IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WAL-MART STORES, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA	EMPLOYER/CARRIER/APPELLANTS/ CROSS-APPELLEES
V.	CASE NO. 2007-WC-00539
TERESA G. PATRICK	CLAIMANT/APPELLEE/CROSS APPELLANT

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

REPLY BRIEF OF THE EMPLOYER AND CARRIER/APPELLANTS AND APPELLANTS'/CROSS APPELLEE'S RESPONSE TO APPELLEE/CROSS APPELLANT'S CROSS APPEAL

ORAL ARGUMENT REQUESTED

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V. — **CASE NO. 2007-WC-00539**

TERESA G. PATRICK — **CLAIMANT/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, Claimant/Appellee/Cross Appellant;
2. Wal-Mart Stores, Inc., Employer/Appellant/Cross Appellee;
3. National Union Fire Insurance Co. of Pittsburgh, PA, Carrier/Appellant/Cross Appellee;
4. Claims Management, Inc., Administrator of Claims for Appellants/Cross Appellees;
5. Roxanne P. Case, Esquire, Wilkins, Stephens & Tipton, P.A., Attorneys for Employer and Carrier/Appellants/Cross Appellees;
6. Michelle B. Mims, Esquire, Wilkins, Stephens & Tipton, P.A., Attorneys for Employer and Carrier/Appellants/Cross Appellees;
7. Lawrence J. Hakim, Esquire, Charlie Baglan & Associates, Attorneys for Claimant/Appellee/Cross Appellant;
8. Honorable Ann Hannaford Lamar, Circuit Court of Tate County, Mississippi, Circuit Court Judge.

This the 11th day of January, 2008.

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CONCISE STATEMENT FOR ORAL ARGUMENT

The Employer and Carrier/Appellants/Cross-Appellees request oral argument in this matter before the Justices of this Court. Due to the complex nature of the issues raised on appeal, as well as the factual issues involving same, oral argument may benefit the Justices in rendering a decision in this matter. Further, given the questions of law and fact raised, additional argument and discussion of same should be allowed on this matter in the form of oral argument.

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REPLY ARGUMENT

A. STANDARD OF REVIEW

It is well settled under Mississippi law that the Mississippi Workers' Compensation Commission is the ultimate trier of fact in Workers' Compensation cases. Tyson Foods, Inc. v. Thompson, 765 So.2d 589 (¶10) (Miss.Ct.App. 2000), (citing Pilate v. International Plastics Corp., 727 So.2d 771 (¶12) (Miss.Ct.App. 1999). See also Harper v. N. Miss. Medical Ctr., 601 So.2d 395 (Miss. 1982); Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings, 491 So.2d 211 (Miss. 1982). However, where the Commission has misapprehended the controlling legal principles, the Appellate Courts will review *de novo*. Lee v. Singing River Hospital, 908 So.2d 159, 163 (¶11) (Miss.Ct.App. 2005). The Appellate Courts will reverse should the Commission's decision be clearly erroneous. Wesson v. Fred's, Inc., 811 So.2d 464, 468 (¶23) (Miss.Ct.App. 2002).

The Employer and Carrier assert that the findings of the Full Commission and the Circuit Court that the Claimant satisfied her burden of proof to show that she is permanently and totally disabled and that her second and third disc herniations are related to her original work injury are not supported by the substantial evidence and are clearly erroneous, and accordingly, are in error and should be reversed by the Supreme Court of Mississippi.

The erroneous decision by the Administrative Judge and the Full Commission should be reversed as the error concerns errors of law and not of fact and falls under the definition of the "extraordinary cases" discussed in the case of Hale v. Ruleville Healthcare Center, 687 So.2d 1221, 1224 (Miss. 1991), as was cited by the claimant in her Response to the employer and carrier's initial brief before this Court. The claimant failed to meet her burdens of proof concerning extent of disability and concerning medical causation, and the Administrative Judge and the Full Commission did not apply the correct rules of law and/or legal standards in coming to their decisions to grant

permanent and total disability, to allow certain medical treatment and to evaluate causation according to the correct medical and legal standards.

As to the Circuit Court's reversal of the Full Commission's finding that the Employer and Carrier are not responsible for payment of treatment to Drs. Engelberg, Friedman and Vohra, this ruling is supported by statute and substantial evidence in this case and should stand. However, the Circuit Court's ruling that the Employer and Carrier are responsible for medical bills incurred through Dr. Patel after June, 1999, was erroneous and should be reversed, as the same reasoning should apply to Dr. Patel's bills for treatment rendered post second and third herniations as was applied to the bills and treatment of Drs. Engelberg, Friedman and Vohra.

B. THE CLAIMANT'S SUBSEQUENT DISC HERNIATIONS ARE NOT CAUSALLY RELATED TO HER WORK INJURY ON JULY 28, 1997, AND THEREFORE THE CLAIMANT FAILED TO SATISFY THE REQUISITE BURDEN OF PROOF IN SHOWING THAT THE EMPLOYER AND CARRIER WERE LIABLE FOR DR. PATEL'S TREATMENT POST SECOND AND THIRD HERNIATIONS AND SURGERIES.

In Pittman v. Hodges, 462 So.2d 330 (Miss. 1984), the Court held that a causal connection between treatment and injuries was sufficiently established only by medical testimony, **based upon a reasonable degree of medical certainty or probability**. (Emphasis added). See also Garrett v. Wade, 259 So.2d 476 (Miss. 1972). In Garrett, the Court discussed the fact that it has been consistently held that medical testimony is not probative unless it is in terms of **probabilities and not possibilities**. (Emphasis added). In this case, no medical opinions based upon a degree of medical probability have been presented to establish that the right sided herniations and subsequent medical care for those injuries were a result of the original work injury, or any subsequent work injury that is alleged to have occurred at Wal-Mart.

Contrary to the Claimant's erroneous allegations in her brief, not one of her physicians, either approved or unapproved, opined that her second and third herniations and subsequent surgeries were

"expressly" related. The Claimant provides no definitive evidence of this, but rather makes a general statement that is not supported by the evidence. She cites that the causal relationship is "common sense" or "common knowledge", but, as noted above, the case law requires that the evidence be supported by medical evidence and medical knowledge, not the Claimant's gut instinct or "common sense".

The Circuit Court found that the Employer and Carrier were not responsible for the second or third surgery, including the treatment rendered by Dr. Engelberg, Dr. Friedman and Dr. Vohra, as the treatment was **outside the mandates of the Mississippi Workers' Compensation Act**. (See Order of Circuit Court of Tate County, Mississippi; Record Excerpt 5). For this reason alone, the Employer and Carrier should not be held liable for the second and third herniations and treatment and surgery related thereto, including Dr. Patel's treatment following June 6, 1999, the MMI date for the work-related injury. However, a second compelling reason that the Employer and Carrier are not liable for this treatment is that the Claimant cannot meet her burden to show the causal relationship of these subsequent conditions and treatment to the original work injury. The Circuit Court was absolutely correct regarding its finding that the Employer and Carrier were not liable for the treatment of Drs. Engelberg, Friedman and Vohra, but erred by failing to include Dr. Patel's care during and after the second and third herniations and subsequent surgeries as part of that treatment which it correctly found to be unauthorized.[1] See Miss. Code. Ann. § 71-3-15 (Supp. 2003).

