged, and that doubtful cases should be resolved in favor of compensation. See generally 9 Encyclopedia of Mississippi Law §76:142 (2002); Dunn, Mississippi Workers' Compensation §§264-265 (3d ed. 1982). In making our findings, we may call upon our common knowledge, our common experience, and our common sense. 9 Encyclopedia of Mississippi Law at §76:140.

Having reviewed the testimony and other evidence presented in this case, we are ultimately satisfied that Mr. Towery's injury in fact stems from an accident at work on October 11, 1999, just as he has claimed. The medical evidence certainly supports this conclusion. There is more than ample medical proof which establishes the fact that Mr. Towery's injury is entirely consistent with the history he has alleged.

We recognize that the medical history itself, as documented or not by the various medical providers is subject to question. It is apparent, for example, that Mr. Towery's ability to give his treating doctors a more specific and detailed history improved significantly after he retained legal

counsel. However, we did not find any thing in the very early histories that Mr. Towery gave to Dr. Creekmoore, Dr. Asef and Dr. Feler which necessarily contradicted or belied the claim he is making. The fact is, these histories are uniformly unenlightening, and they don't make Mr. Towery's claim any more or any less truthful.

As for the conflicting testimony concerning Mr. Towery's provision of notice to his employer, and whether this renders his claim somehow unbelievable or incredible, we ultimately cannot ignore the uncontradicted fact that Mr. Towery sustained an injury that is entirely consistent with the claim he is making. Certainly, Mr. Towery could have been more specific with his co-workers and superiors, and we are not sure why he wasn't. Perhaps he was afraid, or perhaps he simply lacked the ability to effectively communicate with his superiors. In the end, it does not cause us much concern.

One thing that stands out is that Mr. Towery made his superiors fully aware that he had a serious problem with his neck and left arm. No one at Wal Mart questioned this. He made his superiors aware of this problem on more than one occasion, and did so during working hours. Apparently, however, because he did not utter certain magic words such as "workers' compensation" or "on-the-job injury", Wal-Mart personnel chose to bury their collective heads in the sand and ignore the obvious workers' compensation ramifications of Mr. Towery's complaints. Even after being contacted by Dr. Feler's office about workers' compensation issues, Wal-Mart personnel did little, if anything, to investigate the matter any further because Mr. Towery hadn't specifically told them it was work related, and that was that. While Mr. Towery could have been more direct in his initial complaints, his superiors at Wal-Mart who were more familiar with the workers' compensation claims process could themselves have been more diligent in their efforts to determine if Mr. Towery's complaints were due to an on-the-job occurrence.

In any event, Mr. Towery, through his attorney, gave formal notice to Wal-Mart of his claim in a letter dated December 14, 1999. Despite Mr. Towery's failure early on to clearly and adequately put his superiors on notice that his injury was probably work related, his story is nonetheless credible, it is fully corroborated by his wife, and it is supported ultimately by the medical findings. There is in fact no other reasonable explanation for Mr. Towery's injury.

We, therefore, reverse the Order of the Administrative Judge dated May 28, 2002 and find instead that Mr. Towery suffered a compensable injury to his neck and left arm on October 11, 1999, as alleged in his Petition to Controvert. Wal-Mart is to provide him with all reasonable and necessary medical treatment, including reimbursement for mileage and other medical expenses incurred by Mr. Towery, consistent with Miss. Code Ann. §71-3-15 (Rev. 2000). Wal-Mart shall also pay temporary total disability benefits to Mr. Towery in the amount of $292.86 per week[4] commencing October 18, 1999 and continuing until the date Mr. Towery reached maximum medical improvement.

This matter is hereby remanded to the Administrative Judge for such further proceedings as the Judge may determine are necessary to fix the date of maximum medical improvement[5], the nature and extent of permanent disability, and any other issues which, in the opinion of the Judge, are appropriate.

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[4] This rate is based on the stipulated average weekly wage of $461.20, and it is the maximum amount allowed by Law for injuries occurring in 1999. Miss. Code Ann. §71-3-13(1) (Rev. 2000).

[5] Dr. Steve Richey stated that Mr. Towery probably reached maximum medical improvement about six months after his second surgery, but Dr. John Brophy recommended further testing to rule out residual nerve root compression, which would possibly lead to additional surgery. We encourage the parties to find agreement on this issue, or else additional medical evidence may be needed to establish a date of maximum medical improvement.

SO ORDERED this the 6th day of March, 2003.

MISSISSIPPI WORKERS' COMPENSATION COMMISSION

Ben Barrett Smith, Chairman

Barney J. Schoby, Commissioner

Lydia Quarles, Commissioner

ATTEST:

Commission Secretary