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

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DELPHI PACKARD ELECTRIC SYSTEMS
EMPLOYER AND SELF-INSURED/APPELLANT

v. NO. 2007-WC-00820

EARNIL BROWN CLAIMANT/APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made so that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. The Honorable Tomie T. Green, Circuit Court Judge for Hinds County, Mississippi
2. Delphi Packard Electric Systems, Employer/Appellant
3. Mr. Andrew D. Sweat and Ms. Jennifer H. Scott of Wise Carter Child & Caraway, attorneys for Appellant
4. Mr. Earnil Brown, Appellee
5. Mr. Roger K. Doolittle, attorney for Appellee
6. The Honorable James Homer Best, Administrative Judge for Mississippi Workers' Compensation Commission
7. Lydia Quarles, former Commissioner, Mississippi Workers' Compensation Commission
8. Ben Barrett Smith, former Commissioner, Mississippi Workers' Compensation Commission
9. Barney J. Schoby, former Commissioner, Mississippi Workers' Compensation Commission

This the 21st day of September, 2007.

BY: _____
ANDREW D. SWEAT (MSB # 8100)
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STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

On March 3, 2000, Claimant Earnil Brown filed a Petition to Controvert, alleging that he injured his neck, back, shoulders and right hand at work on February 11, 1999 when he fell on a wet floor while lifting overhead. (Vol. 2 at 1)[1] Employer/Self-Insured Delphi Packard Electric Systems ("Employer" or "Delphi") answered the Petition admitting Claimant had sustained a compensable injury but denying Claimant's injury occurred as set forth in the Petition. (Vol. 2 at 3-4) Delphi further denied that Claimant suffered any permanency or loss of wage earning capacity as a result of the work accident. (Vol. 2 at 3-4) Delphi also contested liability for the treatment by Dr. Kenneth Vogel as well as any award for penalties. (Vol. 2 at 3-4)

Claimant filed an Amended Petition to Controvert on November 29, 2001, one year and eight months after filing his original Petition to Controvert. (Vol. 2 at 106) In this Amended Petition to Controvert, Claimant first alleged that his work-related injury included mental and emotional distress. (Vol. 2 at 106) Delphi filed its Amended Answer on December 4, 2001, denying the compensability of Claimant's alleged mental injury. (Vol. 2 at 107-108)

Following discovery in this matter, Administrative Judge James Homer Best conducted a hearing in Jackson, Mississippi on March 10, 2003, as to the issues raised in the Petition to Controvert and the defenses asserted by Delphi. The parties stipulated that Claimant suffered compensable injuries to his cervical spine and to his lumbar spine on February 11, 1999 and that Claimant's average weekly wage on February 11, ~~2003~~ was $931.20. (Vol. 3 at 4) The issues placed before Judge Best for adjudication were (1) the nature and extent of temporary disability;

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[1]Citations to the Record are made to volume and page number. Citations to the exhibits are made to the Exhibit number and page number where appropriate.

(2) the nature and extent of permanent disability; (3) loss of wage earning capacity, if any; (3) the reasonableness and necessity of certain medical services provided by Dr. Vogel; and (4) the reasonableness and necessity of all medical services provided by Dr. Jones. (Vol. 3 at 5-6)

On August 5, 2003, Judge Best rendered an order which (1) placed the Claimant at maximum medical improvement on May 2, 2000 for both the cervical injury and the lumbar injury; (2) found Claimant sustained a 5% permanent partial medical impairment rating for the cervical injury and no medical impairment for the lumbar injury; (3) denied any award to Claimant for permanent benefits for his lumbar or cervical injuries; (4) awarded temporary total disability benefits to Claimant for the period of September 1, 1999 through May 2, 2000, with credit for benefits previously paid; (5) denied Claimant's psychological claim and all costs associated with treatment rendered by Dr. Jones; (6) limited the Employer's liability for Dr. Kenneth Vogel's treatment to treatment rendered through March 10, 2001; and (7) denied benefits to Claimant for any loss of wage earning capacity. (Vol. 2 at 137-40) The Claimant appealed to the Full Commission on August 19, 2003. (Vol. 2 at 141)

The Full Commission heard the matter on January 12, 2004 and issued an Order reversing the Administrative Judge's decision on January 22, 2004. (Vol. 2 at 145) In the Order, the Full Commission made the following factual conclusions: (1) Claimant sustained compensable cervical and lumbar injuries which resulted from a lifting incident occurring at work in February 1999; (2) these injuries caused Claimant to suffer chronic pain syndrome which in turn led to depression and other psychiatric disorders; (3) Claimant reached maximum medical improvement from his psychiatric disorders on December 5, 2002; (4) Claimant would require continuing medical treatment as to both his physical and mental injuries. (Vol. 2 at 151) The Commission also found that Dr. Vogel assessed Claimant at maximum medical improvement on

January 11, 2000 and that Dr. Smith assessed Claimant at maximum medical improvement on May 1, 2000. (Vol. 2 at 147-48) In addition, the Commission concluded that Dr. Jones had "noted evidence of depression with psychotic behavior related to work issues."[2] (Vol. 2 at 148)

The Full Commission ordered Delphi to pay permanent total disability benefits of $292.86 per week for 450 weeks beginning September 1, 1999, less credit for benefits already paid, as well as past and future medical services and supplies reasonable and necessary to the treatment of Claimant's physical and mental injuries. (Vol. 2 at 154) On February 13, 2004, Delphi appealed the Full Commission's Order to the First Judicial District of the Circuit Court of Hinds County. (Vol. 2 at 155-57) On January 25, 2007, the Honorable Tomie Green, Circuit Court Judge, issued an opinion affirming the Full Commission's Order. (Vol. 1 at 22-23) Delphi thereafter timely appealed to this Court on February 23, 2007. (Vol. 1 at 24-26)

B. Statement of Relevant Facts

On February 11, 1999, Claimant allegedly injured his neck, low back, shoulders, and right hand at work when he lifted overhead a reel of terminals, weighing between seven and nine pounds. (Vol. 3 at 25-26; *See* Ex. 8 & Ex. 9) Claimant reported the accident to his supervisor, Jessie Adams.[3] (Ex. 9;Vol. 3 at 12) Adams sent Claimant to Dr. Cronin, the company physician, who diagnosed Claimant with lumbar strain. Claimant returned to work after his examination by Dr. Cronin and continued to work through September 1, 1999. (Vol. 3 at 12-13)

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[2]For example, the records of Dr. Jones document that Claimant "felt many times that people at the work place [were] against him" and that he was "ready to go over to Packard/Delphi [and] kill coworkers, esp[ecially] supervisors." (Ex. 3)

[3]The hearing transcript incorrectly identifies Claimant's supervisor as "Jessie Allen."

1. ***Dr. Kenneth Vogel Did Not Causally Connect Claimant's Injury to His Work Until Almost Eighteen Months After Claimant Filed a Petition to Controvert.***

Dr. Kenneth Vogel, a neurosurgeon in New Orleans, Louisiana, had been treating Claimant since 1983 for other neck and back conditions unrelated to the February 11, 1999 injury. (Vol. 3 at 23-24) In fact, Dr. Vogel had examined Claimant on January 25, 1999, less than one month before the work injury at issue. (Ex. 5 at Ex. 3) During this visit, Claimant reported cervical and bilateral shoulder pain, paresthesia of the left arm, and mild lumbrosacral pain. (Ex. 5 at Ex. 3) Dr. Vogel also noted that Claimant had experienced a spontaneous *exacerbation* of pain approximately three weeks earlier–i.e., in early January 1999. (Ex. 5 at Ex. 3) Dr. Vogel documented that Claimant had been following conservative care and that he had experienced no intervening injuries. (Ex. 5 at Ex. 3) Claimant asked to continue conservative care, and Dr. Vogel renewed Claimant's restrictions from November 6, 1998, without any changes. (Ex. 5 at Ex. 3)