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[1]The Employer and Carrier's specific arguments as to causal relationship of second and third herniations and subsequent surgeries for same, including treatment by Drs. Engelberg, Friedman, and Vohra, will be elaborated on further in their Response to the Claimant's Cross-Appeal below.

C. THE LAST INJURIOUS EXPOSURE RULE IN FACT DOES APPLY TO THE INSTANT CASE, AND UNDER SAID RULE, WAL-MART SHOULD NOT BE HELD LIABLE FOR THE CLAIMANT'S ENTIRE COMPENSATION AFTER THE CLAIMANT REACHED MMI FOR THE WORK RELATED INJURY ON JULY 28, 1997.

Should this Honorable Court entertain that the Circuit Court's order should be reversed as to the issue of whether the two subsequent conditions and surgeries are related to the work injury on July 28, 1997, the Employer and Carrier have shown that they are not responsible for treatment rendered to the Claimant for these subsequent injuries.

The last injurious exposure rule was expressly adopted in United Methodist Senior Services v. Ice, 749 So.2d 1227 (Miss.Ct.App. 1999). See also Cedeno v. Moran Hauling, 769 So.2d 203 (¶25) (Miss.Ct.App. 2000), and it states 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 to the disability is usually liable for the entire compensation." Ice at 1227.

The Claimant was employed with Elemo Pea from September, 2000, through March, 2001. On February 20, 2001, the Claimant reported back pain with right leg pain to Dr. Patel, **which he diagnosed as acute**, which in medical terms means that it is likely new and not ongoing or "gradual". (Claimant Exh. 12, Dr. Patel's 2-20-01 note). On February 26, 2001, she reported she still had persistent cough and back pain to Dr. Patel. (Claimant Exh. 12, Dr. Patel's 2-26-01 note). The Claimant was complaining at the time of **right sided pain**, which was the opposite side as was affected with the original work injury. Id. By March 6, 2001, Dr. Patel ordered an MRI, which was performed on March 8, 2001, showing a ruptured disc at L5-S1 **on the right**. (Claimant Exh. 12, Dr. Patel's 3-8-01 note). Dr. Patel then referred the Claimant to Dr. Engelberg for this right sided pain. Id. The Claimant clearly testified at the hearing in this matter that **her right side injury did**

not occur while she was working at Wal-Mart, but rather, during the time she was working at Elemo Pea:

CASE: Okay. So you had not been working at Wal-Mart when this second herniation or problem with the right side that ultimately referred you to Dr. Engelberg occurred; is that right?

PATRICK: Yes, ma'am.

(R. 158-59, Vol. 4). In addition, Dr. Clark found that the MRI performed in October, 2000, before this incident occurred, showed **no recurrent herniation**, and this MRI took place just after the Claimant no longer worked for Wal-Mart, but had begun working at Elemo Pea. (General Exh. 8, Dr. Clark's 10-9-00 note). Dr. Engelberg clearly testified that, given the history, it was likely that the basis for which he performed surgery would have occurred some time **after** the Claimant saw Dr. Clark in 2000. (E/C Exh. 13, p. 17-18). Thus, the insurance carrier for Elemo Pea was the entity covering the risk at the time of the second herniation, which clearly occurred in early 2001, when the Claimant was employed with Elemo Pea. This insurance carrier should be liable for the entire compensation owed to the Claimant after the Claimant reached MMI for the injury on July 28, 1997. See Ice at 1227.

The Claimant's claims that this recurrent herniation in 2001, was ongoing or gradual in nature are completely false and unsupported by the medical evidence. The medical terms used by the Claimant's physicians all denote a new and intervening problem not related to the initial work injury. The problem was said by her physicians to be "acute" and "right-sided", not left-sided as with her work injury. The medical evidence shows that this was a separate and new injury from that of the initial injury on July 28, 1997, based on the fact that her physicians opined so, and in fact, specifically stated that the injury occurred sometime after the Claimant's employment at Wal-Mart. The Claimant has put forth no objective medical evidence to show that this was an ongoing problem

rather than a new and acute injury as denoted by her physicians. The Claimant's argument that the last injurious exposure rule does not apply therefore completely fails. The Claimant cites no law other than that cited by the Employer and Carrier and she completely fails to distinguish her case from this line of cases involving new, intervening injuries under the last injurious exposure rule.

D. THE COURTS ERRED IN FINDING THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AND THE CLAIMANT FAILED TO MEET HER BURDEN OF PROOF TO SHOW SAME.

The Claimant failed to prove, by a preponderance of the evidence, that she had any permanent loss of wage earning capacity as a result of her work related back injury. In order to prove a loss of wage earning capacity when the Claimant has not returned to work, a Claimant must prove that she is unable to return to her former employment **and that she has made reasonable efforts to find another type of employment**. See Pontotoc Wire Products Co. v. Ferguson, 384 So.2d 601, 603 (Miss. 1980). (Emphasis added).

The evidence does not demonstrate that the Claimant is permanently and totally disabled. In this case, it is the Claimant's allegation that she is permanently and totally disabled as a result of the July 28, 1997, injury. The Employer and Carrier have maintained, and the Circuit Court agreed, that the Claimant failed to satisfactorily causally relate either the second or third herniations and surgeries, including resulting medical care and disability, to the July 28, 1997, injury, and it is also the contention of the Employer and Carrier that the Claimant has failed to demonstrate a complete loss of wage earning capacity as a result of the compensable injury in this matter.

The Claimant has testified that she was able to return to work for the Employer herein until she voluntarily left that employment. The Claimant returned to work at the same rate of pay or higher. The Claimant testified that, following her voluntary resignation from Wal-Mart, she was employed by various employers, including Portrait Studio, Allied Enterprises, and Elemo Pea. The

evidence clearly shows that she worked for some of these employers in a managerial capacity and held similar, if not the same, duties as before the original work injury. After the first injury and surgery, the Claimant successfully returned to the work force. The Employer and Carrier therefore have proven that there was no satisfactory showing of a loss of wage earning capacity following the Claimant's release by her treating physician, and therefore, there cannot be a finding of permanent total disability which is said to be supported by substantial evidence in this case. See Miss. Code Ann. § 71-3-15 (Supp. 2003). See also Stewart v. Singing River Hospital, 928 So.2d 176, (¶ 36) (Miss.Ct.App. 2005).

Further, the claimant's treating physician for the work related injury, Dr. Clark, opined that she should be limited to lifting thirty pounds for a temporary period, but that this restriction would not be permanent in nature. (Gen. Exh. 8, Dr. Clark's 6-7-99 note). Dr. Clark further noted that the Claimant should probably avoid bending and should be given the opportunity to sit or stand as needed. Id.

