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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DELPHI PACKARD ELECTRIC SYSTEMS — APPELLANT

V. — NO. 2007-WC-00820

EARNIL BROWN — APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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DELPHI PACKARD ELECTRIC SYSTEMS
EMPLOYER AND SELF-INSURED/APPELLANT

v. NO. 2007-WC-00820

EARNIL BROWN CLAIMANT/APPELLEE

REPLY BRIEF OF APPELLANT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION'S DETERMINATION THAT CLAIMANT EXPERIENCED A PERMANENT DISABILITY AS A RESULT OF THE FEBRUARY 11, 1999 INCIDENT

Employer/Self-Insured discussed in detail the record's absence of substantial evidence showing that Claimant experienced permanent disability as a result of the February 11, 1999 work incident. Claimant attempts to downplay this lack of evidence by focusing on Dr. Vogel's July 31, 2001 Statement of Employee's Physician form and largely ignoring the remainder of the doctor's often contradictory treatment records. Claimant also attempts to divert attention from the missing evidence by misrepresenting the conclusions of both Dr. McGuire and Dr. Smith. None of these attempts succeeds in remedying Claimant's failure to present substantial evidence sufficient to support the Commission's finding.

As previously argued in Appellant's initial Brief, the Court should reverse the Commission's finding on this issue because Dr. Vogel's internally inconsistent medical records should not, as a matter of law, constitute substantial evidence to support that finding. Evidence qualifies as "substantial evidence" where it "is not contradicted by positive testimony or circumstances and is not otherwise unreliable or untrustworthy." *Eubanks v. Prof'l Bldg. Servs.*, 909 So. 2d 1132, 1134 (Miss. Ct. App. 2005). Where a single medical expert's opinions present

"discrepancies, contradictions, and misstatements" that make the opinions "effectively unuseable," the court has affirmed the Commission's determination that a claimant failed to present competent medical proof to support her claim.[1] *Richardson v. Johnson Elec. Auto., Inc.*, 962 So. 2d 146, 153, 154 (Miss. Ct. App. 2007). As discussed in detail in Employer/Self-Insured's initial Brief, Dr. Vogel offered conflicting opinions regarding the cause of Claimant's post-February 1999 cervical and lumbar problems. (Appellant's Brief at 5-7, 19-23) Most significantly, Dr. Vogel documented on October 27, 1999, a "spontaneous recurrence" of cervical pain and "persistent mild" lumbar pain with no history of intervening injury since 1995. (Ex. 1) This treatment note simply cannot be reconciled with the form Dr. Vogel later completed on July 31, 2001, in which he first mentioned the February 11, 1999 work incident. (Ex. 3) Indeed, the certified records furnished under oath by Dr. Vogel do not even contain this form. (Ex. 1; Appellant's Brief at 21) The form instead was only included among the records furnished by Dr. Jones. (Ex. 3) As these examples show, Dr. Vogel's records contain discrepancies and contradictions that make his opinions unreliable and effectively unuseable. As such, this Court should reject Dr. Vogel's opinions as substantial evidence supporting the Commission's findings on this issue.

Even if Dr. Vogel's records did constitute reliable evidence, those records overwhelmingly indicated that Claimant's post-February 11, 1999 treatment was merely a continuation of treatment that had begun years earlier in 1983. Importantly, Claimant had presented to Dr. Vogel in January 1999, less than one month before his alleged work incident, complaining of neck and back pain which had spontaneously exacerbated three weeks earlier.