Claimant next treated with Dr. Vogel on March, 29, 1999–almost a month and half after his alleged work injury. (Ex. 1) Dr. Vogel indicated that Claimant's March 29, 1999 visit was a "re-evaluat[ion] . . . for cervical, interscapular and bilateral arm pain" and that Claimant had "lifted heavily ten days ago [March 19, 1999] with recurrent cervical pain." (Ex. 1) Dr. Vogel described Claimant's symptoms and problems as mild. (Ex. 1)

On September 21, 1999, Dr. Vogel recommended a cervical medial branch neurotomy. (Ex. 1) This recommendation came after Claimant had completed a series of diagnostic tests that, according to Dr. Vogel, had revealed a herniated lumbar disc with symptomatic lumbar *degenerative* disc disease suspected. (Ex. 1) An October 21, 1999 radiology consultation report for a test performed on Claimant's cervical spine similarly indicated that Claimant's neural

foramina were patent but compromised more on the right than left secondary to uncovertebral joint *degenerative* change at the C5-6 and C6-7 levels. (Ex. 1) Notably, in recounting his impressions and recommendation on September 21, 1999, Dr. Vogel did not make any statements relating the Claimant's condition to a February 11, 1999 lifting incident. (Ex. 1)

On October 27, 1999, Dr. Vogel performed a cervical medial branch neurotomy at C3-4, C4-5, C5-6, C6-7, left. (Ex. 1) In the notes regarding Claimant's pre-operative history and physical examination, Dr. Vogel again made no statements relating Claimant's condition to any February 11, 1999 lifting incident. (Ex. 1) In fact, Dr. Vogel wholly failed to note any recent lifting incident at all, describing Claimant's "present illness" as follows:

> he was initially injured 2/20/90, when he slipped and fell at work. He subsequently experienced both cervical and lumbosacral pain. In 11/95, he underwent a left cervical medial branch neurotomy. He experienced significant relief. He returned to gainful employment. He has subsequently experienced the *spontaneous recurrence* of cervical and bilateral arm pain, primarily on the left. He also has *persistent* mild lumbosacral pain.
>
> . . . .
>
> *The patient's past history reveals no intervening injury since his hospitalization of 1995.*

(Ex. 1, emphasis added) As this record shows, Dr. Vogel viewed Claimant's condition as related to his prior cervical and lumbar problems rather than to any recently occurring trauma or injury.

Post-surgery, Claimant continued to complain of lumbosacral and left leg pain. (Ex. 1) At Claimant's six-week post-operative examination, Dr. Vogel again noted Claimant had "*lifted heavily* in March of 1999 and [had] experienced *increased* lumbosacral pain." (Ex. 1, emphasis added) This December 7, 1999 reference marked the first time since the March 29, 1999 letter that Dr. Vogel had referred to any accident or injury occurring after Claimant's fall at work in

1990. (Ex. 1) Because the reel Claimant allegedly lifted in February 1999 weighed only seven to nine pounds, it is not reasonable to interpret Dr. Vogel's note as referring to the injury at issue.

On January 11, 2000, in response to Claimant's continued complaints, Dr. Vogel recommended an intradiscal electrothermal therapy or IDET procedure. (Ex. 1) On the same day, Dr. Vogel assigned a five percent (5%) *increased* impairment rating to Claimant's body as a whole and imposed restrictions against Claimant's lifting more than thirty-five pounds or hyper-extending the neck. (Ex. 1) Dr. Vogel's notes from that visit, however, neither causally related his findings and recommendations to the February 11, 1999 incident nor even referenced that incident. (Ex. 1) Instead, Dr. Vogel merely concluded that claimant "will have incurred" the increased impairment without identifying the precise cause of the increase. (Ex. 1)

On February 9, 2000, Dr. Vogel discharged Claimant to the care of his referring physician. (Ex. 1) Dr. Vogel examined Claimant on four additional occasions after January 11, 2000, reiterating each time the January 11th impressions and recommendations. (Ex. 1) On August 21, 2000, Dr. Vogel referred Claimant to Dr. Faeza Jones. (Ex. 6) This referral came over seven months after Dr. Vogel assessed an impairment rating.[4] Dr. Vogel's referral from August 21, 2000 does not causally relate Claimant's need for psychiatric treatment to his February 11, 1999 incident.[5] (Ex. 6) Significantly, Dr. Vogel did not specifically reference a February 11, 1999 incident until July 31, 2001, when he completed a Statement of Employee's Physician. (Ex. 3) Dr. Vogel did not complete this document until almost a year and a half after Claimant had filed his Petition to Controvert.

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[4]Presumably Dr. Vogel had concluded that Claimant was at maximum medical improvement when he assigned this impairment rating. The Commission found that Dr. Vogel had so concluded.

[5]Dr. Vogel does not even mention this referral in his August 21, 2000 status letter to Employer/Self-Insured. (Ex. 1)

2. *Dr. Robert Smith Concluded That the Work Incident Merely Aggravated Temporarily Claimant's Pre-existing Condition and That No IDET or Surgical Procedures Were Warranted.*

Dr. Robert Smith, a neurosurgeon in Jackson, Mississippi, evaluated Claimant on May 2, 2000 at the request of Delphi. (Ex. 2) Dr. Smith noted that Claimant presented with "degenerative disc disease with folding of the ligament." (Ex. 2) Dr. Smith described Claimant as having a "[t]errible degenerative spine with bony changes L4-5 and L5-S1" as well as "some degenerative joints" in his cervical spine. (Ex. 1) Dr. Smith determined that Claimant was "not a candidate for intradiscal electrothermal treatment," stating that the IDET procedure is regarded "as experimental." (Ex. 2) Dr. Smith further opined that Claimant's degenerative disc problems would not respond to surgical treatment. (Ex. 2) In fact, he also saw no indications for the surgery that Dr. Vogel had performed on Claimant. (Ex. 2) Dr. Smith concluded that Claimant had reached maximum medical improvement and that he could perform light duty work. (Ex. 2) Dr. Smith also concluded that the February 11, 1999 incident was "a temporary aggravation of a pre-existing condition." (Ex. 2) As these records show, the Commission incorrectly asserted that Dr. Smith did not quantify the nature of Claimant's restrictions and impairments and that Dr. Smith did not indicate whether the same were causally related to the lumbar injury or the cervical injury or both. Dr. Smith did both, limiting Claimant to light duty work and concluding the effects of the February 1999 incident were only temporary.

3. *Dr. Faeza Jones Did Not Expressly Indicate That the Work Incident Caused Claimant's Alleged Psychological Problems.*

Dr. Vogel referred Claimant to Dr. Faeza Jones, a psychiatrist in Clinton, Mississippi, in August 2000, stating as follows: "P[atien]t referred to Dr. Faeza Jones for psych treatment/pain management." (Ex. 6) Claimant began treating with Dr. Jones on August 30, 2000, and he was

still treating with her at the time of the hearing on this matter on March 10, 2003. (Ex. 3; Ex. 10) Dr. Jones repeatedly diagnosed Claimant with "major depressive disorder, recurrent, severe with psychotic features." (Ex. 3; Ex. 10) Notes from her treatment of Claimant indicate that he was frequently anxious, paranoid, and irritable during this period. For example, on July 17, 2002, Dr. Jones noted that Claimant was "having some problems hearing voices at times." (Ex. 10) She also noted that Claimant "feels others are watching at times." (Ex. 10) On September 11, 2002, Dr. Jones noted that Claimant "has anxiety, problems sleeping, feels bugs crawling at night at times. He says he sees black things running around." (Ex. 10) Then, on November 6, 2002, Dr. Jones noted that "many times [Claimant] does feel like he hears things at times that other people do not hear." (Ex. 10)

In various statements specifically addressing the cause of Claimant's psychological problems, Dr. Jones did not causally relate her diagnosis to the lifting incident of February 11, 1999 or to any physical, work-related injury suffered by Claimant. (Ex. 10) Instead, Dr. Jones consistently stated that the psychological problems were secondary to chronic pain rather than to a specific accident or injury. For example, Dr. Jones completed an Allstate Insurance form on July 11, 2001 in which she indicated that Claimant's condition was *not* related to an accident but was instead due to chronic pain. (Ex. 3) In a November 6, 2002 letter sent to Roger K. Doolittle and addressed "To Whom It May Concern," Dr. Jones again stated that Claimant was "being treated for Major Depressive disorder, secondary to Chronic Pain Syndrome." (Ex. 10) In another letter addressed "To Whom It May Concern" on December 5, 2002, she opined that Claimant was "totally disable (100%)" and noted that "Mr. Brown has poor memory." (Ex. 10) However, neither of these letters indicated the February 11, 1999 incident resulted in Claimant's

chronic pain or his depression. In fact, Dr. Jones did not offer any opinion regarding the cause of Claimant's chronic pain.