The evidence shows that this Court must recognize the opinion of the work injury physician, Dr. Clark, over Dr. Rahul Vohra as to the work restrictions. This was the argument of the Employer and Carrier before the Full Commission, and while the Commission misapplied the statutes and case law governing treating physicians and the proper chain of referrals, the Circuit Court correctly agreed with the Employer and Carrier on this point. Dr. Vohra was not the treating physician for the work injury and his restrictions and ratings were based, in part, on the non-work related injuries and subsequent care for same, which were found by the Circuit Court not to be the responsibility of the Employer and Carrier. Even if this Court were to look to the opinions of Dr. Vohra, despite the Circuit Court's order and despite the fact that the Claimant saw Dr. Vohra at the behest of her attorney and not within the proper chain of referral, the Claimant incorrectly asserts that Dr. Vohra's

opinion was that the Claimant was permanently and totally disabled from returning to work. In fact, Dr. Vohra could state no such opinion to a reasonable degree of medical probability, which is the required medical standard in these cases.

Predictably, the Claimant argues that the residual functional capacity evaluation obtained from Dr. Patel, a general practitioner, completely limits her from returning to the work force. However, this is one of many red herrings in the Claimant's brief before this Court, which is simply meant to divert this Court's attention from the overwhelming medical evidence in this case. This functional capacity form, which was not even properly introduced before the Commission, was never presented to the claimant's treating specialists for their opinions. Further, this form is one that has nothing to do with this workers' compensation claim or the standards of proof required therein, but is rather a simple form filled out by general practitioners to submit for consideration in Social Security Disability cases. As this Court is aware, the same medical and legal standards do not apply in Social Security Disability cases as in workers' compensation cases, and these forms and other Social Security disability arguments typically are not, and should not be, given significant weight by the Administrative Judges or the Full Commission in determining permanent disability and/or loss of wage earning capacity.

More importantly, the Commission and Courts have routinely held that the opinion of a treating specialist should outweigh the opinion of other doctors, especially a general practitioner. Stewart, 928 So.2d at (¶ 36). Dr. Patel is a general practitioner whose opinion does not hold as much weight as that of a specialist, such as the claimant's treating specialist, Dr. Clark. Id. See also Roberts v. Hunter Engineering Co., 2000 WL 1778994 (Mississippi Workers' Compensation, Nov. 29, 2000); Johnson v. Ferguson, 435 So.2d. 1191 (Miss. 1983); Clements v. Welling Truck Svcs., Inc., 739 So.2d 476, 479 (¶9)(Miss.Ct.App. 1999); South Central Bell Telephone Co. v. Aden, 474

So.2d 584, 593 (Miss. 1985).

The Claimant's brief is wrought with allegations that she is permanently and totally disabled because she is in "excruciating pain" and the effect of same on her relationships. The Claimant goes on in her brief to state in some detail the things she feels she can and cannot do. Nonetheless, the medical evidence and opinions of her treating specialist, Dr. Clark, do not support these allegations. Furthermore, as was pointed out in the Employer and Carrier's initial brief before this Court, subjective complaints of pain with no real objective evidence to support those complaints is not a basis for compensation or for a finding of disability. Dunn, Vardaman S., Mississippi Workmen's Compensation § 73 (3d. ed. 1990). The Claimant has offered nothing more than these allegations of pain in support of her plea that this Court uphold the permanent and total disability finding of the lower Courts, but this is simply not enough. The medical evidence is quite clear that the Claimant could not be permanently and totally disabled as a result of the work related injury given her release by Dr. Clark and the subsequent jobs the Claimant was able to undertake before these subsequent jobs, or some other problem, caused the need for additional medical treatment, which is not the responsibility of the Employer and Carrier, as was found by the Circuit Court.

The Claimant attempts to deceive this Court by alleging that Morris Selby, the Claimant's vocational rehabilitation specialist, and David Stewart, the Employer and Carrier's vocational rehabilitation specialist, both found that she was unable to return to the work force. This allegation is in direct conflict with the reports and/or testimony of both of these specialists, and the Claimant also left out several significant details when making such allegations. First, Mr. Selby acknowledged that the work history of the Claimant contained in his report was not accurate or complete. He further acknowledged that he had not taken any additional actions to obtain a complete history. Mr. Selby also admitted that many of his opinions were based upon assumptions given that

he was not privy to all of the information needed to perform his evaluation. Mr. Selby's report and testimony do not come close to supporting the Claimant's allegations that she is permanently and totally disabled based upon its inaccuracies, lack of complete information, and given the fact that the opinion of Mr. Selby was obtained by the Claimant's attorney for a limited purpose, which did not include performing an actual vocational assessment, vocational rehabilitation or a job search.

The Employer and Carrier's vocational expert, Mr. Stewart, in fact, testified to the positive economic outlook of the Claimant's community, the available jobs in her community, and that, because of her education and work skills, and notwithstanding her temporary restrictions, **she could obtain employment**. He stated so to a reasonable degree of probability in the field of vocational rehabilitation services. When informed of and asked about the irrelevant residual FCE of Dr. Patel, on which the Claimant has attempted to "hang her hat", so to speak, Mr. Stewart did not change his opinion. In addition, **both** vocational experts did agree that the fact that the Claimant was a manager trainee and/or manager for Portrait Studio and Elemo Pea, both of which were post-injury employers, would significantly affect the Claimant's vocational rehabilitation in a positive way.

Contrary to the Claimant's erroneous allegations in her brief, it is a fact that Mr. Stewart testified that these jobs, as well as other pre-injury and post-injury employment, opened up a broad range skills that could possibly transfer to other types of jobs. Mr. Stewart initially stated that, if taken at her testimony **only**, with no other facts or evidence present, it is likely he would find that she would not be able to return to work. However, Mr. Stewart addressed each and every factor to be considered in determining whether the Claimant could work, and whether in fact she made a valid effort to obtain work, and each of his responses were in favor of the Claimant being able to return to gainful employment, despite her testimony concerning her ongoing pain. See Moore v. Independent Life & Accident Insurance Co., 788 So.2d 106, 114 (Miss.Ct.App. 2001).

Mr. Selby did not address any of these factors as he testified that he was not asked to do so by counsel for the Claimant. As such, his testimony offered little to no significant support for the Claimant, and in fact, simply showed that Mr. Selby did not do an accurate job in attempting to truly assess the Claimant's ability to return to work. His only function was to evaluate the Claimant's allegations that she was in too much pain to work, which allegations cannot prove permanent and total disability. Pain and suffering and loss of companionship are not factors in considering awards or judgments in workers' compensation cases, and the Claimant's allegations as to pain and loss of companionship are misplaced in this case and cannot be used alone as evidence for permanent and total disability.

The Claimant has alleged that she has made valid attempts at employment since her return to work for the employer and her subsequent employment with three other employers, which have failed as a result of her work related medical condition. However, the Employer and Carrier have shown that the veracity of these job searches is questionable. The Employer and Carrier followed up with at least ten of these alleged employers whose names were submitted by the Claimant, but **only one** of these employers could verify that the Claimant actually sought employment, and the evidence showed that the potential employer corroborated that the Claimant's attempt **could not be considered genuine**. Furthermore, the Claimant's own attorney gave her an opportunity to meet with a vocational counselor and it is undisputed that all efforts to work with this counselor were not made for the purpose of actually engaging in a genuine attempt for the Claimant to return to the work force. In addition, the Claimant was not honest regarding her unrelated cervical condition and the part that it played in her allegedly unsuccessful job search efforts. Thus, the Claimant's recent job search lacks good faith, and her allegations that she performed an "extensive and unsuccessful" job search are disingenuous and did not qualify as reasonable as required under the law. Walker

Manufacturing Co. v. Cantrell, 577 So.2d 1243, 1249 (Miss. 1991).