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[1]Claimant has acknowledged the evidentiary worthlessness of internally inconsistent medical records, citing *Richardson* for this same legal principle in his Brief. (Appellee's Brief at 14)

(Ex. 5 at Ex. 3; *see also*, Appellant's Brief at 5) In the documentation relating to this January 1999 visit, Dr. Vogel noted that Claimant complained of "cervical and bilateral shoulder pain plus paresthesia of the left arm" and "mild lumbrosacral pain." (Ex. 5 at Ex. 3) In the summary relating to Claimant's next visit on March 29, 1999, Dr. Vogel again documented Claimant's complaints of "mild lumbrosacral pain." (Ex. 5 at Ex. 3) Because Dr. Vogel's treatment records indicated that Claimant's neck and back conditions were significant enough to require treatment before the February 11, 1999 work incident, those records suggest that the work incident did not significantly aggravate Claimant's preexisting conditions. *See*, *Eubanks*, 909 So. 2d at 1135 (rejecting claimant's argument that work incidents aggravated his preexisting condition where "[t]he record clearly evidenced that [claimant's] back injuries were significant enough to visit the emergency room [four months] before the slip and falls occurred at [claimant's place of work]").

Except for the Statement of Employee's Physician completed by Dr. Vogel, the record is noticeably lacking evidence expressly supporting the Commission's finding that the February 11, 1999 work incident caused the Claimant permanent disability. Claimant argues that Dr. McGuire found a causal connection between the February 11, 1999 work incident and Claimant's permanent impairment rating to the cervical spine. Claimant's argument wholly misrepresents Dr. McGuire's conclusion. Although Dr. McGuire conceded that the February 11, 1999 incident may have aggravated Claimant's preexisting cervical spine condition, he viewed any such aggravation as having no significant permanent effect: "If you look at this gentleman–if he came in with exactly the same symptoms or signs with no injury, it would still be five percent." (Ex. 4 at 19) In fact, Dr. McGuire characterized the February 11, 1999 incident as merely a "potential contribution," based solely upon Claimant's subjective complaints of pain after the incident. (Ex. 4 at 19) Other medical evidence, however, undercut this potential by establishing that

Claimant had presented to Dr. Vogel with complaints of neck pain just three weeks before the February work incident. (Ex. 5 at Ex. 3) In light of the medical evidence as a whole, Dr. McGuire's conclusion about a potential contribution does not constitute substantial evidence to support the Commission's finding on this issue.

Also without merit is Claimant's attempt to discount Dr. Smith's opinion that the February 11, 1999 work incident caused no permanent disability. Claimant incorrectly describes Dr. Smith's records as incomplete and contradictory. First, Claimant suggests that Dr. Smith referred in his reports to "previous dictation which has never been produced." (Appellee's Brief at 5) Claimant apparently does not realize that Dr. Smith's September 7, 2000 report is the second of two reports detailing his conclusions. Dr. Smith prepared an initial report regarding his examination of Claimant, which was dated May 2, 2000. After reviewing this initial report, Employer/Self-Insured contacted Dr. Smith to request additional information regarding his conclusions. In response to that request, Dr. Smith prepared the September 7, 2000 report, in which he refers to the initial report as "dictation": "As previously in the dictation, this was a temporary aggravation of a preexisting condition." (Ex. 2) Both the May 2, 2000 report and the September 2, 2000 report are part of the record in this matter at Exhibit 2. Claimant's contention that Dr. Smith's previous "dictation" has never been produced is, therefore, indisputably disproved by the record and is wholly without merit.

Claimant also mistakenly contends that Dr. Smith does not specify in his reports whether his conclusion applies to Claimant's neck or back condition. As evidenced by the initial report, Dr. Smith examined and evaluated Claimant's cervical spine and his lumbar spine. Dr. Smith then concluded that Claimant was not a candidate for *any* neurosurgical care. (Ex. 2) In the September 7, 2000 report, Dr. Smith concluded that the work incident had merely temporarily

aggravated Claimant's condition. (Ex. 2) Based on Dr. Smith's initial report that considered Claimant's cervical and lumbar spine complaints as a single "condition," this September 7, 2000 conclusion reasonably applies to both components of that condition.[2]

Because Claimant did not present internally consistent and reliable evidence showing he incurred a permanent disability as a result of the February 11, 1999 incident, the Commission did not base its award on substantial evidence. The Commission instead overlooked the substantial evidence establishing that no such permanent disability resulted. As a result of this error, the Court should reverse the Commission's award.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION'S DETERMINATION THAT CLAIMANT EXPERIENCED A PSYCHOLOGICAL INJURY AS A RESULT OF THE FEBRUARY 11, 1999 INCIDENT