4. ***Dr. Robert McGuire Concluded That Claimant's Condition Resulted from Degenerative Changes Rather Than from the Work Incident.***

On February 12, 2001, Dr. Robert McGuire, an orthopaedic surgeon with University Orthopaedic Associates and professor of orthopaedic surgery in Jackson, Mississippi, performed an independent medical examination (IME) of Claimant at the request of the Administrative Judge.[6] (Ex. 4 at 4-5) Based upon his examination of Claimant and review of medical records, Dr. McGuire determined Claimant "had some degenerative changes" in his cervical spine as well as "fairly significant degenerative changes" in his lumbar spine. (*Id.* at 12) Dr. McGuire opined the IDET procedure was not appropriate to treat Claimant's degenerative disc problems.[7] (*Id.* at 13) Dr. McGuire also stated the February 11, 1999 incident described by Claimant was not likely either to have caused the severe degeneration of Claimant's discs or to have significantly contributed to an aggravation of the degenerative disc disease. *Id.*

Dr. McGuire, in contrast, found no connection between Claimant's complaints and the lifting accident of February 11, 1999; instead, he ascribed Claimant's problems to *degenerative* changes:

> Q. Was there anything in the examination that you found objectively, or from the MRI scan or other diagnostic studies that you reviewed, that you would find attributable to the February 11, 1999 injury?
>
> A. *Looking specifically at the cervical, I did not find that.* From the lumbar, again I didn't feel that the way he described it, that that had been a part of the initial

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[6]In discounting this report, the Commission incorrectly stated that Dr. McGuire examined Claimant at the request of Employer Delphi. (Vol. 2 at 152)

[7]Interestingly, the Commission accepted the Opinion of Drs. Smith and McGuire regarding the inappropriateness of the IDET procedure.

> injury, anyway. That just seemed, with his description, to come along as a secondary type of problem that just arose. So that would again be more of a degenerative. *So I didn't feel like the low back symptoms were at all related to that particular incident.*

(Ex. 4 at 17-18, emphasis added) Regarding the causal connection between Claimant's back condition and the work incident, Dr. McGuire specifically testified as follows:

> Ordinarily when you have severe degenerative condition in your back, you are more apt with a minimum of activity, to be able to have worsening of that particular condition. Usually what happens is an individual will sustain either a twisting type or a sudden loading of the spine unexpected that has a tendency to trigger those particular episodes. That was not a description that he gave me. This was a controlled type lift up over. So that makes me think, that rather than a specific aggravation of the low back, that this is just a more of a degenerative- - manifestation of the degenerative that was there.[8]

(Ex. 4 at 25-26) This testimony confirms Dr. McGuire's report, in which he opined that

> the incident described by Mr. Brown is not likely to have caused this severe degeneration, nor is it likely that the description of such significantly contributed to its aggravation. I feel the problem with which Mr. Brown is presently complaining is that of a progressive degenerative nature of the problem that he has had for many years.

(Ex. 4. at report attached as Exhibit 3) As Dr. McGuire further explained in his deposition,

> The way he described his lifting incident, I didn't feel that that was contributing to the low back. But with his description, certainly with the severity of degenerative changes that he had in his low back, the symptoms that he was describing, could very well have been just attributable to the normal progression of the degenerative changes. He did not have a twisting episode, he did not have a sudden jerk or any of that type stuff in his description of the injury.

(Ex. 4 at 17) Dr. McGuire placed Claimant at maximum medical improvement and concluded

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[8]As Dr. McGuire explained in his deposition, "You know, it didn't seem that the back was really triggered by that particular incident when I was discussing it with him. So from the neck standpoint, it sounded like that that had been aggravated, but then that that was actually improving somewhat." (Ex. 4. at 16)

that

> [a]n impairment rating *from these degenerative changes and previous surgery* to the body as whole from the cervical and lumbar spine using combined tables is 10 percent. It is felt that the impairment rating is due to the degenerative changes rather than as a result of the incident of February of 1999.[9]

(Ex. 4 at 17, emphasis added) As to Claimant's physical restrictions, Dr. McGuire imposed no new restrictions:

> Q. But you would not - - what I'm getting at, you would not increase any of his physical restrictions- -
>
> A. No.
>
> Q. - - as a result of the February 11, 1999 [injury]- -
>
> A. That's correct . . . . No, I would not change those specific limitations that he had previously.

(Ex. 4 at 20-21)

Dr. McGuire's examination also indicated that Claimant exhibited four out of five positive Waddell's signs.[10] (Ex. 4 at 13) For instance, Dr. McGuire stated that "what we found here, the description of his symptoms, as far as sensation-wise, was dermatome. But the other exams were a little bit exaggerated . . . . [I]t just makes you think there's something else going on other than the pure findings from that standpoint." (Ex. 4 at 15) As a result, Dr. McGuire found "a potential non-organic component involved with [claimant's] symptoms." (Ex. 4 at 13) He

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[9]This ten percent impairment rating resulted from totaling the five percent cervical impairment and five percent lumbar impairment. (Ex. 4 at 18-19) Dr. McGuire further explained in his deposition that the February 11, 1999 lifting incident could have potentially contributed to the five percent cervical impairment, as Claimant contended that incident caused him neck pain. (Ex. 4 at 18-19) Dr. McGuire could not, however, determine what specific percentage, if any, the February incident contributed to the five percent cervical impairment. (Ex. 4 at 19) He did conclude that, "if [claimant] came in with exactly the same symptoms or signs with no injury, [the cervical impairment] would still be five percent." (Ex. 4 at 19) Dr. McGuire also concluded that the February 1999 incident did not contribute to the five percent lumbar impairment. (Ex. 4 at 19)

[10]Dr. McGuire explained that positive Waddell's signs indicate self-magnification or embellishment of symptoms and help identify patients who will not respond well to surgical intervention. (Ex. 4 at 15)

therefore concluded that "[t]he likelihood of this being purely a traumatic injury . . . was very very small." (Ex. 4 at 13) When asked whether referral to a psychiatrist would be appropriate to treat the effects of the February 11, 1999 incident, Dr. McGuire responded as follows:

> Certainly from the standpoint of there is some illness behavior that's being exhibited by- -evidenced by Waddell's. I am certainly not the one to suggest that that lifting incident triggered all of that. We do know that the longer an individual is out, the more apt he is to develop an illness behavior. I would personally like to see- -have him see a psychiatrist. I think that would be beneficial to him. But as far as attributing that as a direct result of that incident, I don't think that that is absolutely necessary. I think it's the complaints of pain and that type stuff, that really lends itself to that illness behavior component that ultimately is exhibited.

(Ex. 4 at 21-22) As this response shows, Dr. McGuire refused to identify the work incident as the cause of Claimant's psychological problems.

