IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEPARTMENT OF HEALTH/ELLISVILLE STATE SCHOOL AND MISSISSIPPI STATE AGENCIES WORKERS' COMPENSATION TRUST,	()	
APPELLANTS	()	NO. 2007-WC-01139
VERSUS	()	
PHYLLIS STINSON,	()	
APPELLEE	()	

BRIEF OF THE APPELLEE

(ON APPEAL FROM THE ORDER OF THE CIRCUIT COURT OF PERRY COUNTY, MISSISSIPPI)

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CERTIFICATE OF INTERESTED PERSONS

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

1. Phyllis Stinson, claimant/appellee;
2. Ellisville State School, employer/appellant;
3. Mississippi State Agencies Workers' Compensation Trust, carrier/appellant;
4. Percy W. Watson, Esq., attorney for the claimant/appellee;
5. Diane V. Pradat, Esq., attorney for the employer-carrier/appellant;
6. Tameka W. Buck, Esq., attorney for the employer-carrier/appellant.
7. Honorable Mark Henry, Administrative Judge;
8. Honorable Robert Helfrich, Circuit Court Judge

This the 29th day of October, 2007.

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STATEMENT OF THE CASE

Phyllis Stinson, 57 years old and a direct care alternate supervisor, sustained an industrial injury in the course and scope of her employment with the Department of Mental Health/Ellisville State School on April 1, 2002. Subsequently, on August 1, 2003, she filed a Petition to Controvert stating that she had sustained total and permanent loss of wage earning capacity as a result of this admitted injury. On July 19, 2005, a hearing on the merits before the Administrative Judge was held in Hattiesburg, and this Administrative Judge rendered his opinion on October 7, 2005 wherein he found Phyllis Stinson totally and permanently disabled. This opinion was affirmed by the Full Commission on May 5, 2006. On June 7, 2007, the Circuit Court of Perry County affirmed the decision of the Full Commission. The Employer/Carrier appealed this decision on July 5, 2007.

Claimant and other workers at Ellisville State School Group Home in Richton were attempting to subdue a violent client. In the struggle with the client, claimant fell to the ground and injured her back. (R. 22). She received medical care from Dr. John Beamon on the date of this injury and several occasions thereafter. Later on April 16, 2002, Dr. Beamon referred the claimant to Dr. Michael C. Molleston, a board certified neurosurgeon in Hattiesburg. (R. 22-24).

Ms. Stinson began work in 1997 at the Richton Campus as a direct care alternate supervisor. (R. 18-19). In this position, claimant worked directly with the clients. She bathed clients, shopped for them, and at times, it was necessary for her to restrain violent clients. (R 18-19). On any given day, she would have to reposition bedridden clients and lift wheelchair clients. (R. 20). Considerable standing, walking, lifting, stooping, and bending were required of this alternate supervisor. (R. 19).

After examining claimant, Dr. Molleston ordered an MRI which showed a ruptured disc at the L4-5 level. (Exhibit 1, Page 5). On June 10, 2002, Dr. Molleston performed a lumbar laminectomy and

interbody fusion at L4-5 level at Wesley Medical Center. Unfortunately, claimant's back pain did not improve significantly after this operation. The pain began to radiate down her left leg and later she began experiencing numbness in this leg which continued to the date of the hearing. (Exhibit 1, Pages 8 & 9). She is in constant pain and does not have any pain free moments. (R. 48).

Since Ms. Stinson's initial surgery, Dr. Molleston diagnosed her with adjacent disc syndrome and he recommended another surgical procedure. (Exhibit 1, Pages 12 & 15). Ms. Stinson has declined this surgery because she fears that this surgery may worsen her condition. (R. 30 & 31). Dr. Molleston has concluded that claimant cannot return to any gainful employment, and accordingly he has not released her to return to work. (Exhibit 1, Page 14). Dr. Molleston has restricted Ms. Stinson from lifting, bending, stooping or reaching overhead. (Exhibit 1, Page 15).

Ms. Stinson has major problems walking and uses a cane prescribed by Dr. Molleston. (R. 31). After standing or walking for several minutes, she has to sit or lean against a wall. (R. 31). Climbing is particularly difficult. Further, claimant has to lie down for 30 to 45 minutes three or four times each day. (R. 33, 35, 36).