In its initial Brief, Employer/Self-Insured also fully discussed the lack of record evidence substantiating a causal connection between the February 11, 1999 work incident and Claimant's psychological condition. (Appellant's Brief at 8-10, 23-24) Nevertheless, Claimant incorrectly alleges in his Brief that "[c]ause and effect are clearly proven" to show that his chronic pain results from the February 1999 injury. (Appellant's Brief at 17) Claimant does not provide any record citation to support his allegation because the record lacks substantial evidence causally connecting the chronic pain syndrome to the February 11, 1999 incident. This lack of evidence is especially significant considering that Dr. Jones was directly asked her opinion regarding the

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[2]Even if Dr. Smith's conclusion referred to only one, unspecified component of Claimant's condition, the conclusion does not become contradictory or unreliable as a result. Dr. Smith's initial report indicated that neither the cervical nor the lumbar component was permanently effected by the February 11, 1999 work incident; thus, a later conclusion that either of these separate components was only temporarily aggravated by that incident is consistent with the earlier conclusion. Moreover, Dr. Smith's conclusion that Claimant incurred only a temporary aggravation to one or both of these components is completely consistent with Dr. McGuire's ultimate conclusions regarding the effect of the February 1999 incident on both the cervical and lumbar components.

cause of Claimant's psychological problems, yet she never expressly opined that the February 11, 1999 incident caused those psychological problems. Dr. Jones instead consistently identified chronic pain syndrome as the cause. Claimant has identified no record evidence causally relating that chronic pain syndrome to the February 11, 1999 incident.

Employer/Self-Insured, in contrast, identified in its initial Brief the record evidence proving that Claimant's chronic pain resulted from his preexisting degenerative conditions rather than from the February 1999 incident. Included among this evidence is a July 11, 2001 insurance form completed by Dr. Jones, in which she indicated that Claimant's psychological condition was not related to an accident. (Ex. 3) Dr. Webb's conclusions constitute further evidence that Claimant's psychological condition was not related to any work injury. (Ex. 5; Ex. 11) Because substantial evidence does not establish a causal connection between Claimant's psychological condition and the work incident, this Court should reverse the Commission's award of damages on this issue.

III. THE COMMISSION ERRED AS MATTER OF LAW BY AWARDING PERMANENT TOTAL DISABILITY BENEFITS DESPITE CLAIMANT'S FAILURE TO ESTABLISH A PRIMA FACIE CASE OF DISABILITY

In its initial Brief, Employer/Self-Insured discussed the two elements required to establish a prima facie case of disability, which include proof of reasonable efforts to find other employment. (Appellant's Brief at 28-31) Claimant unconvincingly argues in his Brief that he was excused from making reasonable efforts to find other employment and that he could establish a prima facie case of disability without showing such efforts. In addition to the arguments and authorities presented in its initial Brief, Employer/Self-Insured presents the following counter arguments.

A. Claimant did not present substantial evidence to show that he satisfied both elements required to establish a prima facie case of disability or was otherwise excused from making such showing.

As noted in Employer/Self-Insured's initial Brief, neither the Administrative Judge nor the Commission definitively determined that Claimant had in fact attempted to return to work at Delphi. (Appellant's Brief at 18) The Commission merely acknowledged that Claimant had presented hearing proof in support of his claim and that Employer/Self-Insured had presented proof to dispute that claim. (Vol. 2 at 152) The Commission then specifically acknowledged that it did not have to resolve the disputed issue before determining the case: "We need not absolutely *believe* the claimant, disregard the testimony of Mr. Weakley and apply *Jordan v. Hercules, Inc.*[,] 600 So. 2d 179 (Miss. 1992) in order that this claimant be entitled to permanent indemnity benefits." (Vol. 2 at 152) This statement indicates that the Commission chose to avoid determining this "hotly contested" factual issue because it believed it could determine the ultimate issue without having to make such determination. (Vol. 2 at 151-52)