5. ***Dr. Mark Webb Concluded That the Work Incident Did Not Cause Claimant's Alleged Psychological Condition and That Claimant Had No Permanent Psychological Impairment.***

Dr. Mark Webb, a psychiatrist with the Mississippi Neuropsychiatric Clinic in Jackson, Mississippi, evaluated Claimant on January 8, 2002 at the request of the Employer. (Ex. 5 at 5) Dr. Webb diagnosed Claimant as suffering from "major depression with psychotic features and personality disorder, not otherwise specified, with histrionic and paranoid features."[11] (Ex. 5 at 10) Dr. Webb opined that Claimant "ha[d] had paranoia his whole life, almost from childhood, and over time that has worsened to the point of he has gotten himself depressed." (Ex. 5 at 12) Moreover, Dr. Webb found a causal connection between Claimant's lifelong personality disorder and his current psychological problems: "Personality disorder caused and fueled these, the paranoia, histrionic, and [Claimant] became depressed. Otherwise, he would have come back to

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[11] Dr. Webb testified that Claimant's diagnosis of "[p]aranoid and histrionic disorders and personality disorder, NOS, in the old days . . . was called malingering disorder." (Ex. 5 at 17)

work. And he has gotten himself into a real depressive state and sort of blaming [Delphi] Packard or over-reacting." (Ex. 5 at 12)

Dr. Webb did not, however, find any causal connection between Claimant's February 11, 1999 work injury and his psychological problems. (Ex. 5 at 15-16) Dr. Webb instead determined that the work incident did not cause Claimant's alleged chronic pain. (Ex. 5 at 23-24) Dr. Webb expressly concluded that Claimant's "pain [was] coming from his paranoia and histrionic features." (Ex. 5 at 15) With regard to the causal relationship between the February 11, 1999 incident and Claimant's pain, Dr. Webb testified as follows:

> Q. I have only one further question. In your review of the medical records from Dr. McQuire [sic] and Dr. Smith regarding his complaints of pain, do you recall all those findings were as to whether those complaints of pain were related to the incident at Packard on February 11, 1999?
>
> A. In my reading of the records, it was not. I think Dr. McQuire [sic] called it progressive degenerative problem. Dr. Smith and Dr. McQuire [sic] did not say much there and what they do say there seems to be non-work related. And basically I have a man who is exaggerating his complaints and with or without the pain, he would be in the shape he was in.

(Ex. 5 at 24) In commenting on Dr. Jones' opinion regarding the cause of Claimant's psychological problems, Dr. Webb made these statements:

> With respect to Doctor Jones' letter stating that his depression is secondary to a chronic pain syndrome, more than likely Doctor Jones has not seen the records of Doctor Robert Smith or Doctor McGuire. Their records state to minimal physical symptoms that are mostly of a degenerative nature. Also, non-organic overlay was emphasized by his physical doctors. Therefore, his psychiatric symptoms cannot be due to the pain or the 2/11/99 incident and must be due to his maladaptive personality traits.

(Ex. 11)

Dr. Webb also noted that, during the medical status examination, Claimant "was calm, he showed no pain behavior. You can see people acting out and showing pain behavior. He didn't

show any of that behavior. That tends to let me know there is not as much pain behavior that I felt would coincide with his complaints." (Ex. 5 at 18) Dr. Webb found such potential to exaggerate was consistent with Claimant's paranoid and histrionic personality traits: "They tend to make mountains out of mole hills. Everything is a crisis and they are usually overwhelmed by things." (Ex. 5 at 18) In fact, Dr. Webb explained the meaning of the term "histrionic" as "meaning overstating complaints and exaggerating physical symptoms. In other words, hysterical." (Ex. 5 at 11) Although Dr. Webb identified Claimant's neck and back pain among the Axis III impressions, he stated that those medical complaints were not related or connected to Claimant's major depression and paranoid and histrionic personality traits.[12] (Ex. 5 at 13) When asked whether "the causal factors or contributing factors which produced the condition indicated in [his] diagnosis on page four [of his report] are not work related," Dr. Webb responded as follows: "I don't think his pain and degenerative problem is. I think in the course of getting treatment and having other pain and degenerative problems, he began making mountains out of mole hills. The problem wasn't the pain but his reaction to the pain." (Ex. 5 at 23)

In short, Dr. Webb concluded that the February 11, 1999 incident did not play a role in causing Claimant's psychological problems. (Ex. 5 at 15-16) Instead, Dr. Webb concluded that Claimant's paranoid and histrionic personality traits had been with him his entire life and were the cause of his depression and pain. (Ex. 5 at 16) Furthermore, Dr. Webb stated that Claimant "had no permanent impairment from a psychiatric standpoint and his work-related incident of [February 11, 1999] gave him no psychiatric injury or impairment." (Ex. 5 at 16)

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[12]Dr. Webb further explained, "The Axis III is the physical on the patient, and I didn't do a physical on *him* . . . . [T]*he* Axis III is a listing of medical complaints that the patient gives to us, and they are not verified by me but I write them down." (Ex. 5 at 13)

6. *Claimant Failed to Seek the Same or Other Employment.*

Claimant, who was 51 years old at the time of the hearing, completed high school and attended Utica Junior College for two years. (Vol. 3 at 21) During those two years, Claimant studied "build and trade." (Vol. 3 at 22) In addition to his employment at Delphi, Claimant had worked for Borden Ice Cream, where he loaded ice cream onto freezer trucks. (Vol. 3 at 17)

On February 11, 1999, Claimant worked for Delphi at the Megamat machine, whose operation required him to lift a reel of terminals over his head three to five times per eight-hour shift. (Vol. 3 at 25-26, 34-35; Ex. 8) Claimant did not know the weight of each reel. (Vol. 3 at 27) However, Claimant's supervisor Jessie Adams had actually weighed a Megamat reel and testified that the reel weighed between seven and nine pounds. (Vol. 3 at 35) Operating the Megamat machine also required Claimant to lift bundles of wire weighing between three to five pounds and dyes weighing under ten pounds.[13] (Vol. 3 at 36-37) None of Claimant's duties as a Megamat machine operator required him to lift anything weighing over ten pounds. (Vol. 3 at 35-37)

After the February 1999 incident, Claimant continued to work at Delphi until September 1, 1999. (Vol. 3 at 30) As noted previously, Dr. Vogel imposed restrictions against lifting more than thirty-five pounds and hyper-extending the neck in January 2000. (Ex. 1) As the description of Claimant's pre-injury job shows, operating the Megamat machine did not involve lifting requirements beyond Claimant's post-injury restrictions.

Curtis Weakley, the field supervisor in Delphi's Industrial Relations, testified that Claimant did not contact Employer about returning to work at any time after Dr. Vogel assigned

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[13]Operating the Megamat machine required Claimant to change the dye only three to four times per week. (Vol. 3 at 36)

physical restrictions in January 2000. (Vol. 3 at 39-40) Claimant offered contradictory testimony, saying that he had discussed with Weakley the possibility of returning to a light duty position approximately one year before the hearing--i.e., in March 2002. (Vol. 3 at 17-20) Weakley allegedly told Claimant that he could not return to work at Delphi because he had had too many injuries and too many accidents. (Vol. 3 at 17-18) However, Weakley testified that no such conversation took place. (Vol. 3 at 39-40) Weakley stated, "[I]t's my job to make sure we can return our employees to work, if possible." (Vol. 3 at 39-40) He testified that Claimant had *never talked to him about returning* to work. (Vol. 3 at 40-41) Weakley also testified that Delphi can and does accommodate many different types of physical restrictions and that Delphi has light duty jobs available: "[W]e work with them to place them in something that's within the restrictions." (Vol. 3 at 40-41)

In considering the evidence on this issue, it is important to note that Claimant has been diagnosed with major depression with psychotic features and personality disorder with histrionic and paranoid features by Dr. Faeza Jones and by Dr. Mark Webb. Indeed, the notes of Dr. Jones, Claimant's treating psychiatrist, are replete with references regarding paranoia and hallucinations; Dr. Jones has also taken note of Claimant's poor memory. (Ex. 10) Further documenting these problems are the records relating to Claimant's inpatient treatment in the geropsychiatric program at Magee Hospital in March 2001.[14] (Ex. 5 at Ex. C)

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[14]For example, the Psycho-Social Clinical Assessment dated March 9, 2001 indicates that Claimant "voice[d] problems with long term memory," that he had experienced "suicidal thought and homicidal thoughts toward his plant managers," and that he "hear[d] crying sounds in the walls and ha[d] been seeing shadows and eyes staring at him." (Ex. 5 at Ex. C--Page 1 of Psycho-Social Clinical Assessment) This assessment also noted Claimant's "anger and frustration toward managers at his place of employment" and his "homicidal thoughts toward company managers because . . . they lied to him and are contesting his claim for workers compensation benefits"; Claimant had even "thought [about] building a bomb and blowing the plant up." (Ex. 5 at Ex. C--Page 2 of Psycho-Social Clinical Assessment) Another assessment form dated March 9, 2001 provides additional evidence of Claimant's mental status: Claimant identified "Johnston"

Even taking Claimant's testimony as true, that testimony indicates that Claimant made no attempt to return to work at Delphi until March 2002 despite having been under no physical restrictions preventing him from performing that pre-injury job since January 2000. Believing Claimant's testimony, moreover, establishes that Claimant merely requested a "light-duty position" even though his post-injury restrictions did not limit him just to light-duty positions.