After the Claimant was released and found to be at MMI for the only medical care causally related to the work injury with Employer herein, the Claimant was clearly capable of returning to work and earning the same or similar wages as demonstrated by her ongoing post-injury work. The Claimant failed to demonstrate a permanent total disability as she was clearly earning post-injury wages. (General Exh. 8, Dr. Clark's 1-26-01 letter; and Claimant Exh. 9, p. 15). After the second and third surgeries, which were found by the Circuit Court not to be work related or the responsibility of the Employer and Carrier, the Claimant still failed to demonstrate a permanent total disability as her physicians for those conditions also found that she was capable of returning to the work force.

In addition, it has been established through reports and testimony that the vocational experts agree that jobs are available within her work related restrictions, despite the Claimant's unsuccessful attempts to argue the contrary. The Claimant has not suffered a total loss of wage earning capacity as a result of her work injury. Thus, the Full Commission's and Circuit Court's findings that Claimant is totally and permanently disabled as a result of the July 28, 1997, incident cannot be shown to be supported by substantial evidence, and the award for benefits should be reversed.

E. and F. OF CLAIMANT'S/CROSS APPELLANT'S BRIEF/

AND

RESPONSE TO CROSS APPEAL BY CLAIMANT/APPELLEE

I. THE CLAIMANT FAILED TO SATISFY HER REQUISITE BURDEN OF PROOF TO CAUSALLY RELATE THE CLAIMANT'S SECOND AND THIRD HERNIATIONS AND MEDICAL TREATMENT RELATED THERETO, INCLUDING POST-INJURY MEDICAL CARE BY DR. ENGELBERG, DR. FRIEDMAN, DR. PATEL AND DR. VOHRA, TO THE WORK RELATED INJURY.

For purposes of this Response to Claimant's/Cross-Appellant's Cross Appeal, the Employer

and Carrier adopt all Statements of Facts and Statements of the Case as represented in their initial brief before this Court. The facts and procedural history do not bear repeating in the interest of saving the Court's time and preventing a lengthy Response. All relevant facts and history cited in the initial brief of the Employer and Carrier/Cross-Appellees is accurate and correctly cited to the record of this case as received and certified by the Circuit Court of Tate County, Mississippi.

Consideration of whether the Claimant should prevail in this matter must rest upon whether she has satisfied her burden of proof to show a work related injury. Hedge v. Leggett & Platt, Inc., 641 So.2d 9, 12 (Miss. 1994). To recover compensation benefits, the Claimant must prove a causal connection between the work injury and a subsequent disability and medical treatment. Hardin's Bakeries v. Harrell, 566 So.2d 1261, 1265 (Miss. 1990). The Claimant must establish by a fair preponderance of the evidence (1) an accidental injury occurred; (2) arising out of and in the course of employment; **and** (3) there is a causal connection between the injury or death and the claimed disability. Id. at 1264, citing Miss. Code Ann. § 71-3-3 and § 71-3-7 (1972); See also Harrell v. Time Warner Cable Vision, 856 So.2d 503 (¶7) (Miss.Ct.App. 2003). (Emphasis added).

The Claimant has the burden of proving every essential element of her claim, leaving nothing to surmise, conjecture, or speculation. So. Miss. Elec. Power Ass'n. v. Graham, 587 So.2d 291, 294-295 (Miss. 1991). Workers' compensation cases "require expert medical opinion to help establish causation." Janssen Pharmaceutical, Inc. v. Stuart, 856 So.2d 431, (¶24) (Miss.Ct.App. 2003). Diagnosis of herniated discs requires medical testimony as to existence of injury, and ordinarily would require expert medical testimony as to its etiology. Bechtel Corp. v. Phillips, 591 So.2d 814, 817 (Miss. 1991). "[R]ecovery under the workers' compensation scheme must rest upon reasonable probabilities, not upon mere possibilities." Harrell, 856 So.2d at (¶ 30) (citing Burnley Shirt Corp. v. Simmons, 204 So.2d 451, 454 (Miss. 1967)). See also Janssen, 856 So.2d at (¶ 24); Fought v.

Stuart C. Irby Co., 523 So.2d 314, 317 (Miss. 1988). The Mississippi Supreme Court has stated that testimony in terms of medical probability, rather than possibility, is required by Mississippi law. Sutherland's Lumber & Home Center, Inc. v. Whittington, 878 So.2d 80, (¶10)(Miss.Ct.App. 2003).

In this case, the submitted evidence, particularly and most importantly expert testimony, has failed to establish by a reasonable probability any causal connection between her alleged medical condition, post-care by Dr. Clark, including a second and third disc herniation and treatment for same, and any on the job accident. The Claimant's medical treatment for her right sided herniations subsequent to the accident at Wal-Mart in July, 1997, does not support a finding of a compensable injury following the Claimant reaching MMI for her initial work injury in June, 1999.

The Claimant did not satisfy the burden of proof to causally relate the second herniation and surgery for same with Dr. Engelberg, or the third herniation and surgery for same with Dr. Harry Friedman, to the original work-related injury of July, 1997. Following the first hearing in this matter, the Claimant had been found to be at maximum medical improvement by her treating neurosurgeon, Dr. Clark. (General Exhibit 8, Dr. Clark's 6-7-99 note). The Claimant had been released in June, 1999, to return to work with restrictions which were not found to be permanent in nature. Id. The Claimant had also been instructed to return on an as needed basis to Dr. Clark. Id. By the Claimant's own testimony, she had been offered a position and returned to work with Wal-Mart post-injury, but after working for a period of time, she self-terminated that employment. (R. 44-45, Vol. 3).

The Claimant was able to find subsequent employment with at least three different employers making the same or comparable wages following her voluntary termination from Wal-Mart. (R. 140, Vol. 3). She worked at Elemo Pea from September, 2000, through March, 2001, which was the time span in which the second disc herniation occurred. (R. 147, Vol. 3). The Claimant did not return

to Dr. Clark until August 23, 2000, following his initial release of her. (General Exhibit 8, Dr. Clark's 8-23-00 note). After performing an updated MRI following that August 23, 2000 visit, Dr. Clark found that there was no present spinal defect, that there was no recurrent disc herniation and that the Claimant was not in need of any additional medical care. (General Exh. 8, Dr. Clark's 10-9-00 note). Dr. Clark had found that after examining her on August 23, September 11, October 9, and on November 6, 2000, she had no evidence of any new changes or any recurrent or residual neural compression. (General Exh. 8, Dr. Clark's 1-26-01 note). Dr. Clark did not change his MMI date or impairment rating from his previous findings in June, 1999, based on these **objective medical findings**. Id.