Employer/Self-Insured deny that Claimant ever presented for re-employment before or after reaching maximum medical improvement. Even if the Commission had accepted Claimant's testimony on this issue, however, that testimony would have proven only that Claimant waited until March 2002 to ask Delphi about returning to work. Such testimony confirms that Claimant made no effort to return to his former job in 2000, despite being released by Dr. Vogel to return to work on January 11, 2000 with lifting restrictions accommodating that former job. (Appellant's Brief at 16-18) Claimant cannot excuse his failure to report back to work during this seven month period by citing Dr. Jones's assertion that he could not work: Claimant did not even begin treating with Dr. Jones until August 30, 2000. (Ex. 3) Thus, Claimant's own testimony proves that for well over seven months he made absolutely no efforts

to find employment within the restrictions imposed by his treating physician. No legal doctrine excuses Claimant's failure during this period to present to Delphi for re-employment or to seek other employment elsewhere because Claimant cannot show he was medically unable to work.[3] As such, Claimant has failed to establish either element of a prima facie case of disability under the standard in *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638 (Miss. 1978).

Moreover, Claimant could not raise any presumption of disability under *Jordan v. Hercules, Inc.*, by his alleged attempt to return to work in March 2002. 600 So. 2d 179 (Miss. 1992). The Mississippi Supreme Court has emphasized that the *Jordan* presumption requires a claimant to present for re-employment after reaching maximum medical improvement, and the court has found that return to work attempts predating maximum medical improvement are insufficient to raise the presumption. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1227-28 (Miss. 1997) (finding claimant's attempt to return to work before reaching maximum medical improvement did not establish a prima facie presumption of disability). In the case at bar, the Commission specifically found that Claimant did not reach maximum medical improvement from his psychiatric condition until December 5, 2002. (Vol. 2 at 151) Claimant's alleged conversation with Weakley cannot, therefore, raise the *Jordan* presumption: Claimant contends he presented for re-employment approximately eight months before reaching maximum medical improvement; even if true, such presentation is legally insufficient under *Hale*.

In addition, Dr. Jones's opinion did not excuse Claimant from taking steps to satisfy both elements of a prima facie case of disability. First, unlike the admittedly compensable injuries at issue in *University of Mississippi Medical Center v. Rainey*, 926 So. 2d 938 (Miss. Ct. App.

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[3]Had Claimant presented for re-employment during this period, the evidence establishes either that he could have performed his former job or that Delphi would have worked to accommodate otherwise his restrictions. (Appellant's Brief at 16-17)

2006), and *Stewart v. Singing River Hospital System*, 928 So. 2d 176 (Miss. Ct. App. 2005), Employer/Self-Insured has at all times denied compensability for Claimant's psychological condition. Employer/Self-Insured disputed the reasonableness and medical necessity of the treatment Claimant received from Dr. Jones and the causal connection between any conditions she diagnosed and Claimant's February 11, 1999 work incident. Employer/Self-Insured was not, therefore, required to accept without question Dr. Jones's opinion about the extent of Claimant's disability.[4] Indeed, Employer/Self-Insured did not unquestionably accept her opinion but exercised its right under the Commission's Rules to an employer's medical examination (EME), which was conducted by Dr. Webb. After reviewing the relevant medical records and examining Claimant, Dr. Webb concluded that the February 11, 1999 work incident did not cause the psychological condition at issue. (Ex. 5; *see also*, Appellant's Brief at 13-15) Although Claimant cites *Rainey* and *Stewart* to support his argument, his facts lack the conditions prerequisite to the legal principle applied in those cases: Employer/Self-Insured has admitted neither that Claimant sustained a compensable psychological injury nor that such injury contributed, in whole or part, to Claimant's alleged disability, if any. As such, the facts in *Rainey* and *Stewart* are distinguishable from the facts at issue.[5]

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[4]Employer/Self-Insured dispute that Dr. Jones was even competent to declare Claimant "disabled" as that term denotes a legal, not medical, conclusion. (*See*, Appellant's Brief at 21 n.15)

