IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WAL-MART STORES, INC. AND
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA — *EMPLOYER/CARRIER/APPELLANT*

V. — CASE NO. 2007-WC-00539

TERESA G. PATRICK — *CLAIMANT/APPELLEE*

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

BRIEF FOR THE EMPLOYER AND CARRIER/APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

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

This the 11 day of September, 2007.

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TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PARTIES i

TABLE OF CONTENTS ii

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES ..... iii-v

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 19

ARGUMENT 21

I. STANDARD OF REVIEW 21

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S FINDING THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED 21

III. UNDER THE LAST INJURIOUS EXPOSURE RULE, ELEMO PEA SHOULD BE LIABLE FOR THE CLAIMANT'S ENTIRE COMPENSATION AFTER THE CLAIMANT REACHED MMI FOR THE WORK RELATED INJURY ON JULY 28, 1997 29

IV. THE CLAIMANT FAILED TO SATISFY THE REQUISITE BURDEN OF PROOF IN REGARD TO THE MEDICAL EVIDENCE PRESENTED TO CAUSALLY RELATE THE CLAIMANT'S MEDICAL CARE POST SECOND AND THIRD SURGERY PROVIDED BY DR. PATEL 31

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

STATUTES **Page**

Miss. Code Ann. § 71-3-3 (Supp. 2003) 22

Miss. Code Ann. § 71-3-7 (Supp. 2003) 28

Miss. Code Ann. § 71-3-15 (Supp. 2003) 19, 20, 23, 32

Miss. Code Ann. § 71-3-17 (Supp. 2003) 22

CASES

Cedeno v. Moran Hauling,
769 So.2d 203 (Miss.Ct.App. 2000) 30

Clements v. Welling Truck Svcs., Inc.,
739 So.2d 476 (Miss.Ct.App. 1999) 25

Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings,
419 So.2d 211 (Miss. 1982) 21

Edwards v. Marshall Durbin Farms, Inc.,
754 So.2d 556 (Miss.Ct.App. 2000) 27

Fowler v. Durant Sportswear, Inc.,
203 So.2d 577 (Miss. 1967) 27

Garrett v. Wade,
259 So.2d 476 (Miss. 1972) 32

Harper v. N. Miss. Medical Ctr.,
601 So.2d 395 (Miss. 1982) 21

Hedge v. Leggett and Platt, Inc.,
641 So.2d 9 (Miss. 1994) 31

Jackson Ready-Mix Concrete v. Young,
236 Miss. 550, 111 So.2d 255 (1959) 28

Johnson v. Ferguson,
435 So.2d. 1191 (Miss. 1983) 25

CASES **Page**

Lee v. Singing River Hospital,
908 So.2d 159 (Miss.Ct.App. 2005) 21

M.T. Reed Construction Co. v. Martin,
215 Miss. 472, 61 So.2d 300 (1952) (*overruled on irrelevant grounds*) 22

McCluskey v. Thompson,
363 So.2d 256 (Miss. 1978) *(overruled on irrelevant grounds)* 22

Moore v. Independent Life & Accident Insurance Co.,
788 So.2d 106 (Miss.Ct.App. 2001) 27

Penrod Drilling Co. v. Ethridge,
487 So.2d 1330 (Miss. 1986) 27

Pilate v. International Plastics Corp.,
727 So.2d 771 (Miss.Ct.App. 1999) 21

Pittman v. Hodges,
462 So.2d 330 (Miss. 1984) 31

Pontotoc Wire Products Co. v. Ferguson,
384 So.2d 601(Miss. 1980) 22

Reading & Bates, Inc. v. Whittington,
208 So.2d 437 (Miss. 1968) 28

Roberts v. Hunter Engineering Co.,
2000 WL 1778994 (Mississippi Workers' Compensation, Nov. 29, 2000) 25

Smith v. Jackson Constr. Co.,
607 So.2d 1119 (Miss. 1992) 21

South Central Bell Telephone Co. v. Aden,
474 So.2d 584 (Miss. 1985) 25

Stewart v. Singing River Hospital,
928 So. 2d 176 (Miss. Ct. App. 2005) 23, 24, 25

Tyson Foods, Inc. v. Thompson,
765 So.2d 589 (Miss.Ct.App. 2000) 21

CASES **Page**

Wagner v. Hancock Medical Ctr.,
825 So.2d 703 (Miss.Ct.App. 2002) 21

Walker Manufacturing Co. v. Cantrell,
577 So.2d 1243 (Miss. 1991) 26-27

Wesson v. Fred's, Inc.,
811 So.2d 464 (Miss.Ct.App. 2002) 21

United Methodist Senior Services v. Ice,
749 So.2d 1227 (Miss.Ct.App. 1999) 30, 31

University of Mississippi Medical Center v. Smith,
919 So. 2d 1209 (Miss.Ct.App. 2005) 27

RULES

Mississippi Workers' Compensation Commission Procedural Rule 9 17

OTHER AUTHORITY

Dunn, Vardaman S., Mississippi Workmen's Compensation § 73 (3d ed. 1990) 22

Dunn, Vardaman S., Mississippi Workmen's Compensation, § 74 (3d ed. 1990) 22

Dunn, Vardaman S., Mississippi Workmen's Compensation, § 273 (3d ed. 1990) 29

STATEMENT OF THE ISSUES

THE FINDINGS OF THE FULL COMMISSION AND THE CIRCUIT COURT THAT THE CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED ARE BASED UPON A MISAPPLICATION OF LAW AND NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE AND AS A RESULT ARE IN ERROR.

1. **THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S FINDING THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.**

2. **UNDER THE LAST INJURIOUS EXPOSURE RULE, WAL-MART SHOULD NOT BE LIABLE FOR THE CLAIMANT'S ENTIRE COMPENSATION AFTER THE CLAIMANT REACHED MMI FOR THE WORK RELATED INJURY ON JULY 28, 1997.**

3. **THE CLAIMANT FAILED TO SATISFY THE REQUISITE BURDEN OF PROOF IN REGARD TO THE MEDICAL EVIDENCE PRESENTED TO CAUSALLY RELATE THE CLAIMANT'S MEDICAL CARE POST SECOND AND THIRD SURGERY PROVIDED BY DR. PATEL.**

STATEMENT OF THE CASE

Teresa Patrick has alleged a work-related injury which occurred on July 28, 1997. This was originally a denied claim; however, a hearing was held on September 14, 1999, in this matter before Administrative Judge Linda A. Thompson, following which Judge Thompson found that the Claimant had been found to have sustained a work-related injury and ordered that the Employer and Carrier pay temporary total disability benefits at the rate of $187.01 per week, beginning July 8, 1998, and continuing until June 9, 1999, with credit for any wages earned by the Claimant during this time. (AJ Thompson Order, p. 11); See Record Excerpt 8. A determination of permanent occupational disability or loss of wage earning capacity was reserved until a later date by the Administrative Judge. (Id. at 11-12); See Record Excerpt 8.