In the "Decision" portion of the August 2003 Order, Judge Best did not resolve the factual dispute regarding whether Claimant had actually met with Weakley as alleged. Judge Best instead denied permanent disability benefits "because [Claimant] ha[d] failed to prove a loss of wage earning capacity by making a reasonable post-injury effort to find gainful employment." (Vol. 2 at 139) The January 2004 Order from the Full Commission, however, mischaracterized Judge Best's opinion. The Commission stated that Judge Best had "found that the claimant made no job search, *except to return to Delphi Packard seeking employment*–and this fact is hotly contested." (Vol. 2 at 151, emphasis added) The Commission, therefore, incorrectly believed that Judge Best had resolved the credibility issue in favor of Claimant.

Despite this conflicting evidence regarding Claimant's attempts to return to work at Delphi, no conflict existed regarding Claimant's attempts to obtain other employment. Claimant unequivocally testified that he had not applied for a job anywhere since leaving the employment of Delphi. (Vol. 3 at 32)

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as the President of the United States and "Lincoln" as the President before Johnston. (Ex. 5 at Ex. C–Page 6 of Geropsychiatric Program Intergrated Admission Assessment)

SUMMARY OF THE ARGUMENT

Claimant failed to establish a claim for disability by a preponderance of the evidence. Claimant did not show that the February 11, 1999 work injury caused a disabling back condition. Claimant's only medical evidence of a work-related disability was one insurance form completed by Dr. Vogel almost eighteen months after Claimant filed a petition to controvert. This form did not provide substantial evidence upon which to base an award, especially in light of numerous contradictions within the treatment records from Dr. Vogel and in light of opinions from other experts rejecting any connection between Claimant's disability and his alleged work injury.

Claimant likewise failed to show any disability as a result of a mental condition caused by the work injury. Although Dr. Jones related Claimant's mental problems to his chronic pain, she did not determine the cause of that chronic pain. Dr. Webb, however, specifically concluded that Claimant's mental condition was *not* work related. Substantial evidence, therefore, does not support the Commission's award of benefits.

The Commission also committed a clear error of law when it awarded permanent disability benefits to Claimant without requiring him to prove his efforts to find other employment. Established case law requires such proof in order for a claimant even to establish a prima facie case of disability. In awarding permanent disability benefits despite Claimant's admitted failure to seek other employment, the Commission ignored established law.

ARGUMENT

A. The February 11, 1999 Incident Did Not Cause Any Permanent Disability.

The Commission erred when it awarded Claimant permanent total disability benefits because the medical evidence does not support a finding that the claimed injury caused Claimant any permanent disability. In a workers' compensation action, "the claimant bears the burden of

proving by a preponderance of the evidence each element of the claim of disability." *Harrell v. Time Warner/Capitol Cablevision*, 856 So. 2d 503, 506 (Miss. App. 2003). Thus, a claimant must prove that he sustained an accidental injury arising out of and in the course of his employment and that a causal relationship exists between that injury and his disability. *Id.* Because Claimant Brown did not present evidence to prove the causal relationship element of his claim by preponderance of the evidence, he is not entitled to permanent disability benefits. Thus, the Commission's award of permanent disability benefits is not legally justified, and this Court should reverse that award.

In the records made contemporaneously with Claimant's course of treatment, Dr. Vogel did not expressly indicate that Claimant sustained any permanent impairment caused by the February 11, 1999 incident. One office note from March 29, 1999 references an incident in which Claimant "lifted heavily" approximately ten days before the visit. This reference cannot, however, be the incident at issue in this case: Claimant contends his injury occurred when he lifted a reel over his head, and the uncontradicted evidence establishes that each reel weighed only seven to nine pounds. Lifting a seven to nine pound object overhead cannot reasonably be characterized as "lifting heavily." In another treatment record, Dr. Vogel expressly stated that Claimant had experienced no injuries between his 1995 hospitalization and the October 1999 surgery. In addition, although Dr. Vogel assigned Claimant "a five percent increase of medical impairment of the body as a whole" and imposed lifting restrictions on January 11, 2000, Dr. Vogel did not indicate in that office note that the assigned impairment was causally related to the February 11, 1999 incident rather than to progression of Claimant's pre-existing degenerative condition. In fact, the January 11, 2000 office note and the office notes prior to that date were

silent as to the February 11, 1999 incident, neither citing it as the cause of Claimant's impairment *nor even mentioning an injury on that date.*

The records documenting Dr. Vogel's treatment of Claimant do not, therefore, offer substantial evidence that such treatment was related to a February 1999 work injury. These records instead indicate that Claimant's post-February 1999 treatment with Dr. Vogel was simply a continuation of Dr. Vogel's ongoing treatment of Claimant's pre-existing problems, which, by Claimant's own admission, began in 1983. Dr. Vogel did not causally connect Claimant's purported disability to the work incident until July 31, 2001, when he completed a Statement of Employee's Physician form. Dr. Vogel completed this form over two years after the injury and almost eighteen months after Claimant filed the Petition to Controvert. This form is not even part of the records attached to the Medical Records Affidavit certifying Dr. Vogel's treatment records; the form is instead part of the records received from Dr. Jones.[15] (Ex. 1; Ex. 3)

Rather than providing substantial evidence of a causal connection to a work injury, Dr. Vogel's treatment notes and Statement of Employee's Physician form, at best, present internally contradictory and unreliable medical opinions from which Claimant attempts to infer such a connection. Significantly, Claimant did not depose Dr. Vogel, so the record contains no direct evidentiary testimony from him. As a result, the contradictions in his opinions remain unresolved. Claimant's attempt to infer from these contradictory opinions definitive evidence of a causal connection is not only unreasonable; the attempt is also legally insufficient to carry

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[15]That Dr. Vogel declared Claimant "disabled" in this form does not, moreover, satisfy Claimant's burden of establishing disability under workers' compensation law. As discussed in Section D of the Argument, workers' compensation law defines "disability" not only in terms of medical impairment but also in terms of loss of wage earning capacity. Declaring a claimant "disabled" pursuant to workers' compensation law involves a legal conclusion. Accordingly, that declaration is properly made by the Commission rather than by a claimant's treating physician.

Claimant's burden of proof on this issue in the face of the direct and internally consistent causation opinions offered by Dr. McGuire and Dr. Smith.[16] First, Dr. McGuire was asked to address specifically this causation issue, and he ascribed Claimant's cervical and lumbar spine problems to degenerative changes. He also specifically found no connection between the five percent lumbar impairment and the February 11, 1999 incident. Neither could he definitively ascribe any portion of the five percent cervical impairment to that incident. Moreover, Claimant exhibited significant positive Waddell's signs, thereby suggesting to Dr. McGuire that Claimant exaggerated his symptoms and was not a good surgical candidate. In addition, Dr. Smith did not assign any impairment to Claimant as a result of the February 11, 1999 injury, finding Claimant instead sustained only a temporary aggravation of his pre-existing degenerative disc disease as a result of that incident. Dr. Smith opined that Claimant had reached maximum medical improvement from a cervical and lumbar standpoint as of May 2, 2000. He also concluded that Claimant could perform light duty work.