[5]Claimant seems to suggest that his allegedly disabling pain, purportedly continuing after maximum medical improvement, also constituted a basis for the Commission's award of compensation. As the cases cited by Claimant note, subjective reports of disabling pain may support an award only when such reports are presented "in the absence of circumstances tending to show malingering or to indicate the claimant's testimony as to pain is not inherently improbable, incredible or unreasonable, or that the testimony is untrustworthy." *Morris v. Landsdell's Frame Co.*, 547 So. 2d 782, 785 (Miss. 1989). These facts involve such evidence to refute Claimant's subjective reports. For example, Dr. McGuire found Claimant exhibited four out of five positive Waddell's signs. (Ex. 4 at 13) In addition, Dr. Webb found that Claimant's subjective reports of pain were untrustworthy. (Ex. 5 at 18, 23) Employer/Self-Insured fully discussed the findings of these doctors in its initial Brief. (Appellant's Brief at 10-15)

Finally, Claimant attempts to divert attention from his failure to raise a prima facie case of disability by arguing that Employer/Self-Insured had an obligation to offer him a job once he reached maximum medical improvement. The Court has unequivocally rejected this argument in *Lane Furniture Industries., Inc. v. Essary*, finding "the Commission [had] improperly placed upon [the employer] the burden of seeking [the claimant] out to determine when she could return to work, and if so, under what circumstances." 919 So. 2d 153, 159 (Miss. Ct. App. 2005). Claimant even argues that Employer/Self-Insured has made an admission against interest by "refusing to offer him suitable employment." (Appellee's Brief at 17) In this argument, Claimant in essence suggests that Employer/Self-Insured has implicitly made an admission against interest by failing to satisfy a non-existent obligation or burden of proof. The lack of logical support for this argument is self-evident. Rather than taking actions that constituted an admission against interest, Employer/Self-Insured simply acted in accordance with the established legal precedent. Under such precedent, Employer/Self-Insured had no duty to seek Claimant out and offer him a job. Claimant proves nothing by showing that Employer/Self-Insured did not take such actions.

B. The Commission incorrectly applied the standard for establishing a claim for permanent disability.

In its initial Brief, Employer/Self-Insured discussed the applicable standard for establishing a claim for permanent disability under Workers' Compensation Law and acknowledged the confusion among the cases restating and applying this standard. (Appellant's Brief at 27-35) Employer/Self-Insured is aware of and, in its initial Brief, has called this Court's attention to cases suggesting an interpretation contrary to the one urged by Employer/Self-Insured. (Appellant's Brief at 29-30, citing *Jordan v. Hercules, Inc.*, 600 So. 2d 179 (Miss.

1992)) Another recent case seems to embrace the *Jordan* formulation for a prima facie case of disability: *Chestnut v. Dairy Fresh Corp.*, 2007 WL 2994326 (Miss. Ct. App. Oct. 16, 2007), 2006-WC-01985-COA.

Nevertheless, Employer/Self-Insured renews its argument that the statutory definition of "disability" requires a claimant to establish *both* an inability to work in the same employment *and* an inability to work in other employment. Miss. Code Ann. § 71-3-3(i). The Mississippi Supreme Court has clearly approved this statutory interpretation by citing the following passage from Dunn's Mississippi Workmen's Compensation treatise:

> If the injury prevents the employee from resuming his former trade, work or employment, this alone is not the test of disability to earn wages or the test of the degree of such disability, but the definition relates to loss of capacity in "the same or other employment," and the meaning is that the employee, after his period of temporary total incapacity, must seek employment in another or different trade to earn his wages. Thus, when an employee is prevented from resuming his trade because of a developed allergy to the materials with which he is required to work, he must seek other employment and may not recover as for a permanent disability solely because of a total incapacity to engage in the same or similar work.