The Claimant testified, and Dr. Patel's records show, that he treated her for various ailments, illnesses and complaints for numerous injuries and issues, both pre- and post- injury. On February 20, 2001, she reported right-sided back pain with right leg pain, **which Dr. Patel diagnosed as acute**. (Claimant Exh. 12, Dr. Patel's 2-20-01 note). As noted in a previous argument, the medical term acute does not denote an ongoing or progressive problem, but rather a new and recent trauma. By February 26, 2001, she reported she still had a persistent cough and back pain. At this time, she was no longer working for Wal-Mart, but was working for Elemo Pea. An MRI was recommended in March of 2001, based on her new complaints. (Claimant Exh. 12, Dr. Patel's 3-6-01 note). At that time, the Claimant's complaints, per her own testimony, were different in that they were on the **right side rather than the left side**. (Claimant Exh. 12, Dr. Patel's 2-20-01 note). The Claimant sought medical care from a different neurosurgeon, Dr. Engelberg, rather than returning to Dr. Clark.

In Sections E. and F./Cross-Appeal of her brief before this Court, the Claimant makes much of the fact that seeing Dr. Engelberg was an "emergency" decision and that she should have been allowed to see Dr. Clark, or any other neurosurgeon, with or without the Employer and Carrier's

approval. This is simply not the case. Section 71-3-15 of the Mississippi Code states:

> Referrals by the chosen physician 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 employee 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 may be authorized to obtain such treatment at the expense of the employer or carrier.

(Emphasis added). The Claimant has completely ignored the language in the statute that was inconvenient to her, which states that there can be **only one physician** within the specialty of neurosurgery selected in her claim. This means that she cannot choose another neurosurgeon aside from the approved neurosurgeon, Dr. Clark, for her treatment, nor can she have Dr. Patel refer her to a different neurosurgeon without Commission approval. Claimant submitted no proof demonstrating why she did not return to Dr. Clark or to justify that Dr. Clark was actually refusing to treat her. Further, she failed to exhaust her remedies with the Mississippi Workers' Compensation Commission. In essence, she simply sought care from an unauthorized neurosurgeon, Dr. Engelberg and Dr. Friedman, while she was clearly represented by counsel in this matter. In addition, she never informed Dr. Engelberg or Dr. Friedman she was seeking treatment for a work-related injury.

The Claimant simply wishes to spin the facts in her favor by alleging that she falls under the "emergency exception" of this statutory provision, which is simply not the case. In no way was the Claimant's situation emergent in that Dr. Clark could find absolutely nothing wrong with her back, either new or recurring, in the Summer and Fall of 2000. It was only well after she voluntarily terminated her employment with Wal-Mart and started her job with Elemo Pea that a problem was detected through objective testing, and that problem was said by her own physician, Dr. Patel, to be

acute in nature, not ongoing or progressive. Claimant has never testified to an emergent situation, there is no medical testimony to support a claim of an emergent situation by any physician and the defense was never raised by Claimant. In addition, even had the care been emergent, evidence of same should have been submitted under said exception to the Commission immediately following the Claimant's need to seek same outside the chain of physicians.

The Claimant cannot have her cake and eat it too, so to speak. She did not meet her burden of showing that Wal-Mart or its carrier were responsible for this new injury before selecting either a new neurosurgeon and proceeding with either the second or third surgery that was not found to be necessary until after 2001. The Claimant's situation was far from emergent when Dr. Clark found nothing out of the ordinary about her exam or diagnostic test results in the Fall of 2000, and the Claimant waited until 2001, to see the doctor again, after which a new injury was detected. Whether her duties with Elemo Pea were sedentary or not, it is clear that she did not herniate her disc a second time while working for Wal-Mart both through the medical evidence and her own testimony, which was quoted in Section C. of the Reply Brief of the Employer and Carrier herein. Further, she came to her physicians with different complaints than those she had at the time of her original work injury, for which she had long been at MMI, and after which she had continued to work for the Employer and other employers for over a year.

The Claimant would have this Court believe that the issue of whether the Employer and Carrier were responsible for this second disc herniation, despite overwhelming medical evidence showing that they were not, should have been completely overlooked and she should have been allowed to seek this unauthorized treatment and have the Employer and Carrier worry about who was really responsible at a later time. This is not the practice of the Mississippi Workers' Compensation Commission. The Employer and Carrier were entitled to have this matter heard before an

Administrative Judge before being required to submit to payment of medical treatment which was clearly not related to the original work injury based on sound objective medical evidence. Further, pursuant to Miss. Code Ann. §71-3-15, the Claimant is limited to her chain of physicians and must statutorily follow the guidelines for physicians' care to be compensable.

The Claimant states that Administrative Judge Thompson's order required the Employer and Carrier to pay indemnity and medical benefits associated with the original work injury in July, 1997. That is not disputed, and the Claimant is correct when she points out that the findings of Judge Thompson were not appealed after that order. Following said Order, benefits owed for that injury were paid by the Employer and Carrier. However, the second and third herniations and medical treatment related to both are not related to the original work injury, or at the very least, these issues are disputed, and therefore was not subject to Judge Thompson's original order. Judge Thompson did not rule on the second and third back conditions as those did not occur until after the Employer and Carrier were ordered to pay on the original work injury. In any event, the Employer and Carrier would not have been ordered to pay for this subsequent treatment without a hearing on the compensability of same.

Claimant failed to exhaust her remedies, follow statutory guidelines, and demonstrate that the second and third back condition were related based upon a reasonable degree of medical probability to the original work injury in July, 1997. The Claimant has conveniently ignored all these facts and the overwhelming medical evidence in her attempt at a sympathetic public policy argument that contains facts bearing no resemblance to the applicable law and evidence surrounding the second and third back conditions in this case. Claimant has no medical evidence in the record to support her new claim that each surgery was an emergent situation that entitled the Claimant to circumvent the litigation system and begin making choices completely outside the chain of referral,

at least without a proper hearing before an Administrative Judge as to whether the Employer and Carrier would be compelled to authorize same and/or whether said medical treatment was related to the work injury of July, 1997. The Claimant's arguments to this effect are tantamount to requesting that this Court throw out all procedural rules if they be deemed too "rigid" and "technical" for a particular claimant. This is not logical or proper.

Drs. Engelberg and Friedman may certainly ***not*** be deemed "initial specialists" as the Claimant would suggest, as this violates Section 71-3-15 of the Mississippi Code in every sense. The statute does not say that the treating physician can refer to not one, but three specialists in one specialty. In fact, the Claimant is entitled to **only one** specialist in a certain field, and the Claimant should have sought an immediate hearing from the Commission requesting authorization, or a hearing on the issue of compensability, rather than moving forward to treat on her own when she wanted or felt a need to see Dr. Engelberg, and then again Dr. Friedman. The facts clearly show neither of these were an emergent situation as there was no evidence of a new problem until months after she had left Wal-Mart's employ.

As to the reason the Employer and Carrier have not paid for this treatment pursuant to Judge Harthcock's more recent order as asserted by the Claimant, that is because the parties are still in litigation and appeals concerning whether this finding of liability is proper, as is evidenced by the numerous briefs with which this Court has been presented in this case, including this one. The Employer and Carrier are not required to comply with the order of Judge Harthcock until all appeals have been exhausted and a final determination has been made by the Courts.