The weight of this medical evidence demonstrates that the February 11, 1999 incident caused, at most, a temporary aggravation of Claimant's pre-existing degenerative disc disease. Claimant did not offer sufficient medical evidence to prove that the February 11, 1999 incident *caused* any permanent impairment. The substantial credible evidence actually established the opposite: Claimant's pre-existing degenerative disc disease caused his current ten percent impairment rating. Because Claimant failed to prove that the February 11, 1999 incident caused

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[16]*See Richardson v. Johnson Electric Automotive*, 2006 WL 767721 (Miss. Work. Comp. Com. February 17, 2006). In *Richardson*, the Full Commission affirmed an Administrative Judge's determination that the evidence from claimant's family physician was "too inconsistent and contradictory to support any finding of disability." *Id.* at *7. Significantly, the claimant's family doctor constituted "the sole medical proponent" of her claim. *Id.*

him any permanent physical impairment or additional restrictions, the Commission did not base its award of permanent total disability benefits on the substantial credible evidence before it. As a result, this Court should reverse that award.

B. The February 11, 1999 Incident Did Not Cause Any Psychological Injury to Claimant.

The Commission erred when it concluded that, as a result of the February 11, 1999 incident, Claimant suffered chronic pain syndrome which led to depression and other psychiatric disorders and when it ordered Employer to provide such medical services and supplies as may have been and may yet be reasonable and necessary to treat Claimant's psychiatric injuries. Because Claimant failed to offer medical evidence causally connecting his chronic pain syndrome and psychiatric problems to the February 11, 1999 incident, he failed to meet his burden of proof on this claim. Thus, no legal basis existed upon which to require Employer to pay for Claimant's past or future treatment for these conditions.

No medical evidence in the record causally connects Claimant's chronic pain to the February 11, 1999 work incident. In referring Claimant to Dr. Jones for treatment, Dr. Vogel did not indicate the *cause* for the referral; he merely prescribed the type of treatment for Dr. Jones to provide–"psychiatric treatment/pain management." Claimant received medical treatment from Dr. Jones for depression secondary to chronic pain from August 2000 through March 2003. In identifying "chronic pain" as a source of Claimant's depression, Dr. Jones did not causally connect the depression to Claimant's work injury. By describing the pain as "chronic," Dr. Jones only offered an opinion as to the duration of the pain underlying Claimant's depression. Her opinion that Claimant's pain was chronic was consistent with his history of back and neck problems dating back to 1983. This description of the duration of Claimant's pain provided no

insight into the source of that pain, however. Quite simply, Dr. Jones did not offer in her treatment notes an opinion regarding the etiology of Claimant's chronic pain syndrome; she only concluded that a source of Claimant's depression was chronic pain, *the cause of which she did not identify.*

The evidence relevant to this issue actually suggests that any chronic pain syndrome results from Claimant's degenerative disc condition. For example, Dr. Robert Smith found that the February 11, 1999 incident was a temporary aggravation of a pre-existing condition (degenerative disc disease) and that Claimant had reached maximum medical improvement by May 2, 2000, the date of the Independent Medical Evaluation–three months before Claimant began treating with Dr. Jones. Furthermore, Dr. McGuire opined he could find nothing objectively to show that Claimant's neck and back problems were related to the February 11, 1999 incident. Therefore, according to both Dr. Smith and Dr. McGuire, any continued pain Claimant was experiencing in August 2000 resulted from the pre-existing degenerative disc disease and not the February 11, 1999 incident. Finally, Dr. Vogel did not contradict any of this testimony. Dr. Vogel did not draw any causal connection between Claimant's chronic pain and the February 11, 1999 work-related injury. Furthermore, the Commission found that Dr. Vogel "established [Claimant's] maximum neurological improvement on January 11, 2000," a date months before Claimant began treating with Dr. Jones in August 2000.

As this analysis shows, the record does not contain substantial evidence upon which the Commission could base its decision that Claimant experienced a work-related psychological injury. Accordingly, the Court should reverse the Commission's decision on this issue.

C. Claimant's Mental Injury Is Not Compensable Because It Occurred After the Organic Physical Effects of the February 11, 1999 Injury Had Disappeared.

The Commission erred when it concluded that, as a result of the February 11, 1999 incident, Claimant had suffered chronic pain syndrome which led to depression and other psychiatric disorders and that those mental injuries were compensable injuries. Because Claimant's chronic pain syndrome and the resulting psychiatric disorders did not begin until August 2000–months after the Claimant had reached maximum medical improvement with regard to his physical injury–and because Claimant failed to present evidence causally connecting his mental injury to the work incident, no legal basis exists for requiring Employer to pay any benefits relating to Claimant's mental injury. The Commission's ruling on this issue is clearly erroneous and is inconsistent with its own findings of fact regarding Claimant's maximum medical improvement date.

Under workers' compensation law, "when an injury occurs but the resulting organic physical effects disappear, imagined incapacity and symptoms of pain without physical basis are not compensable, since incapacity due to a mental condition not resulting from work connected injury is not within the coverage of the Act." Vardaman S. Dunn, Mississippi Workmen's Compensation § 114 (3d ed. 1990) (citing *Bates v. Merchs. Co.*, 161 So. 2d 652 (Miss. 1964); *Powers v. Armstrong Tire & Rubber Co.*, 173 So. 2d 670 (Miss. 1965); *Nat'l Impact Metal Corp. v. Huffstatler*, 184 So. 2d 877 (Miss. 1966)). Generally, for the mental injury to be compensable, the Claimant must prove that "(1) an actual physical injury occurred, and (2) that the neurosis was the direct and immediate result of such injury." *Id.* Moreover, "when the mental or emotional disturbance is in no way related to the injury but is due to pre-existing mental disorders, the resulting disability is not made compensable merely because the employee himself

actually relates, in his own mind, all of his difficulty to his physical injury." *Id.* (citing *Merchs. Co. v. Moore*, 197 So. 2d 791 (Miss. 1967)).

As noted earlier, the Commission concluded that Dr. Vogel, Claimant's treating physician, established maximum medical improvement for Claimant's neurological problems on January 11, 2000. However, Dr. Vogel did not recommend treatment for psychiatric problems and pain management until he referred Claimant to Dr. Jones on August 21, 2000–over seven months after Claimant's physical injury had reached maximum improvement. Moreover, in his status letter and referral, Dr. Vogel did not causally relate Claimant's pain and psychiatric condition to the work incident on February 11, 1999. Similarly, Dr. Jones also failed to relate Claimant's psychological problems to any physical injury he sustained as a result of the February 11, 1999 incident. She merely concluded that his psychiatric problems were secondary to chronic pain syndrome; she did not, however, offer any opinion regarding the genesis of the chronic pain syndrome.

In fact, the Commission itself concluded only that Dr. Jones had "noted evidence of depression with psychotic behavior related to work issues." That factual finding is an insufficient basis for concluding that Claimant's psychological condition resulted from the February 11, 1999 incident. Certainly, Dr. Jones documented psychotic behavior related to or involving Claimant's perceived issues at work. That such behavior *pertained to* Claimant's work does not mean that the behavior was causally connected to the February 11, 1999 incident in particular. Neither the facts as found by the Commission nor the facts documented in Dr. Jones's records provide a substantial basis for the Commission's determination that the work incident caused the mental injury. Because Claimant did not present any direct evidence showing his

psychiatric condition resulted from his work, he failed to prove that his chronic pain disorder and psychiatric condition were direct and immediate results of the February 11, 1999 incident.

In contrast, Employer presented direct medical evidence from Dr. Webb indicating that Claimant's psychiatric condition *was not* causally related to the February 11, 1999 work injury. (Ex. 5 at 16, 20-21) Dr. Webb opined that the source of Claimant's pain was his paranoia and histrionic features. Dr. Webb further equated Claimant's paranoid and histrionic disorders and personality disorder with what was once called malingering disorder. Dr. Webb also emphasized that Claimant remained calm and exhibited no pain behavior during the examination and that such behavior did not coincide with his complaints.