The second hearing was held on July 14, 2005, on the issue of causation of the Claimant's subsequent injuries and extent of disability. Prior to the hearing, the parties stipulated that the Claimant sustained a work accident on July 28, 1997, injuring her lower back, that her average weekly wage was $280.51 and that the Claimant was paid $9,649.29 in disability benefits from July 8, 1998, until November 2, 1999, at a rate of $187.01 per week. (AJ Harthcock Order, p. 1-2); See Record Excerpt 7.

The testimony demonstrated that Ms. Patrick finished at least the tenth grade in high school and has made attempts to obtain her GED, actually passing all but the essay portion of the GED. (R. 13, Vol. 3). She also has taken classes in conjunction with passing this test. Id. In regard to her work history, prior to working for Wal-Mart, she has testified that she was employed with Hollywood Casino as a slot attendant, and at Pyroil, a chemical plant, for ten years where she operated machines, worked on the lines, packed boxes, and drove a forklift. (R. 14-16, 48 and 52, Vol. 3). While working for Wal-Mart, she has testified that she worked as a grocery stocker and in

the accounting office. (R. 16-17, 19-21, Vol. 3).

The Claimant's testimony during the hearing demonstrated that post injury, after being released by Dr. Clark, she returned to work for the Employer. (R. 28-30, 53-54, Vol. 3). She testified she attempted to perform her work until she voluntarily terminated her employment with Wal-Mart. (R. 44-45, Vol. 3). She testified that, after working for Wal-Mart, she was able to find employment with several employers and earn wages at the same level as her employment with Wal-Mart. (R. 140, Vol. 3; AJ Harthcock Order, p. 3); See Record Excerpt 7. In 1999, she began to work for Allied Enterprises, a Vocational Rehabilitation facility. (R. 34-36, Vol. 3). She explained in the initial hearing as found by Judge Thompson:

> she is taking course through Vocational Rehabilitation to get her GED certificate, and she hopes to go on to take some college courses. She explained that she is interested in bettering her employment status through education.

(R. 35, 41-42, Vol. 3; AJ Thompson Order, p. 5); See Record Excerpt 8.

The Claimant testified that she also was able to obtain employment with a retail clothing store named Elemo Pea in 2000. (R. 147, Vol. 3). According to the Claimant, this was only a part-time position as a sales clerk which allowed her to earn approximately $5.95 per hour and eventually, she earned $7.50 per hour. (R. 147-48, Vol. 3). She testified that she would work approximately two to five hours per day, three days per week. Id. She acknowledged that she was required to perform some managerial functions and in fact, was left in charge of the store on many occasions. (R. 148, Vol. 3). When she completed a subsequent employment application at Portrait Studio, it was confirmed that she informed Portrait Studio/PCA that she was working for Elemo Pea as a manager earning $7.50 per hour when she left. (R. 147, Vol. 3). The Claimant further confirmed that she had worked for Elemo Pea from September 2, 2000, through March 18, 2001, when the store

closed. Id.

Ms. Patrick testified that she worked for Portrait Studio/PCA after her work injury. (R. 109, 140-44, Vol. 3). She testified that she worked as a photographer in Senatobia, Olive Branch and Southaven, Mississippi. (R. 141, Vol. 3). In addition, the Claimant testified that she was required to process orders, including taking money from customers and changing the film. (R. 109, 140-41, Vol. 3). She explained that she was trained on the job for this employment. Id. She further explained that the position had allowed her to work approximately eight hours a day, five days a week, and she earned approximately $8.00 per hour. (R. 142, Vol. 3). Ms. Patrick testified that her PCA personnel file demonstrated that she was hired for this position at the end of August, 2001, and she voluntarily resigned from this job at the end of October, 2001. (R. 109, Vol. 3). The Claimant maintained that she was not aware of the fact that she was actually hired to perform a managerial job with this company, however, she eventually acknowledged that she was at least working toward a manager position. (R. 144, Vol. 3). The Claimant confirmed that the personnel records submitted and introduced from Portrait Studio indicated that the Employer categorized the Claimant as a manager. Id.

The Claimant introduced several job search lists in support of her claim for disability. (Claimant Exh. 10). The Claimant admitted that the initial job search from June 26, 2001, through August 24, 2001, resulted in a successful job search in that she was ultimately hired by Portrait Studio. (R. 140, 154, Vol. 3).

The Claimant further testified that Dr. Clark was her treating physician as a result of the original work-related injury. (R. 155, Vol. 4). She acknowledged that he released her to return to work with restrictions following her first surgery. Id. She further acknowledged that he released her to return on an as needed basis. Id.

The Claimant testified that her second surgery and corresponding medical care for same was with Dr. Jerry Engelberg. (R. 156, Vol. 4). She admitted that the second surgery was performed as a result of a disc herniation and resulting right sided problems, whereas the first surgery was for a herniation with resulting left sided problems. Id. She further testified that at the time she began treatment with Dr. Engelberg, she was, and had been, working at Elemo Pea. (R. 158, Vol. 4). She admitted that she had not been working at Wal-Mart when those symptoms necessitating the second or third surgery began. (R. 158-59, Vol. 4).

The Claimant further acknowledged that Morris Selby, a vocational rehabilitation specialist, met with her on one occasion. (R. 159, Vol. 4). She admitted that he did not help her with her interviewing skills. (R. 160, Vol. 4). She admitted that he did not help her to find other employment. Id. She admitted that he did not help her pinpoint what employers would be best from whom to seek employment, given her employment history, current restrictions, and capabilities. Id. She further admitted that she did not recall asking him to help her return to the work force. Id.

The Claimant further testified that she did suffer from other medical conditions, including a heart condition and a cervical herniation for which she was wearing a cervical collar during the time that she was evaluated by Mr. Selby in November, 2004. (R. 161-63, Vol. 4). She testified that, although she informed Mr. Selby that she was required to wear this collar at all times, except when she bathed and slept, she would take the collar off whenever she visited potential employers. (R. 163, Vol. 4). According to the Claimant, she would take it off in the car before she entered the place of business to apply for work. She felt that none of the employers would see her do this. (R. 164, Vol. 4).

Dr. Craig Clark's medical records were submitted into evidence at the initial hearing. (General Exh. 8). Dr. Clark is a neurosurgeon. Judge Thompson's previous Order summarized Dr.