Administrative Judge Harthcock found, based only upon the Claimant's testimony, that she was denied treatment with Dr. Clark, and as a result, was allowed to see a new physician. (AJ Harthcock Order, p. 13; Record Excerpt 1). The Employer and Carrier contend that the Claimant's

testimony regarding this was unsupported and contradicted by the facts and the circumstances. She simply failed to exhaust her remedies with the Mississippi Workers' Compensation Commission. In addition, as far as Dr. Engelberg's care, she never informed Dr. Engelberg that she was seeking treatment as a result of her work related injury, and this is evident from Dr. Engelberg's records and testimony contained in the record.

Proper referrals are required from initial physicians in order to impose costs on the Employer and Carrier. Miss. Code Ann. § 71-3-15; Cuevas v. Copa Casino, 828 So.2d 851, 857 (¶20) (Miss. 2002). The Court of Appeals in Wesson, 811 So.2d at (¶15), explained that the purpose of the statutory procedure for seeking medical treatment and permitting referrals only from those initial physicians must, in part, be to systemize the means by which medical costs are to be imposed on an employer. When one party is responsible for another party's expenses, it is critical that some control exists. Id. As previously noted, any additional referrals outside the initial referral (in this case, Dr. Clark) **must** be first authorized by the employer and carrier. Id. Therefore, medical treatment without such approval and the related expenses are not the responsibility of the Employer and Carrier. Id.

The same could be said for the third herniation treatment by Dr. Harry Friedman. The Claimant, on her own or through Dr. Patel, sought referral to yet a third neurosurgeon, Dr. Harry Friedman, again without authorization. As with the unauthorized referral to Dr. Engelberg, the Claimant has failed to supply any evidence as to why she did not seek recourse from the Commission if she believed this medical care to be related to her work-related injury, despite the overwhelming medical evidence to the contrary. The Claimant's decision to use her husband's health insurance to pay these medical expenses support that the Claimant could not meet her burden of proving a causal relationship. Otherwise, the Claimant and/or her counsel would have taken the

proper action and had the matter heard before the Commission at that time via Motion. Thus, the Full Commission clearly misapplied statutory law by recognizing the unauthorized treatment and finding the Employer and Carrier liable for such services in direct violation of Miss. Code Ann. § 71-3-15 (1) (Supp. 2003).

In regard to the requisite causal connection, Dr. Clark found nothing that objectively linked the Claimant's complaints in 2000, to the original work injury. Further, Dr. Engelberg has clearly testified that when she came to him, she did not report to him that the condition for which treatment was being sought was as a result of a work-related injury or a continuation of a work-related injury. (E/C Exh. 13, p. 29). He explained that the Claimant informed him that she was a housewife, and thus he never made any notation regarding her work status. (E/C Exh. 13, p. 21 and 22). Dr. Engelberg **would not** testify to a reasonable degree of medical probability that the Claimant's surgery and medical care that he provided to her were causally related to the July, 1997, work injury, contrary to the Claimant's claims. (E/C Exh. 13, p. 21, 30-31). In fact, Dr. Engelberg clearly testified that given her history, it was **likely** that the basis for which he performed surgery would have occurred sometime **after** the Claimant saw Dr. Clark in 2000. (E/C Exh. 13, p. 17-18). Dr. Engelberg was questioned regarding whether or not one rupture could predispose an individual to additional ruptures at the same location. (E/C Exh. 13, p. 25). Dr. Engelberg testified that this would be **speculative** and he could not provide an opinion based upon a reasonable degree of medical probability or certainty regarding that issue. (E/C Exh. 13, p. 26). Hence, this neurosurgeon could not and **would not relate the Claimant's treatment for which he was providing her care to her work-injury of July, 1997, based upon a reasonable degree of medical probability or certainty**.

Claimant has also not obtained an opinion from Dr. Clark relating her subsequent herniations

on the right side and treatment of same to her work injury of 1997. However, he has spoken on her subsequent treatment to some degree. Dr. Clark's records reflect that the Claimant did not see him after June 7, 1999, until August 23, 2000. (General Exhibit 8, Dr. Clark's 8-23-00 note). On September 11, 2000, she complained of pain, although Dr. Clark found no evidence of radiculopathy or new herniation. Dr. Clark commented at that time:

> She has previously undergone surgery at L5-S1 and one would wonder whether this constitutes really new pain or the same pain she was having at the point of her maximum medical improvement. Because of the **insistence of the changes and the difference in her pain syndrome**, we will proceed with a MRI of the lumbar spine with contrast.

(General Exhibit 8, Dr. Clark's 9-11-00 note). (Emphasis added).

In addition to the absence of any conclusive finding of causal relationship from Dr. Clark or Dr. Engelberg to the applicable medical and legal standards, Dr. Friedman also did not provide any statement causally relating the third herniation and subsequent surgery to a reasonable degree of medical probability or certainty to the Claimant's July, 1997, injury. The Claimant has provided no evidence to the contrary other than a blanket allegation that her "physicians" have causally related her second and third herniations and surgeries, which is not supported in any way by the objective medical evidence, as shown here.

Dr. Friedman's records indicate that the Claimant had undergone another MRI on June 26, 2002, at the request of Dr. Patel, revealing a defect at the same level but with resulting **right sided pain**. She was admitted for a third surgery by Dr. Friedman on July 31, 2002. (General Exhibit 8, Dr. Friedman's 7-31-02 note). In the admission note, Dr. Friedman reviews the Claimant's history and notes that Dr. Clark had previously done surgery for a symptomatic disc on the **left**. (General Exhibit 8, Dr. Friedman's 7-31-02 note). He noted that later, she was diagnosed with another ruptured disc with **right** sided pain for which she ultimately had surgery by Dr. Engelberg. (General

Exhibit 8, Dr. Friedman's 7-31-02 note). He noted the surgery he performed was again for **right** sided symptoms. (General Exhibit 8, Dr. Friedman's 7-31-02 note).

After all the disputes regarding the medical providers and proper authorization for same, and knowing well the proper procedures to follow by this point, the Claimant sought yet another opinion from a non-surgical physician, Dr. Rahul Vohra, on her own or at the behest of her attorney, but she was never referred to Dr. Vohra by a board certified specialist and no showing has ever been made that Dr. Vohra's treatment was reasonable and necessary at all, least of all based on a work related injury. Dr. Vohra is a physical medicine and rehabilitation specialist, not a neurosurgeon. He was not referred by a neurosurgeon. Although an expert in his field, in this case, he is not an authorized treating physician. He has acknowledged that he was hired by the Claimant's attorney in this case merely to provide opinions on extent of disability and causation, although he has not been following the Claimant's treatment from the time of her work injury and is therefore not in a position to make determinations as to causation to the original work injury in 1997. Hence, his opinion lacks weight, especially on the issue of causal connection. Therefore, the **speculative** opinions of Dr. Vohra should have been discounted.

It is a well-established rule that treating specialists' opinions carry more weight than that of a general practitioner or a physician **outside of the specific area of expertise**. Larson's Workers' Compensation Law, §130.054)(b)(2000).Additionally, the Mississippi Workers' Compensation Commission has held that testimony by specialists in the particular field in question should be given more weight than that of a **general practitioner or other type of specialist**. Roberts v. Hunter Engineering Co., 2000 WL 1778994 (Mississippi Workers' Compensation Commission, Nov. 29, 2000). (Emphasis added). See also Johnson v. Ferguson, 435 So.2d 1191 (Miss. 1983). The Mississippi Supreme Court has addressed situations similar to the one outlined above. It has held that

when there are cases where medical opinions are conflicting in a workers' compensation claim, **the credible opinion of the treating specialist generally carries more weight** than the opinion of other physicians who have not examined the Claimant as thoroughly or completely as the treating physician, or who do not have the level of expertise needed to form such opinions and can only offer conjecture. Clements, 739 So.2d at 479 (¶ 9). See also Aden, 474 So.2d at 593. (Emphasis added).