The law unequivocally bars Claimant from receiving at the Employer's expense medical treatment which is unrelated to the subject injury. On this record, substantial evidence does not support the Commission's conclusion that Employer was liable for the past and future medical bills relating to Claimant's psychiatric condition. Rather, the Commission ruled *against* the overwhelming weight of the evidence when it so concluded. As a result, this Court should reverse the Commission's order on this issue.

D. Claimant Failed to Prove Any Permanent Disability or Loss of Wage Earning Capacity.

Mississippi Workers' Compensation law defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the 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(i). Where a claimant suffers "total disability adjudged to be permanent," the law entitles him or her to permanent total disability benefits. *Id.* § 71-3-17(a). Under these statutory provisions, "[a] conclusion that the employee is disabled rests on a

finding that the claimant could not obtain work in similar or other jobs and that the claimant's unemployability was due to the injury in question." *Georgia Pac. Corp. v. Taplin*, 586 So. 2d 823, 828 (Miss. 1991).

In this case, the Full Commission found itself "faced with the question: is the absence of a job search fatal to claimant's request for permanent indemnity benefits?" (Vol. 2 at 151) The Commission responded, "Not necessarily." (Vol. 2 at 151) In so responding, the Commission erred as a matter of law. Rather than applying the statutory language to the facts before it, the Commission instead decided that it could "delve 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) Indeed, the Commission ignored thirty-eight years of precedent when it created an exception for this Claimant by holding that, "*in the absence of a job search* or expert vocational evidence, there are occasions when the facts portend permanent disability and indemnity should be granted." (Vol. 2 at 151, emphasis added)

1. ***Claimant's Proof of Disability Must Include Evidence of Reasonable Efforts to Find Other Employment.***

The Mississippi Supreme Court has long required a claimant seeking permanent disability benefits to prove that he or she made reasonable efforts to obtain other employment. The court has drawn this requirement from the statutory definition of "disability," which it interprets as "mean[ing] that the claimant must seek, after the disability subsides, employment in another or different trade to earn his wages." *Coulter v. Harvey*, 190 So. 2d 894, 897 (Miss. 1966). With regard to the order and burden of proof for establishing disability, the court ultimately set forth the following rule:

> The claimant has the burden of proof to make out a prima facie case for disability, after which the burden of proof shifts to the employer to rebut or refute the

> claimant's evidence. After the burden shifts, evidence indicating that suitable employment was available to claimant becomes relevant and admissible. . . . [T]he employer may present evidence . . . showing that claimant's efforts to obtain other employment were a mere sham, or less than reasonable, or without proper diligence.

Thompson v. Wells-Lamont Corp., 362 So. 2d 638, 641 (Miss. 1978).

In applying this rule, the court later explained "that 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." *Sardis Luggage Co. v. Wilson*, 374 So. 2d 826, 829 (Miss. 1979) (emphasis added). In a case where "nothing in the record . . . even allude[d] to [claimant's] seeking other employment," the court therefore ruled that "the lower tribunals were manifestly wrong in awarding permanent partial disability benefits." *Id.* In subsequent opinions, both the Supreme Court and the Court of Appeals consistently adhered to this rule requiring a claimant's prima facie case of disability to include proof of reasonable efforts to find other employment. *See, e.g., Georgia Pac. Corp. v. Taplin*, 586 So. 2d at 828; *Piper Indust., Inc. v. Herod*, 560 So. 2d 732, 735 (Miss. 1990) (noting that employer "[was] correct that the employee must make a 'reasonable effort' to find other comparably gainful employment").

In 1992, the Supreme Court restated its earlier *Thompson* rule using the following language:

> When the claimant, having reached maximum medical recovery, reports back to his employer for work, and the employer refuses to reinstate or rehire him, then it is prima facie that the claimant has met his burden of showing total disability. The burden then shifts to the employer to prove a partial disability or that the employee has suffered no loss of wage earning capacity.

Jordan v. Hercules, Inc., 600 So. 2d 179, 183 (Miss. 1992). In discussing the impact of this restatement of the established rule, the Court of Appeals acknowledged that before *Jordan* a prima facie case of disability included two elements: proof that the employer had "refuse[d] to

offer work to the former employee anxious to return to the employer's fold" and "evidence of a reasonable effort to obtain work from other available sources." *McCray v. Key Constructors, Inc.*, 803 So. 2d 1199, 1201 (Miss. Ct. App. 2000). That court further noted that the *Jordan* court "seem[ed] to have simply discarded . . . the second part of the claimant's previously existing burden." *Id.* Despite this apparent discarding, the *McCray* court read a post-*Jordan* opinion from the Supreme Court as "acknowledg[ing] the continued viability of *Thompson* . . . and, in fact, appear[ing] to blur the distinction between the two cases by discussing the 'Jordan/Thompson test.'" *McCray*, 803 So. 2d at 1202 (citing *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1227 (Miss. 1997)).

Later courts continued to confirm the viability of *Thompson*'s two-part test and to recognize the deficiency in the *Jordan* court's restatement of that test. One court, for example, summarized the relevant standards for evaluating disability claims as follows: "Case law has long held that, in order to meet that burden, it is an integral part of the claimant's proof that he show (a) an inability to resume his former work, and (b) the effort he has made to seek employment in another or different trade for which he might be suited." *Entergy Miss., Inc. v. Robinson*, 777 So. 2d 53, 55 (Miss. Ct. App. 2000). On appeal to the *Robinson* court was a case in which "the Commission excused [the claimant's] nineteen-month long period of inactivity in searching for alternate employment on the basis that [the employer's] failure to return [the claimant] to his former employment was sufficient proof of the existence of his disability." *Id.* The court, however, found no precedent holding that an employer's refusal to rehire, standing alone, was conclusive evidence of disability or loss of wage earning capacity. *Id.* In fact, to the extent *Jordan* endorsed such a one-pronged test for disability, the *Robinson* court classified that pronouncement as "dictum," explaining that the "[one-pronged *Jordan*] rule, announced without

any citation to authority, appeared to conflict with prior decisions requiring both (a) failure to return to the old employment together with (b) proof of efforts to obtain other employment in order to establish disability." *Id.* at 56. The court then held that "the Commission erred as a matter of law when it refused to consider the extent of [the claimant's] efforts to find other suitable employment for which he might be suited in his post-injury condition when assessing the extent of his permanent partial disability" and that, "as a matter of law, it was necessary for the Commission to address those questions in assessing [the claimant's] degree of disability." *Id.*

Two other cases confirm that the two-prong *Thompson* rule constitutes the appropriate standard for determining permanent disability. In one case, the Court of Appeals again acknowledged the deficiencies in the *Jordan* rule formulation, characterizing the *Jordan* opinion as "one of those occasional cases in the workers' compensation area that in attempting to restate former caselaw may just not have fully described it." *Wesson v. Fred's Inc.*, 811 So. 2d 464, 470 (Miss. Ct. App. 2002). That court further described the *Jordan* rule as "only an abridged form of the presumption," and the court contrasted "the *Jordan* truncated iteration" with "the [*Thompson v.*] *Wells-Lamont* complete version."[17] *Wesson*, 811 So. 2d at 470. In addition, the Court of Appeals recently renewed its approval of the two-prong *Thompson* standard for proving disability. In *Aldolphe Lafont USA, Inc. v. Ayers*, 958 So. 2d 833, 839 (Miss. Ct. App. 2007), the court stated that, to prove permanent total disability, "a claimant must show something more than an inability to return to the job existing at the time of injury"; the claimant must also prove that "he has made a diligent effort, but without success, to obtain other gainful employment."