Clark's medical records at the time of the initial hearing. Judge Thompson found that Dr. Clark "testified that assuming Ms. Patrick gave an accurate history, the disc rupture was caused by the lifting injury at Wal-Mart." (AJ Thompson Order, p. 9); See Record Excerpt 8. Administrative Judge Thompson further found that as of June 7, 1999, Dr. Clark had found that the Claimant had reached maximum medical improvement and found the following:

> He gave a permanent impairment rating of 10% to the body as a whole. Dr. Clark said the 30 pound lifting restriction should not be required to be permanent, that she should gradually lift more. He thought she should probably avoid bending and should be given the opportunity to sit or stand. Dr. Clark noted the functional capacity evaluation showed Ms. Patrick could lift twenty-five pounds.

(AJ Thompson Order, p. 9); See Record Excerpt 8.

Dr. Clark's records reflect that the Claimant did not see him after June 7, 1999, until August 23, 2000. (General Exh. 8, Dr. Clark's 8-23-00 note). At that time, Dr. Clark noted that the Claimant "has recently experienced increasing pain in the low back and left hip." Id. Dr. Clark went on to note that the Claimant had no lower extremity complaints. He recommended conservative care and to return in two weeks. Id. On September 11, 2000, she continued to complain of pain, although he found no evidence of radiculopathy. (General Exh. 8, Dr. Clark's 9-11-00 note); See Record Excerpt 9. 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.

Id.; See Record Excerpt 9.

On October 9, 2000, Dr. Clark reviewed the MRI which had been performed. He found there was no evidence at that time of a recurrent HNP or remarkable neural compression. (General Exh.

8, Dr. Clark's 10-9-00 note); See Record Excerpt 9. On November 6, 2000, Dr. Clark reiterated that the Claimant had minimal scarring and nothing present that would require surgery. (General Exh. 8, Dr. Clark's 11-6-00 note); See Record Excerpt 9.

On January 6, 2001, Dr. Clark opined that the Claimant's continued complaints since previously being placed at maximum medical improvement on June 7, 1999, were "a simple exacerbation of the same pre-existing complaints." (General Exh. 8, Dr. Clark's 1-6-01 letter); See Record Excerpt 9. Dr. Clark had found that after examining her on August 23, September 11, October 9, and November 6, 2000, she had no evidence of any new changes or any recurrent or residual neural compression. Id.; See Record Excerpt 9. Dr. Clark left the rating as 10% to the body as a whole. Id.; See Record Excerpt 9. Dr. Clark also provided an opinion that her work restrictions were essentially unchanged and should now be considered "permanent restrictions". Id.; See Record Excerpt 9.

By the Claimant's own testimony, she was treating with Dr. Patel, a general practitioner. Dr. Patel's records have been introduced via affidavit as Claimant Exhibit 12, and demonstrate that he treated her for various ailments, illnesses and complaints for numerous injuries and issues, both pre and post injury. Specifically, in January of 2001, she was seen with pneumonia. (Claimant Exh. 12, Dr. Patel 1-8-01 note). She was seen again on January 16, 2001, for follow up of pneumonia and left shoulder problems. (Claimant Exh. 12, Dr. Patel 1-16-01 note). On February 6, 2001, Dr. Patel's note documents that she returned, complaining that she "started to cough again!" (Claimant Exh. 12, Dr. Patel 2-6-01 note). She was seen again on February 7, 2001, indicating that the medicine was not helping. (Claimant Exh. 12, Dr. Patel 2-7-01 note). On February 20, 2001, she came back and reported back pain with right leg pain, which Dr. Patel diagnosed as acute. (Claimant Exh. 12, Dr. Patel 2-20-01 note). By February 26, she reported she still had the cough and back

pain. (Claimant Exh. 12, Dr. Patel 2-26-01 note).

By March 6, 2001, Dr. Patel felt Ms. Patrick's complaints of lower back pain on the right, radiating into the right leg, necessitated the need for an MRI. (Claimant Exh. 12, Dr. Patel 3-6-01 note). The MRI was performed and on March 8, 2001, Dr. Patel diagnosed a ruptured disc at L5-S1. (Claimant Exh. 12, Dr. Patel 3-8-01 note). His note of that date documents he referred her to Dr. Jerry Engelberg, a neurosurgeon, even though the Claimant had already been treated by a neurosurgeon, Dr. Clark, who was also referred by Dr. Patel. Id.

Dr. Jerry Engelberg's deposition was taken and has been submitted into evidence as Employer and Carrier Exhibit 13. Dr. Engelberg testified that he first saw Ms. Patrick on March 16, 2001, on referral from Dr. Patel. (E/C Exh. 13, p. 6, 8). He testified regarding his examination and that, upon review of the MRI and exam, he felt there to be nerve entrapment on the right side and, accordingly, recommended they move forward with surgery at L-5. (E/C Exh. 13, p. 10, 12). He testified that the surgery occurred on April 5, 2001, and following this surgery, he continued to follow Ms. Patrick through May 11, 2001, at which point he released her to return on an as needed basis. (E/C Exh. 13, p. 11, 13).

In regard to work, Dr. Engelberg testified clearly that he was never told that this was a work-related injury, and therefore, work or work status was not discussed. (E/C Exh. 13, p. 14); See Record Excerpt 10. He explained that Ms. Patrick informed him that she was a housewife, and thus he never made any notation regarding her work status. (E/C Exh. 13, p. 21-22); See Record Excerpt 10.

Dr. Engelberg confirmed that Ms. Patrick provided no history of a work-related injury. (E/C Exh. 13, p. 29); See Record Excerpt 10. Dr. Engelberg could not provide testimony based upon a reasonable degree of medical probability that the medical care that he provided treatment for to Ms.

Patrick was causally related to her work-related injury with Wal-Mart. (E/C Exh. 13, p. 21, 30-31); See Record Excerpt 10. In fact, Dr. Engelberg clearly testified that, given her history, it was likely that the condition for which he performed surgery would have occurred sometime after the Claimant saw Dr. Clark in 2000. (E/C Exh. 13, p. 17-18); See Record Excerpt 10.

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, the Claimant's unauthorized treating physician for the second surgery, a neurosurgeon, with Semmes-Murphy Clinic in Memphis, Tennessee, could not and would not relate the Claimant's treatment for which he was providing her care to her work-injury of July 28, 1997, based upon a reasonable degree of medical probability or certainty.

Dr. Engelberg did confirm that the medical care was filed under non-work-related insurance. He further confirmed that he made no referrals and that had Ms. Patrick contacted him about additional treatment, he would have been willing to see her. (E/C Exh. 13, p. 30).