The Administrative Judge and Full Commission found that the Claimant's second and third injuries were related to her original work injury solely based upon a comment made by Dr. Vohra in response to a hypothetical question in which he stated that, statistically speaking, the Claimant was more likely than not susceptible to reherniation. Dr. Vohra testified:

> I think there's clearly no doubt that this person was more likely to herniate at L5-S1 after she had her first surgery than had she not had a disk herniation in the first place. I think that's statistically speaking that's clear. As to absolutely telling you the causation, as I said previously, **I don't think there's any way to tell you for sure**.

(Claimant Exhibit 9, page 22). (Emphasis added). Therefore, although Dr. Vohra testified that a reherniation was more likely than not to happen as a result of a previous herniation, he did not testify that it did happen as a result of the Claimant's work injury in 1997, and he certainly did not say that this is the chain of events in every similar case. Even if this Court gave weight to Dr. Vohra's opinion in this matter, when reviewed in its entirety, Dr. Vohra testified there was no way to say to the appropriate medical and legal standards what the cause of the second and third disc herniations would be, but that in his opinion, **statistically speaking**, a percentage of patients **can** re-herniate. (Claimant Exhibit 9, p. 13). Dr. Vohra testified during cross examination that he could not state to a reasonable degree of medical certainty that the Claimant's right sided herniation and resulting surgery fell within this percentage of patients. He also acknowledged that the fact that she sustained the first herniation would not necessarily be the only cause of subsequent herniations. (Claimant

Exhibit 9, p. 20). Given that the herniation and symptoms were on the opposite side from the original injury, this lends even more weight to the fact that Dr. Vohra's opinion is nothing more than statistical and speculative in nature and not supported by objective medical findings.

Furthermore, Dr. Vohra testified that a cough could cause a herniation. (Claimant Exhibit 9, p. 14). It is quite clear from the Claimant's medical records that she complained of a cough with accompanying pain over a year after she reached MMI for the original work injury, but before she underwent the second surgery and was diagnosed with the second herniation. While this could be a medical coincidence, it is also evidence that there was the possibility of an intervening event in the way of a cough, which contributed to her herniation, if it was not some event that occurred at Elemo Pea. In March, 2001, the Claimant was diagnosed with pneumonia and suffered from a persistent cough. (Claimant Exhibit 12, Dr. Patel's 01-18-01, 01-16-01, 02-06-01; and 02-07-01 office notes).

After reviewing all of the available testimony, including that by way of medical affidavits, this Honorable Court is charged with determining whether any of the Claimant's physicians could render an opinion as to causation in terms of probabilities and not possibilities. Harrell, 856 So.2d at (¶30). In this case, the treating physicians and neurosurgeons, Dr. Clark, Dr. Engelberg and Dr. Friedman, did not provide an opinion based upon a reasonable degree of medical certainty or probability that the Claimant's herniations on the right side, two subsequent surgeries, associated medical care and disability, are related to the work injury of 1997. The Claimant's own expert, Dr. Vohra, only expressed that it was **possible** since a percentage of patients **can** re-herniate, but do not necessarily always do so. This rises to the level of speculation and conjecture, but nothing more. This opinion was obviously not based upon the required reasonable degree of medical probability as is required. Dr. Vohra was speaking in terms of hypothetical patients and not necessarily this Claimant's treatment, by his own admission.

In the present case, case law and statutory authority supports that the medical proof has only demonstrated that the first surgery for the **left** sided herniation performed by Dr. Clark was caused by the work incident in August, 1997. All medical and indemnity benefits associated with this injury have been paid by the Employer and Carrier pursuant to the Administrative Judge's initial order, which did not include treatment and injuries concerning a second and third back condition or herniations. There have been no medical opinions based upon a degree of medical probability presented by the Claimant to establish that the **right** sided herniations and subsequent medical care for those injuries were a result of the August, 1997, work injury, or any work injury with Wal-Mart. Simply because a herniation is found to be at the same disc level, does not necessitate a finding that all herniations at that level are connected. Rather, there are different symptoms and parts of the spine that may be affected on that disc level, and in this case, the Claimant's symptoms were different and medical evidence supports that these differences translate into a new or intervening injury.

There is no question that Dr. Clark, or even Dr. Engelberg or Dr. Friedman, were in a better position to provide a more informed and credible opinion on whether the Claimant's medical conditions for which they provided care are work-related, and to determine the true cause of those conditions. It is elementary workers' compensation law that there must be a causal connection provided by a physician which is based upon a reasonable degree of medical probability. None of the Claimant's treating physicians, not even the Claimant's own expert, Dr. Vohra, provided a medical opinion that rose to this standard that the Claimant's right sided herniations and subsequent treatment for same were related to a work incident at Wal-Mart. The requisite burden of proof was not satisfied by the physician's records and testimony, and accordingly, there should be no findings of disability under the Mississippi Workers' Compensation Act as to the second and third herniations and all treatment and disability related thereto. See Miss. Code Ann. § 71-3-3, 71-3-7 (Rev. 1993); See also,

Edwards v. Marshall Durbin Farms, Inc., 754 So.2d 556, 560 (¶16) (Miss.Ct.App. 2000). The award of benefits equates to reversible error. The only evidence offered by the Claimant, nearly by her own admission, is her own self-serving testimony and allegations that, in her situation, the well-established statutory authority and procedures of the Commission should be ignored by this Court. The Employer and Carrier have never acted outside the scope of the Mississippi Workers' Compensation Act in regard to having these matters heard and considered by the Courts, requiring the Claimant to meet her burden of proof, and there is no basis for such gratuitous allegations by Claimant as proven herein.

In response particularly to the Claimant's allegations that the Employer and Carrier failed to "dispute with the Commission" payment of the treatment of Dr. Engelberg, Dr. Friedman and Dr. Vohra, the Employer and Carrier would argue that their treatment was admittedly outside of Miss. Code Ann. §71-3-15, Claimant failed to demonstrate a showing of causal relationship, and failed to request the outside care pursuant to Miss. Code Ann. §71-3-15. By her own admission, she readily filed these medical expenses on her health insurance . There is clear evidence that the Claimant's new problems were not related to the work injury. The burden did not lie with the Employer and Carrier to controvert this medical treatment. See Miss. Code Ann. §71-3-37. In fact, it should have been the Claimant that had sought relief from the Commission before starting treatment with new and unauthorized physicians if she intended to argue that this treatment was related to the original work injury. See Miss. Code Ann. §71-3-15. Regardless, to say that these were not an issue before the Commission is completely erroneous and a misstatement to the Court. The Administrative Judge was asked at the hearing in this matter to consider these issues directly. (AJ Harthcock Order p. 1-2, Record Excerpt 7). What Claimant failed to do was follow Miss. Code Ann. § 71-3-15 prior to seeking care from a second and third neurosurgeon, including two surgeries, after she already had a

treating neurosurgeon approved by the Commission. Claimant is now attempting to place liability elsewhere for this duty, or years later allege an emergent condition to circumvent the statute.