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[17]The *Wesson* court did not conclusively decide whether *Jordan* incorrectly restated the earlier *Thompson* rule because the court simply did not reach the issue; the court instead found the claimant had presented no evidence of a permanent impairment, making the "threshold for the presumption" non-existent. *Wesson*, 811 So. 2d at 471.

2. ***Claimant Did Not Provide Any Evidence That He Made Reasonable Efforts to Find Other Employment.***

No question exists as to the unreasonableness of Claimant's efforts to obtain other employment in this case because Claimant has unquestionably admitted that he made *no effort* to find other employment after reaching maximum medical improvement. During the hearing in this matter, Claimant testified as follows:

> Q. . . . [S]ince you have left the employment of Delphi Packard, you haven't gone out and applied for a job anywhere?
>
> A. No.

(Vol. 3 at 32) This case did not, as a result, require the Commission to evaluate the extent and reasonableness of the Claimant's job search. Claimant's non-existent attempts to find other jobs simply cannot, under any theory, equal a reasonable effort to obtain other employment. Accordingly, Claimant did not establish the second element required to raise a prima facie case of permanent total disability.[18]

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[18]Employer also denies that Claimant established the first element of a prima facie case of disability. Claimant testified that he met with Weakley approximately one year before the hearing to discuss returning to work at Delphi and that Weakley allegedly said Claimant could not return to work because of his past injuries and accidents. Weakley, in contrast, testified that no such conversation took place. Weakley also affirmed Employer's commitment to returning employees to work if possible and its ability to accommodate various physical restrictions and to provide light duty work. Only Claimant's testimony supported his alleged attempt to return to work; the credibility of his testimony on this point is, however, questionable. Claimant's own treating physician, Dr. Jones, had documented that Claimant had a poor memory and that he heard things that other people did not hear. Dr. Jones was treating Claimant in March 2002, when the conversation with Weakley allegedly occurred; however, she did not document in any of her office notes for 2002 that Claimant made any reference to Weakley's rejection. The weight of the credible evidence, therefore, showed that Claimant never attempted to return to work after reaching maximum medical improvement and that, had Claimant done so, Employer would have worked with him to accommodate any medical restrictions. As discussed in this Section of the Brief, the resolution of this credibility issue does not, however, effect Employer/Self-Insured's argument that the Commission erred as a matter of law in awarding disability benefits. The law clearly requires a claimant to establish both components of the *Thompson* standard in order to prove permanent disability, and this Claimant undeniably failed to establish the first one.

3. ***The Commission Erred as a Matter of Law by Awarding Permanent Total Disability Benefits Despite Claimant's Failure to Prove Reasonable Efforts to Find Other Employment.***

In awarding permanent total disability benefits despite Claimant's admission that he made no effort to obtain other employment, the Commission erred as a matter of law. Indeed, this case presents the same error of law as was present in *Robinson*. Instead of applying the statutory provisions and established precedents, the Commission announced a new standard for establishing permanent disability–a standard in which "a job search, *per se*, is unnecessary." This newly created standard is at odds with the Supreme Court's holding in *Sardis Luggage Co.*, where the court required a claimant to prove "unequivocally" that he had made a reasonable effort to find other employment. The Commission's decision also contradicts the decisions in *Hale*, *McCray*, *Wesson*, and *Aldolphe Lafont USA, Inc.*, all of which are discussed in the Argument Section D.1 of this Brief.

The Commission cited two cases which purportedly supported its determination that a claimant did not have to prove efforts to obtain other employment in order to establish a claim for permanent disability. Neither case, however, provides authority for the Commission's deviation from established precedent because neither court addressed this issue.

The Commission first relied on *South Central Bell Telephone Co. v. Aden*, 474 So. 2d 584 (Miss. 1985). As the Commission noted, the *Aden* court did award the claimant permanent disability benefits; but the Commission failed to recognize that the necessity of a job search to prove permanent disability was not among the issues addressed and decided by that court. In other words, the *Aden* court did not expressly address the issue of the claimant's search for similar or other employment. It seems unreasonable and illogical to interpret the *Aden* court's silence on this issue as an abandonment of the *Thompson* rule, especially since the subsequent

courts expressly addressing the issue had, in fact, consistently followed the *Thompson* rule and since the court decided *Aden* seven years before the *Jordan* court's "truncated iteration" of that rule had created any questions. A more likely explanation for the *Aden* court's decision is that Employer South Central Bell's primary challenge to the claim was "that claimant ha[d] not suffered a compensable injury." *Aden*, 474 So. 2d at 589. The court noted, "Assuming arguendo that claimant has a disability, employer suggests that disability couldn't have been caused in the way claimant describes." *Id.* at 590. Thus, the employer argued that the claimant's disability claim was not supported by medical findings as required by Mississippi Code Annotated § 71-3-3(i). *Id.* at 591. The court rejected the employer's argument, stating that the statute did not require "a precise, complete and unequivocal medical explanation of just how the accident caused the injury which in turn caused claimant's disability."[19] *Id.*

The Commission also relied on *M.T. Reed Construction Co. v. Garrett*, 164 So. 2d 476 (Miss. 1964). As in *Aden*, *Garrett* did not present the issue of whether a job search was required to establish permanent disability. Instead, the court addressed whether substantial evidence supported the Commission's determination that the effects of the claimant's injury had subsided and did not continue to combine with a pre-existing condition to produce a disability. *Id.* at 477. Because the *Garrett* court addressed a wholly different issue, the Commission's reliance on that opinion is inappropriate. The Mississippi Supreme Court, moreover, decided *Garrett* in 1964, years before it announced the two-prong standard in *Thompson* in 1978. The Commission's use

[19]In addition, the *Aden* court seemed generally displeased with the employer's arguments in that case. For example, the court found "something *offensive* about Employer's use for purposes of this litigation of claimant's failure to report her injury for four days." *Id.* at 590-91 (emphasis added).

of *Garrett* to support an abandonment of the *Thompson* rule is especially unreasonable in light of this chronology.

In sum, the Commission decided in this case to create and apply a new standard for establishing disability. In doing so, the Commission freed itself and Claimant from the evidentiary requirements set by both the statute and relevant case law. To justify its escape from these legal constraints, the Commission offered no authority other than two cases, neither of which addressed the standards for proving permanent disability as at issue here. In disregarding the established law and creating an unsupported new standard, the Commission issued a clearly erroneous decision: the Commission awarded permanent disability benefits to Claimant despite his failure to establish even a prima facie case of such disability.[20] This Court should, therefore, reverse the Commission's decision and deny Claimant's claim for permanent disability benefits based on his admitted failure to seek other employment.[21]

CONCLUSION

Because Claimant failed to satisfy his burden of proving a permanent disability by a preponderance of the evidence, the Commission did not base its award of benefits on substantial evidence. The Commission also committed a clear error of law by not requiring Claimant to

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[20]The Commission's new legal standard in this case especially prejudiced Employer/Self-Insured as it relied on established case law requiring a Claimant to conduct a job search to establish disability. Knowing that Claimant had not conducted a job search and relying on this established law, Employer/Self-Insured had determined that Claimant would be unable to establish a prima facie case of disability. It could not, therefore, anticipate needing to present proof to rebut a prima facie case.

[21]An alternative basis for this Court to reverse the Commission's permanent disability award is Claimant's failure to prove that, post-MMI, he sought and was rejected for re-employment with Delphi. As discussed in the Facts Section and Note 18 of this Brief, neither the Administrative Judge nor the Commission made a clear ruling that Claimant did present for re-employment as he alleged. Thus, even if Claimant had proven the job search component of the *Thompson* standard, the Commission could not award permanent disability under that standard without conclusively determining that he had also proven the other component.

show reasonable efforts to find other employment as part of his claim for permanent total disability. For these reasons, this Court should reverse the Commission's decision and should hold that Claimant is not entitled to such benefits.

Dated this the 24th day of September, 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:

Ms. Betty Sephton, Clerk
Mississippi Supreme Court
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and via **United States Mail**, postage prepaid, to the following:

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Dated this the 21st day of September, 2007

ANDREW D. SWEAT
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