The Claimant underwent a third surgery by Dr. Harry Friedman, yet another neurosurgeon who was unauthorized, as found by the Circuit Court. Dr. Friedman's medical records have been submitted under affidavit in this matter as Claimant Exhibit 11. The Claimant was referred to this third neurosurgeon by Dr. Patel. Dr. Friedman's records indicate that the Claimant had undergone another MRI on June 27, 2002, at the request of Dr. Patel, revealing a defect at the same level but with resulting right side pain. (Claimant Exh. 11, Dr. Friedman's 7-31-02 note; and Baptist Memorial Hospital 6-27-02 note). She was admitted for the third surgery by Dr. Friedman on July 31, 2002. (Claimant Exh. 11, Dr. Friedman's 7-31-02 note). In this admission note, Dr. Friedman

reviewed the Claimant's history and noted that Dr. Clark had done surgery for a symptomatic disc on the left. Id. He noted that later, she was diagnosed with another ruptured disc with right sided pain for which she ultimately had surgery by Dr. Engelberg. Id. Dr. Friedman noted that the third surgery, which he performed, was again for right sided symptoms. Id.

The Claimant's attorney sent the Claimant for an opinion with Dr. Rahul Vohra, a physical medicine and pain specialist, and has submitted his deposition testimony as evidence in this matter as Claimant Exhibit 9. Dr. Vohra testified that he had seen the Claimant at the request of the Claimant's attorney originally in October, 2001. (Claimant Exh. 9, p. 3, 18). Dr. Vohra admitted during cross-examination that it was not his position to actually provide treatment to Ms. Patrick, but simply to provide opinions on causation, restrictions and ratings. (Claimant Exh. 9, p. 18). He also admitted that his bills had been paid by the Claimant's attorney. (Claimant Exh. 9, p. 19).

Dr. Vohra explained during their initial visit that Ms. Patrick reported that she had undergone surgery by Dr. Clark, as well as Dr. Engelberg. (Claimant Exh. 9, p. 4-5). In October, 2001, he testified that he found, upon exam, evidence of left S-1 radiculopathy, and additional worsening pain over the last several months prior to the visit. (Claimant Exh. 9, p. 7). He noted at that time a new onset of bladder incontinence. Id. He assigned a 12% impairment rating and was concerned over the increased complaints, including leg pain and bladder incontinence. (Claimant Exh. 9, p. 14, 18). He referred the Claimant to Dr. Charles Secrest for evaluation of the incontinence complaints. (Claimant Exh. 9, p. 19). Dr. Secrest found that these complaints were secondary to abnormal bladder neck contraction patterns, and he recommended treatment through medication. (Claimant Exh. 9, p. 10). Dr. Vohra testified he next saw the Claimant on February 11, 2002. He explained that, in his opinion, Dr. Secrest could not relate the bladder problems to the pain in her lumbar spine on either the right or left side. (Claimant Exh. 9, p. 11).

The Claimant was asked to return to Dr. Vohra on September 15, 2003, after her third surgery with Friedman. Id. At that time, Dr. Vohra believed her exam was essentially unchanged and static. (Claimant Exh. 9, p. 12).

During his deposition in November 2003, Dr. Vohra was asked several lengthy, hypothetical and speculative questions by the claimant's attorney regarding Dr. Vohra's opinion on whether or not the initial disc herniation and the resulting surgery caused or contributed to the recurrent disc rupture on the right side. (Claimant Exh. 9, p. 13); See Record Excerpt 11. Dr. Vohra testified there was no way to say with certainty the cause of the second and third disc herniations but that, in his opinion, he could only say statistically speaking, that a percentage of patients can re-herniate. Id.; See Record Excerpt 11. Dr. Vohra testified during cross examination that he could not make this statement to a reasonable degree of medical certainty as to Ms. Patrick. (Claimant Exh. 9, p. 20); See Record Excerpt 11. He also acknowledged that the fact that the Claimant sustained the first herniation would not necessarily be the sole cause of any subsequent herniations. (Claimant Exh. 9, p. 20-21); See Record Excerpt 11.

In regard to the rating, Dr. Vohra explained that the initial 12% was as a result of the original injury; however, the onset of bladder symptoms did not occur until after the second surgery, and therefore, he testified that the second surgery would have resulted in the additional 4% impairment rating, to a total 16% assigned. (Claimant Exh. 9, p. 14). In regard to permanent restrictions as a result of the three disc herniations and the three resulting surgeries, Dr. Vohra testified that Ms. Patrick was limited to a light level of work. (Claimant Exh. 9, p. 15). Dr. Vohra elaborated that in regard to the restriction of light duty, the Dictionary of Occupational Titles generally meant no lifting more than 20 pounds occasionally, no repetitive bending, twisting or stooping, allow a change of positions from sitting to standing every hour as needed, and generally the person was restricted from

climbing at heights. (Claimant Exh. 9, p. 25).

Contained in the affidavit and records of Dr. Patel was a residual functional capacity questionnaire. (Claimant Exh. 12). It was determined that this was likely filled out on July 25, 2003, at the request of the Claimant in conjunction with a Social Security disability hearing. At that time, Dr. Patel had seen the Claimant on July 18, 2003, and diagnosed her with several conditions which he failed to mention in his July 25, 2003, report, including chronic diarrhea and vomiting, secondary to a previous cholecystectomy, hypertensive cardiovascular disease, chronic back pain syndrome and hematuria. (Claimant Exh. 12, Dr. Patel 7-18-03 note). In fact, Dr. Patel had scheduled the Claimant to undergo renal and pelvic ultra sounds in just the next week. Id. His medical records following that date reflect care for cough, cold, lower abdominal pain and other general ailments. In fact, on May 28, 2004, she reported catching a cold from one of her grandchildren, whom she had previously testified she was unable to see as a result of her ongoing medical problems. (Claimant Exh. 12, Dr. Patel 5-28-04 note; R. 108, 166, Vol. 4). By June 9, 2004, Dr. Patel saw the Claimant for a cough, but noted that her chronic low back pain was resolving. (Claimant Exh. 12, Dr. Patel 6-9-04). He also documented her appearance as to be well built, well nourished and not in any distress. Id. By September, 2004, she was diagnosed with cervical disc disease, including muscle spasms in the cervical area. (Claimant Exh. 12, Dr. Patel 9-1-04 note).