Consequently, the Order of the Administrative Judge and the Full Commission as to the findings that the second and third back conditions were related and that the Employer and Carrier are responsible for treatment rendered by all physicians, including Dr. Patel, after June, 1999, were clearly erroneous and in violation of statutory law. These opinions are not supported by substantial evidence and should be reversed. However, the Circuit Court's decision that the Employer and Carrier are not liable for the medical services of Dr. Engelberg, Dr. Friedman and Dr. Vohra based on the very clear language of Miss. Code Ann. § 71-3-15 (1) (Supp. 2003) should stand as it is the only decision by any of these Courts that follows appropriate statutory law and may be supported by the substantial medical evidence in this case.

II. WAL-MART HAS NOT ENGAGED IN A WILLFUL PATTERN OF BAD FAITH IN THIS OR ANY OTHER CLAIM, AND THIS ARGUMENT BY THE CLAIMANT/CROSS-APPELLANT IS IRRELEVANT, INAPPROPRIATE, IRRESPONSIBLE AND NOT BASED ON ACCURATE FACTS AND INFORMATION AND SHOULD BE BARRED AND/OR STRICKEN.

Because the Claimant wishes to circumvent the statutory authority and case law surrounding her workers' compensation claim, she has reasoned that support can be found for her arguments, if not in the actual evidence of the case, then in the libelous assertion that Wal-Mart has engaged in a "willful pattern of bad faith" when it failed to accept **her** claim as compensable, despite overwhelming medical and other evidence that proves that Wal-Mart and its carrier did so in good faith. Employer and Carrier do hereby move to strike any and all argument relating to same as improper and insofar as said claims have not been an issue raised prior to this Court on appeal or as a cross-appeal.

Without waiving the foregoing Motion, it is pointed out that the Claimant does not make room

for even the possibility that the Employer and Carrier had statutory basis for denying her original injury initially, which was that all of the evidence had not yet been presented, and once it was, there was not clear evidence that the injury was work-related. Nonetheless, when an order was issued by the Administrative Judge to pay benefits, the Employer and Carrier met all their obligations under said order in good faith with regard to the injury in July, 1997.

As to the second and third herniations, the Claimant has not provided sufficient evidence that these are work related, Claimant sought medical care outside the Act, and the claim remains on appeal with no final order from this Court at this time. In regard to extent of permanent disability, Employer and Carrier have also appealed this issue, as discussed in briefs to this Court. As such, the non-payment of benefits associated with these subsequent injuries is once again based in good faith, as is outlined in detail in briefs, is statutorily allowed, and further, no final order has been rendered on appeal. The Employer and Carrier are entitled to be heard by all appellate courts as to their interpretation of the evidence presented before they can be required to pay any benefits associated with the second and third herniations and medical treatment related thereto.

The Claimant's argument as to "willful pattern" makes one believe that her position is that no one is entitled to an appeal on legitimately disputed issues unless it is a claimant who feels that he or she has been wronged. As was shown by the Circuit Court's findings, there is a legitimate dispute as to these issues, even though the Claimant would like to pass the Circuit Court's decision off as simply "rigid" and "technical", in her own opinion. Her grievances should be taken up with the legislature, who drafted these statutes, rather than by making inappropriate, irresponsible and irrelevant comments about the Employer and Carrier. These issues remain on appeal and this Court has yet to render a final order. As such, it is irresponsible and reprehensible for the Claimant to make such strong allegations concerning willful pattern and practice and bad faith in an attempt to

circumvent the issues on appeal.

The Claimant puts forth Exhibits concerning the case of Wal-Mart Stores, Inc. and American Home Insurance Company v. Ricky Towery in an attempt to prove a willful pattern of some sort. Employer and Carrier move to strike any discussion of same as that case is currently on appeal and may be coming to this Court. Therefore, any premature review is improper to not only Wal-Mart but also Ricky Towery. Thus, discussion by Claimant herein of another pending case not ripe to be heard at this Court is erroneous and prejudicial. Further, Claimant failed to introduce all Orders in said case, including the Administrative Judge's Order finding said claim non-compensable. Second, this case has no relevance whatsoever to the instant case and simply serves as a distraction and a red herring in the Claimant's hopes that this Court will misdirect its attention away from the Claimant's failure to prove causal relationship as to her second and third back conditions.

In essence, any party is entitled to continue the appeal process until a final order is rendered by the highest court, and there is no basis in alleging bad faith simply because the Employer and Carrier wish for all appeals to be exhausted in cases where there is good faith evidence supporting a denial and a continued argument for same, just as in this case. These arguments have no place here and should be stricken and/or ignored by this Court in favor of looking at the available relevant evidence in the record. Further, Employer and Carrier again move that this issue be barred, as it was never alleged by the Claimant at either of the hearings before an Administrative Judge or during any other part of this ongoing appeal process. The law states that, if evidence is not presented in the record of this case at trial/hearing, then the party is barred from asserting same on appeal. See Douglas v. Blackmon, 759 So.2d 1217, 1221 (Miss. 2000).

CONCLUSION

For good cause shown, the Employer and Carrier respectfully request that this Honorable Court reverse the findings of the Full Commission and the Circuit Court that the Claimant is permanently and totally disabled as the evidence shows that the Claimant failed to satisfy the requisite burden of proof of any loss of wage earning capacity or permanent disability. The Claimant reached maximum medical improvement for the work injury on June 7, 1999, and is not owed any additional temporary total disability benefits or medical benefits after that time, including those medical expenses incurred with Dr. Patel after the MMI date, as these bills have been shown to be non work-related based on the arguments herein.

The Employer and Carrier further request that this Honorable Court uphold the findings of the Circuit Court holding that they are not responsible for the second and third back conditions suffered by the Claimant, as well as all medical treatment related thereto. The Circuit Court's finding that the Employer and Carrier are not responsible for the treatment rendered by Drs. Engelberg, Friedman and Vohra are correct, and based upon the clear language of the statute. This finding should be extended to the care rendered by Dr. Patel post-second and third surgery as well. The Employer and Carrier further request that this Court strike Claimant's improper appeal issues never before raised prior to this appeal, and referrals to documents not contained in the record.

WAL-MART STORES, INC., Employer, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Carrier

BY: WILKINS, STEPHENS & TIPTON, P.A.

BY: _____

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CERTIFICATE OF SERVICE

I, ROXANNE P. CASE, attorney for the Employer and Carrier, do hereby certify that I have this day served via U.S. Postal Service, a true and correct copy of the above and foregoing **BRIEF FOR THE EMPLOYER AND CARRIER/APPELLANT**, to:

Lawrence J. Hakim, Esquire
Charlie Baglan & Associates
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Honorable Ann Hannaford Lamar
Circuit Court Judge
Circuit Court of Tate County, Mississippi
201 Ward Street
Post Office Box 707
Senatobia, Mississippi 38668

THIS the 11th day of January, 2008.

ROXANNE P. CASE