Compere's Nursing Home v. Biddy, 243 So. 2d 412, 414 (Miss. 1971) (quoting Dunn's Mississippi Workmen's Compensation § 72 (2d ed. 1967)). Logic supports this interpretation as does one purpose of the Workers' Compensation Law, which is to "rehabilitat[e] or restor[e] to health and vocational opportunity" injured workers. Miss. Code Ann. § 71-3-1. Courts fulfill this purpose of the Law by requiring a worker to seek other vocational opportunities where an injury prevents him from returning to his former vocation. Employer/Self-Insured urges this Court to follow more recent cases which confirm these earlier cases by also holding that a prima facie case of disability must include proof of reasonable efforts to find other employment. *See, e.g., Piper Indust., Inc. v. Herod*, 560 So. 2d 732, 735 (Miss. 1990); *Sardis Luggage Co. v. Wilson*, 374 So. 2d 826, 829 (Miss. 1979) ("in order for a claimant to make out a prima facie case

of disability she must unequivocally prove a reasonable effort to find other employment); *Aldolphe Lafont USA, Inc. v. Ayers*, 958 So. 2d 833, 839 (Miss. Ct. App. 2007); *Wesson v. Fred's Inc.*, 811 So. 2d 464, 470 (Miss. Ct. App. 2002); *McCray v. Key Constructors, Inc.*, 803 So. 2d 1199, 1201 (Miss. Ct. App. 2000); *Entergy Miss., Inc. v. Robinson*, 777 So. 2d 53, 55 (Miss. Ct. App. 2000).

Under this standard, proving disability requires Claimant to prove that he made reasonable efforts to find other employment. Even if the Commission had accepted Claimant's testimony regarding his alleged conversation with Weakley, such testimony, at most, would only raise a rebuttable presumption of disability, thereby shifting to Employer/Self-Insured the burden of proving no or partial loss of wage earning capacity. *Jordan*, 600 So. 2d at 183. An employer rebuts this presumption with "evidence (if any) showing that the claimant's efforts to obtain other employment were a mere sham, or less than reasonable, or without proper diligence." *Thompson*, 362 So. 2d at 641. *See also*, *Hale*, 687 So. 2d at 1227. Accordingly, Employer/Self-Insured rebutted any presumption Claimant's testimony may have raised by affirmatively establishing that Claimant made no attempts to find other employment. (Vol. 3 at 32; Appellant's Brief at 18) As noted in Employer/Self-Insured's initial Brief, under no theory can Claimant legitimately describe his complete failure to make any efforts to seek other employment as reasonable or diligent efforts.

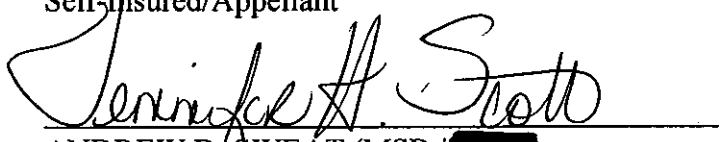
In sum, Claimant did not satisfy both elements required to establish a disability because he admittedly made no efforts to seek other employment. (Vol. 3 at 32) Furthermore, the Commission did not actually determine whether Claimant satisfied even one of the elements of a prima facie case. As discussed earlier in this Reply Brief, the Commission resolved the issue of permanent disability benefits for Claimant by reasoning that it could simply apply an alternative

standard to determine the issue: "delv[ing] into the facts associated with this claimant's injury, disability and the like, and if those facts, combined, support a permanent award, a job search, *per se*, is unnecessary." (Vol. 2 at 152) The authorities cited in this Reply Brief and in the initial Brief show that the Commission erred as a matter of law in awarding permanent disability despite Claimant's failure to prove the elements of a prima facie case. Therefore, this Court should reverse the Commission's award of permanent disability benefits.

Dated this the 2nd day of November, 2007.

Respectfully submitted,

Delphi Packard Electric Systems, Employer and Self-Insured/Appellant



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this day caused to be served via hand-delivery, a true and correct copy of the above and foregoing to the following:

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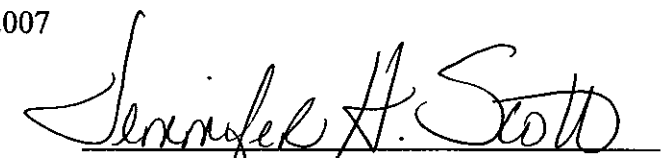
Dated this the 2nd day of November, 2007



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