Claimant submitted testimony of Morris Selby as a vocational rehabilitation expert. Mr. Selby basically admitted that he was hired in this case to provide a vocational assessment and opinion only. (R. 208-09, Vol. 4). He acknowledged that he was not hired to work with the Claimant in any manner to attempt to rehabilitate her or actually help her return to the work force. Id. Mr. Selby testified that he was skilled and trained in helping a person find employment and that he had accomplished this in "thousands" of cases before. (R. 211, Vol. 4). However, in this case,

Mr. Selby did not utilize these skills for the benefit of Ms. Patrick. (R. 208-09, Vol. 4). In sum, Mr. Selby testified that the purpose of his evaluation was only to perform a vocational assessment, as requested by the claimant's attorney. (R. 209, Vol. 4). He was not asked to perform any type of placement or market survey. Id.

Mr. Selby testified that it appeared to him that the Claimant may have been heavily medicated during his testing. (R. 218, Vol. 4). He admitted in regard to his test results, which demonstrated that she was operating at a fourth grade level, that she may have done better had she not been so medicated at the time of testing. (R. 218-19, Vol. 4). Hence, he acknowledged that his testing results may not be accurate. (R. 220, Vol. 4). However, there is no evidence of any attempt on the part of Mr. Selby to re-test or to determine if, in fact, they were accurate results prior to rendering an opinion.

Mr. Selby did acknowledge that Ms. Patrick could read and write. (R. 206, Vol. 4). He also acknowledged that she was a younger individual, which was a significant factor in the work force and should have a positive effect on her ability to seek employment. (R. 206-07, Vol. 4). He further acknowledged that she had what would be considered good work experience in regard to her past work history. (R. 207, Vol. 4). He also acknowledged that she had some transferrable skills; however, he made no investigation into how many positions might be available to this Claimant with those transferable skills. (R. 215, Vol. 4).

Mr. Selby also acknowledged that not all light duty positions or occupations required transferable skills. (R. 208, Vol. 4). He testified that he did not look to see how many of those positions were available to a potential employee such as Ms. Patrick. He testified that he had not reviewed her job search efforts as well. (R. 208, 210, Vol. 4).

Mr. Selby could not disagree with the fact that a person with a strong work background such

as Ms. Patrick, who was also a long time resident in a certain county, would be attractive to local employers. (R. 217, Vol. 4). In all, Mr. Selby could not disagree with the fact that, based upon the doctor's testimony, Ms. Patrick is a person with a semi-skilled work background who was released to perform work at a light level. Mr. Selby further could not disagree with the fact that there is work available for individuals with the Claimant's skills in northwest Mississippi. (R. 217-18, 221, Vol. 4).

Mr. Selby also acknowledged that the work history contained in his report was not accurate. (R. 224-25, Vol. 4). He acknowledged that he had nothing in his report regarding her work with Portrait Studio. (R. 224, Vol. 4). Further, he had nothing in his report regarding her work as an accounting clerk at Wal-Mart. (R. 225, Vol. 4). He further admitted during cross-examination that he did not have a complete history at the time that he provided the report and that he had not taken any additional actions to obtain a complete history. (R. 226-27, Vol. 4). He also admitted throughout his testimony that many of his opinions were based upon assumptions.(R. 220-22, Vol. 4).

The Employer and Carrier introduced into evidence the records of David Stewart, vocational expert, as Employer and Carrier Exhibit 15, and Mr. Stewart testified at the second hearing in this capacity. Mr. Stewart provided sound testimony that Ms. Patrick has above-average worker aptitudes, as well as average worker aptitudes. (R. 239, Vol. 4). He found that she has worker temperaments which would help in her return to work. Id. He also testified that he had reviewed the county statistics which demonstrated that there was a strong overall economy in her area. (R. 240, Vol. 4). Mr. Stewart testified that there were a broad range of semi-skilled entry jobs or light duty jobs in the geographic area surrounding Ms. Patrick. Id. He further testified that the type of geographic area in which Ms. Patrick resided is an excellent area for potential employment. Id. He

stated that the growth sector was considered good in regard to an employee re-entering the work force. (R. 240-41, Vol. 4). He testified that, upon performing an initial labor market survey, he was able to identify employers who would consider Ms. Patrick. (R. 241, Vol. 4). He performed a labor market survey, identifying positions with ranges of salaries for those employers demonstrating a potential earning capacity of between $255.00 to $335.00 per week. (E/C Exh. 15). Ms. Patrick's average weekly wage at the time of injury was $280.51. Id. Mr. Stewart testified that there were light duty and sedentary positions that this Claimant should be able to perform, or at least attempt. (R. 241-42, Vol. 4). His testimony reflected that he had been willing to actually rehabilitate her or attempt to help her return to the work force but had not been allowed to meet and work with the Claimant. (R. 237, Vol. 4).

Mr. Stewart testified that many sedentary positions and light duty positions do allow on-the-job training. (R. 242, Vol. 4). Thus, he acknowledged that there were jobs that Ms. Patrick would be qualified for within her restrictions that would allow her to be trained on the job. Id. Mr. Stewart testified that, based upon his opinion as a vocational expert and to a reasonable degree of probability in the field of vocational rehabilitation services, Ms. Patrick was employable or capable of returning to the work force within her restrictions. Id.

Further, Mr. Stewart was asked to follow up on the Claimant's job search efforts. His vocational report, which is entered into evidence as Employer and Carrier Exhibit 15, demonstrates that he did follow up with at least ten of the alleged employers from whom the Claimant supposedly sought employment. (E/C Exh. 15). Out of those ten, he found that the Claimant actually did apply with only one employer. Further, that employer commented that the application was incomplete and filled out such that it would not necessarily be considered. Id.

Mr. Stewart testified that although he had been questioned hypothetically regarding the

residual functional capacity evaluation, the hypothetical did not change his opinion in regard to whether or not this Claimant was capable of returning to the work force. (R. 255, Vol 4). He testified that the residual functional capacity evaluation at issue in this case was typically filled out by the general practitioner for Social Security disability purposes rather than in the normal course of medical care or for workers' compensation purposes. (R. 243, Vol. 4). Mr. Stewart explained that it was his practice to rely on a specialist's opinions rather than the general practitioner's opinions, and that it was his understanding that this would also be the general practice of most other vocational rehabilitation counselors. (R. 243-44, Vol. 4).

In an Order dated September 6, 2005, Administrative Judge Harthcock found that the Claimant's 2001, right-sided disc rupture and 2002, recurrent, right sided disc rupture were causally connected to her July 28, 1997, work injury. (AJ Harthcock Order, p. 17); See Record Excerpt 7. The Administrative Judge further found that the evidence was insufficient to determine whether Dr. Charles Secrest's treatment was causally connected or medically necessary and reasonable because his records were not entered into evidence. (AJ Harthcock Order, p. 18); See Record Excerpt 7. The Administrative Judge also found the Claimant to be permanently and totally disabled and awarded benefits beginning July 28, 1999, and continuing for a period of 450 weeks at a rate of $187.10, with the Employer and Carrier entitled to proper credit for benefits paid. (AJ Harthcock Order, p. 19); See Record Excerpt 7. As a result of this finding the Administrative Judge found the issues of maximum medical improvement and temporary disability moot. Id.; See Record Excerpt 7. The Administrative judge also awarded payment of reasonable and necessary medical services. Id.; See Record Excerpt 7.

From this Order, the Employer and Carrier appealed to the Full Commission. The Claimant then filed a Motion for Leave to Add Additional Evidence regarding Dr. Secrest's treatment for

bladder incontinence. The Employer and Carrier filed a response informing the Commission that the evidence presented was in direct violation of MWCC Procedural Rule 9. In addition, the Employer and Carrier pointed out that Dr. Vohra had already addressed the lack of causal relation of Dr. Secrest's treatment in his deposition, which was properly entered into evidence before the Administrative Judge. Given the voluminous nature of the records and exhibits in this claim, this testimony may not have been noticed by the Administrative Judge or the Full Commission. Dr. Vohra already had testified and explained that in his opinion, Dr. Secrest could not relate the bladder problems to either the right or left side pain in her lumbar back. (Claimant Exh. 9, p. 11).

The Full Commission summarily affirmed the findings of the Administrative Judge without comment. See Record Excerpt 6. In addition, the Full Commission denied the Claimant's Motion for Leave to Add Additional Evidence, and the matter was remanded to the Administrative Judge to rule on the causal relation of Dr. Secrest's bladder treatment. See Record Excerpt 6.

The Employer and Carrier appealed the finding of compensability regarding the right disc herniation and subsequent medical treatment, and the finding of permanent and total disability to the Circuit Court of Tate County, Mississippi. The Circuit Court affirmed the decision of the Administrative Judge and the Full Commission with regard to the finding of permanent total disability. See Record Excerpt 5. However, the Circuit Court reversed the decisions of the Administrative Judge and the Full Commission as to the issue of whether the employer and carrier are responsible for the Claimant's second and third conditions and subsequent surgeries, including all treatment rendered by Dr. Engelberg, Dr. Friedman and Dr. Vohra. See Record Excerpt 5. The Circuit Court held that this treatment was outside the chain of referral and outside the appropriate treatment allowed under Section 71-3-15 of the Mississippi Code Annotated/Mississippi Workers' Compensation Act. See Record Excerpt 5. However, the Circuit Court erroneously held that the

Employer and Carrier were responsible for Dr. Patel's treatment post referral after the second and third surgeries.

The employer and carrier now appeal the Full Commission and Circuit Court findings as to the finding of permanent total disability and urge this Honorable Court to find that the claimant did not meet her burden of proof to show that she is permanently and totally disabled and that the Full Commission and the Circuit Court were in error to hold that there was substantial evidence to support such a finding. The employer and carrier pray that the erroneous decision of the Full Commission and the Circuit Court be reversed as to the finding of permanent total disability, and as to the finding that the Employer and Carrier are responsible for the medical bills of Dr. Patel after the referral following the second and third surgeries.

SUMMARY OF ARGUMENT

The Administrative Judge, the Full Commission and the Circuit Court of Tate County, Mississippi, improperly adjudicated the issue of the extent of permanent disability suffered by the Claimant, as well as the issue of the Claimant's alleged loss of wage earning capacity. The Commission's decision was based upon the testimony of physicians who provided unauthorized medical treatment pursuant to Miss. Code Ann. § 71-3-15 (1) (Supp. 2003), which was properly reversed by the Circuit Court. The Full Commission and the Circuit Court also erred in finding that the Claimant met her burden of proving a causal relationship between the subsequent two injuries and the work injury on July 28, 1997, with medical expert testimony in terms of a reasonable degree of medical probability. The Employer and Carrier presented evidence at the hearing of this matter in the form of expert testimony, lay witness testimony, employment documentation, vocational rehabilitation expert testimony and medical proof that clearly proved that the Claimant did not sustain a permanent total disability as to the work injury, and therefore, was not entitled to compensation for same. Consequently, the Order of the Full Commission and the Circuit Court as to this issue was clearly erroneous and not supported by substantial evidence.

After the Claimant was released and found to be at MMI for 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 post-injury work history. The Claimant failed to demonstrate a permanent total disability. Even if this Court were to consider the claimant's disability after the second and third surgery, which were not work-related, the Claimant still failed to demonstrate a permanent and total disability. The Claimant's physicians, authorized or not, all found that she was capable of returning to the work force. In addition, the vocational experts agreed that jobs were available within her restrictions. She has also made an insufficient showing of an attempt to return to the work force.

She has not suffered a total loss of wage earning capacity as a result of her work injury. Thus, the Full Commission's finding that she is permanently and totally disabled as a result of the July 28, 1997, incident, and the Circuit Court's affirmation of same, are not supported by the evidence, and the award for permanent total disability benefits should be reversed.

The Claimant's medical treatment for her second and third surgeries have appropriately been found to be non-authorized medical treatment for which the Employer and Carrier is not liable under the Mississippi Workers' Compensation Act. As such, any referrals by those unauthorized physicians for post-surgical care must also be found to be medical treatment for which the Employer and Carrier would not be liable pursuant to Miss. Code Ann. § 71-3-15 (Supp. 2003). Thus, the Circuit Court erred in not including Dr. Patel's post-second and third surgical medical care in those expenses for which the Employer and Carrier would not be liable.

Alternatively, the last injurious exposure rule should be applied to this case as the last known employer for whom the Claimant worked prior to her second and third surgeries was Elemo Pea.

ARGUMENT

I. 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). As long as the Commission's decision is supported by the substantial weight of the evidence, it should be binding upon the Appellate Court. Wagner v. Hancock Medical Ctr., 825 So.2d 703 (¶10) (Miss.Ct.App. 2002), (citing Smith v. Jackson Constr. Co., 607 So.2d 1119, 1124 (Miss. 1992)). However, where the Commission has misapprehended the controlling legal principles, the Appellate Court will review de novo Lee v. Singing River Hospital, 908 So.2d 159, 163 (¶11) (Miss.Ct.App. 2005). The Appellate Court 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 finding 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 is not supported by the substantial evidence, and accordingly, is in error and should be reversed by the Supreme Court of Mississippi.

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S FINDING THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

The Employer and Carrier contend that 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. Under the Act, benefits for permanent disability not involving a scheduled member are

awarded based upon the difference in the Claimant's average weekly wage before the injury, and her "wage-earning capacity thereafter in the same employment or otherwise." Miss. Code Ann. § 71-3-17(c)(25) (Supp. 2003). 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).

"The purpose of the workmen's compensation law is to provide a substitute for lost wages and earning capacity . . . it aims at rehabilitation and restoration to health and vocational opportunity." Id. (citing M.T. Reed Construction Co. v. Martin, 215 Miss. 472, 61 So.2d 300 (1952)(*overruled on other grounds*) and McCluskey v. Thompson, 363 So.2d 256 (Miss. 1978)(*overruled on other grounds*). The term "disability" is defined under Mississippi Workers' Compensation Law as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." Miss. Code Ann. § 71-3-3 (Supp. 2003). In other words, the law requires that there be adequate medical evidence to show that a disability exists, that the Claimant is unable to perform her job duties, or any job duties, as a result of the work injury, and the period of time that the Claimant is considered totally disabled. Further, "total disability, whether temporary or permanent, has been defined as that which prevents the employee from doing the substantial acts required of him in his usual occupation." Dunn, Vardaman S., Mississippi Workmen's Compensation § 74 (3d ed. 1990). However, subjective complaints of pain by the Claimant while working under the restrictions afforded to him or her by the treating physician is not a basis for compensation, especially where the treating physicians are not compelled or inclined to provide a work excuse for the Claimant due to a disability. Id. at § 73.

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 surgery, 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 return to work with Wal-Mart, she was employed by various employers. Specifically, the Claimant has gone to work for Portrait Studio, Allied Enterprises, and Elemo Pea. The records of these post-injury employers, the evidence presented at hearing and the claimant's own statements to other employers indicate that she had worked for some of these employers in a managerial capacity. Following her first surgery, the Claimant conducted a job search which resulted, based upon the Claimant's own admission, in a successful return to the work force. The Employer and Carrier therefore assert that there has been no satisfactory showing of a loss of wage earning capacity following the Claimant's release by her treating physician, Dr. Clark, and thus, based upon case law and statute, there is no permanent total disability. Miss. Code Ann. § 71-3-15 (Supp. 2003). See also Stewart v. Singing River Hospital, 928 So. 2d 176, (¶ 36) (Miss. Ct. App. 2005).

The Employer and Carrier contend that only Dr. Clark's opinion regarding restrictions should be recognized. Dr. Clark placed restrictions on the Claimant following the first surgery which included a 30 lb. lifting restriction. (General Exh. 8, Dr. Clark's 6-7-99 note). He gave a permanent

impairment rating of 10% to the body as a whole. Dr. Clark opined that the thirty pound lifting restriction should not be required to be permanent, and that the Claimant should gradually be able to lift more. Id. 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 Employer and Carrier maintain that the Commission should recognize the opinion of the work injury physician, Dr. Clark, over Dr. Rahul Vohra as to the work restrictions, and the Circuit Court agreed. 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, it is clear that he was of the opinion that the Claimant was not permanently and totally disabled from returning to work.

Despite the opinions of the physicians that treated the Claimant that she is not permanently and totally disabled, the Claimant maintained that the residual functional capacity evaluation obtained from Dr. Patel, a general practitioner, completely limits her from returning to the work force. However, this form, which was not produced prior to the affidavit of Dr. Patel being introduced into evidence, was never presented to the claimant's treating specialists for their opinions. Further, this is a form that is typically filled out by general practitioners to submit for consideration in Social Security Disability cases and not for consideration in Workers' Compensation cases. Additionally, the Courts have 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).

The Commission erred in not providing more weight to the medical opinion of Dr. Clark, the work injury treating physician, rather than the testimony of the family practitioner, Dr. Patel, or

rather than the testimony of other physicians in this case whose opinions the Circuit Court has held to be unrelated to the July 28, 1997, injury, including the Claimant's hired expert, Dr. Vohra. Roberts v. Hunter Engineering Co., 2000 WL 1778994 (Mississippi Workers' Compensation, Nov. 29, 2000); See also Stewart, 928 So. 2d at (¶ 36); 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).

Morris Selby, the Claimant's vocational rehabilitation specialist, did not comment on the residual functional capacity evaluation filled out by Dr. Patel when he performed his evaluation and prepared his report in November of 2004. (Claimant Exh. 10). Mr. Selby also acknowledged that the work history of the Claimant contained in his report was not accurate or complete. He had not taken any additional actions to obtain a complete history. He also admitted that many of his opinions were based upon assumptions. Mr. Selby's report and testimony cannot stand for the proposition for which it was submitted, i.e., that the Claimant 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 or vocational rehabilitation.

The Employer and Carrier's vocational expert, Mr. Stewart, 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 restrictions, she could obtain employment. More specifically, Mr. Stewart testified that, based upon his opinion as a vocational expert and to a reasonable degree of probability in the field of vocational rehabilitation services, Ms. Patrick was employable or capable of returning to the work force within her restrictions. When informed of and asked about the residual FCE of Dr. Patel, Mr. Stewart did not change his opinion. In addition, the

vocational experts did agree that the fact that Ms. Patrick was a manager trainee and/or manager for Portrait Studio and Elemo Pea would significantly affect the Claimant's vocational rehabilitation in a positive way. He testified that this, 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 further testified that it was his practice, as well as the general practice for most vocational counselors, to rely on a specialist's findings in regard to restrictions or work capabilities versus a general practitioner's findings. He testified that the residual functional capacity evaluation at issue in this case was a form typically filled out for Social Security disability purposes rather than in the normal course of medical care or for workers' compensation purposes.

Also of note, since the time the Claimant stopped working at her post-injury employment, the Claimant has submitted additional job searches, which she claims to have been unsuccessful and thus support her claims of permanent total disability. However, the veracity of these job searches is clearly questionable. When the Employer and Carrier followed up with at least ten of these alleged employers, verification that the Claimant actually sought employment with only one could be confirmed, 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. However, that counselor, Mr. Selby, as well as the Claimant, have both testified that all efforts to work together 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 cervical condition and the part that it played in her allegedly unsuccessful job search efforts. Thus, in this case, the Claimant's recent job search is clearly, at the least, questionable and lacks good faith.

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

Supreme Court held that a Claimant must make a reasonable effort to secure "other comparably gainful employment." An employer may rebut the workers' compensation Claimant's prima facie case of disability by showing that the Claimant's effort to find employment was unreasonable or constituted a mere sham. An evaluation of the reasonableness of the Claimant's job search may include consideration of job availability and economics of the community, the Claimant's skills and background as well as the subject disability itself. See University of Mississippi Medical Center v. Smith, 919 So.2d 1209 (Miss.Ct.App. 2005). The factors to consider in deciding whether the workers' compensation Claimant made a reasonable attempt to find employment are: (1) economic aspect of the local community, (2) the jobs available in the community, and (3) the Claimant's general educational background, including work skills and the particular nature of the disability. Moore v. Independent Life & Accident Insurance Co., 788 So.2d 106, 114 (¶31) (Miss.Ct.App. 2001).

In addition, the Mississippi appellate courts have consistently ruled that if the Claimant's testimony is directly contradicted by numerous discrepancies or contradictions, then those contradictions are sufficient grounds for denial of benefits. Edwards v. Marshall Durbin Farms. Inc., 754 So.2d 556, 560 (¶16) (Miss.Ct.App. 2000); Fowler v. Durant Sportswear. Inc., 203 So.2d 577 (Miss. 1967). It is also a well-established rule that negative testimony can serve as substantial evidence for supporting the denial of benefits. Penrod Drilling Co. v. Ethridge, 487 So.2d 1330, 1331 (Miss. 1986).

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 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); See Record Excerpt 9. After the second and third surgery, 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 found that she was capable of returning to the work force. In addition, the vocational experts agree that jobs are available within her work related restrictions. She has made an insufficient showing of an attempt to return to the work force. The Claimant has not suffered a total loss of wage earning capacity as a result of her work injury. Thus, the Full Commission's finding that Claimant is totally and permanently disabled as a result of the July 28, 1997, incident is not supported by substantial evidence, and the award for benefits should be reversed.

In the event this Honorable Court reverses the Full Commission's and the Circuit Court's findings as to the issue of permanent total disability, the Employer and Carrier request that this case be remanded to the Administrative Judge for findings as to maximum medical improvement and extent of temporary disability and/or permanent partial disability, if any. The date of maximum medical recovery is a question of fact for determination by the Administrative Judge, subject to review by the Full Commission. See Miss. Code Ann. § 71-3-7(b)(Supp. 2003). The determination of this fact must be made based upon the findings of a physician. See Reading & Bates, Inc. v. Whittington, 208 So.2d 437, 440 (Miss. 1968); Jackson Ready-Mix Concrete v. Young, 236 Miss. 550, 111 So.2d 255, 258 (1959).

For purposes of clarifying the Employer and Carrier's arguments as to maximum medical improvement and temporary disability as reflected in the record, the Employer and Carrier would show that Dr. Clark had found that the date of maximum medical improvement for that July 28, 1997, work injury was June 7, 1999. (General Exh. 8, Dr. Clark's 6-7-99 note). Dr. Clark has never

changed his finding as to MMI.

Administrative Judge Thompson found that the Claimant sustained a compensable injury on July 28, 1997, and ordered the Employer and Carrier to pay temporary total disability benefits at the rate of $187.01 per week, beginning July 8, 1998, and continuing until June 9, 1999 (MMI), with credit for any wages earned by the Claimant during this time. Since it was established by the Employer and Carrier and held by the Circuit Court that the right sided herniations sustained by the Claimant after the work injury are not causally related to the work injury, no temporary total disability benefits should be ordered by the Administrative Judge for the time the Claimant was taken off of work as a result of the right sided herniation. It is well settled that where disability is claimed from a cause which is not associated with the work injury, benefits cannot be awarded where there is no causal connection. See V. Dunn, Mississippi Workmen's Compensation, § 273 (1990 ed.).

III. UNDER THE LAST INJURIOUS EXPOSURE RULE, WAL-MART SHOULD NOT BE 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 would offer the following argument in support of the Circuit Court's findings that the Employer and Carrier are not responsible for treatment rendered to the Claimant for these subsequent injuries. The argument contained in this portion of the Employer and Carrier's brief should not be construed as a complete argument containing all relevant contentions and issues concerning same, and the Employer and Carrier would request the opportunity to elaborate on this issue further via oral argument and/or supplemental brief or cross appeal brief

should same become necessary.

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. (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 side pain rather than left side pain. 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: Now, at the time you went to Dr. Engelberg, that was back in March 2001, does that sound right, if that's according to his medical records.

PATRICK If that's what he says, yes.

CASE: Okay. You had been working at Elemo Pea prior to that - -

PATRICK: Yes, ma'am.

CASE: - - is that correct? Elemo Pea?

PATRICK: Yes, ma'am.

CASE: Okay. So you had been working for that employer for several months prior to Dr. Patel ordering this MRI and ultimately referring you to Dr. Engelberg; is that correct?

PATRICK: Yes, Ma'am.

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, showed no recurrent herniation. (General Exh. 8, Dr. Clark's 10-9-00 note); See Record Excerpt 9. Also, 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); See Record Excerpt 10. Thus, the insurance carrier for Elemo Pea was the entity covering the risk at the time of the most recent injury, 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.

IV. THE CLAIMANT FAILED TO SATISFY THE REQUISITE BURDEN OF PROOF IN REGARD TO THE MEDICAL EVIDENCE PRESENTED TO CAUSALLY RELATE THE CLAIMANT'S MEDICAL CARE POST SECOND AND THIRD SURGERY PROVIDED BY DR. PATEL.

In Hedge v. Leggett and Platt, Inc., 641 So.2d 9 (Miss. 1994), the Mississippi Supreme Court explained that proof on causal connection must rise above mere suspicion or possibility. 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 and probability. The Court discussed that medical probability is necessary as discussed in 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. In sum, in the present case, the medical proof only demonstrated that the first surgery for the left sided herniation performed by Dr. Clark and the ensuing date of MMI and restrictions had been caused by the work incident in August, 1997. 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 August, 1997, work injury, or any work injury with Wal-Mart.

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); See Record Excerpt 5. By the same standard, the Employer and Carrier should then not be held liable for the post second and third surgical referrals to Dr. Patel or any of Dr. Patel's treatment following June 6, 1999, the MMI date for the work-related injury. It stands to reason that, if the Claimant cannot satisfy § 71-3-15 of the Mississippi Code Annotated as to Drs. Engelberg, Friedman and Vohra, then no additional treatment required by any referrals from those physicians after the unauthorized care, including that of Dr. Patel, can be held to be the Employer and Carrier's liability. Therefore, the Circuit Court erred by failing to include Dr. Patel's care during and after the second and third surgery in that treatment which it found to be unauthorized. Miss. Code. Ann. § 71-3-15 (Supp. 2003).

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 because 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.

In conclusion, the Full Commission's and the Circuit Court's ruling as to permanent disability and loss of wage earning capacity, and as to the Employer and Carrier's liability for Dr. Patel's medical bills post the second and third surgeries, is clearly erroneous and not supported by substantial evidence, and should be reversed by this Honorable Court.

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
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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 7th day of September, 2007.

ROXANNE P. CASE