Claimant resides with her daughter, Karen Stinson, and Karen assists her with vacuuming, sweeping, laundry and other household duties. (R. 35).

Ms. Stinson, a Greene County Election Commissioner, has served in this elective office since 1988. She is paid $70.00 a day and works at least five days a month. She receives no fringe benefits in this part-time position. (R. 36-37).

Ms. Stinson's duties as an Election Commissioner include keeping up with the voter rolls, election books and in conjunction with other commissioners, she conducts county elections. (R. 37). Since her injury, she has been unable to lift the metal ballot boxes and supply boxes which weigh 40

pounds and she requires the assistance of her colleagues. (R. 38, 39).

Ms. Stinson applied for jobs at over 30 businesses. She has been unable to secure employment at these businesses. (R. 42, 43). Also, she registered at the Mississippi Employment Service in Hattiesburg. She has received no referrals from the employment service. (R. 44, 45).

Ms. Stinson has been in constant back pain since her injury. This pain was relieved slightly after her surgery in June, 2002, however, she has had only about three pain free days since April 1, 2002. (R. 48). Ms. Stinson testified as follows about her persistent pain:

> "Q. Mr. [sic] Stinson, since this injure [sic] that we're here on today, since that date, have you had many days when you were completely pain free?
>
> A. No, sir.
>
> Q. Have there been periods of time during any particular day when you were without pain?
>
> A. The only days that I can recall that I have been absolutely pain free, felt so much better, was in June of 2003, and why I remember the date is because a cousin's daughter got married that day and I had an epidural done in my back; and I had three (3) days I wasn't hurting and I had no pain." (R. 48).

Bruce Brawner, a vocational expert hired by the employer/carrier, concluded that the claimant could perform jobs at the light level. Mr. Brawner based his conclusion on the medical opinion of Dr. Vohra who "**suspect[ed]**" that the claimant could perform light duty work. (Claimant's Exhibit 5, Page 5). On cross-examination, considering the restrictions in Dr. Molleston's September 8, 2004 deposition, Mr. Brawner opined that Ms. Stinson could not work on a regular basis. (R. 86, 87). Moreover, Mr. Brawner did not consider Dr. Vohra's final opinion that this employee would never return to regular employment. (R. 91-95).

Dr. Michael Molleston testified through deposition and medical affidavit that he started to treat claimant on April 16, 2002 and that he performed a lumbar laminectomy and interbody fusion on June 10, 2002. Dr. Molleston concluded that based on his treatment, examinations, diagnostic tests of this patient over a three year period that she is totally and permanently disabled:

> "Q. Did you have any recommendations for further treatment?
>
> A. I told her surgical decompression was an option. I told her I'd recommend that she have a decreased level in her, whatever you call it, walking or exertion situation. I told her I didn't think she was going to return to any sort of work at this point and that I thought she was totally and permanently disabled.
>
> Q. Now, Doctor, why did you feel that she was totally and permanently disabled? (Claimant's Exhibit 1, Deposition of Dr. Michael Molleston, page 14, 15)
>
> * * * *
>
> Q. Doctor, do you have an opinion based upon a reasonable degree of medical probability as to your opinion with respect to her ability to return to her job as a direct care supervisor at Ellisville State School?
>
> A. Yes. I thought that she was disabled to return to that job for sure. Again, she had to walk with a cane. She could barely stand longer than 15 minutes, and she certainly couldn't carry, sit, walk or stand longer than 15 or 20 minutes at a time without having to lie down. She used a cane. I thought that she was not able to do sedentary work because she doesn't have good use of both hands. She cannot tolerate sitting. She cannot tolerate standing, and then of course, the bending and lifting associated with this job that she had previously was beyond her physical capabilities, plus she needed to have additional surgery done and she's of advanced age. She was 53 at that time." (Claimant's Exhibit 1, Deposition of Dr. Michael Molleston, page 15)

When cross-examined by employer/carrier's counsel about the election commissioner position, Dr. Molleston responded:

> Q. .....[A]re you aware that she is working and that she works

as an election commissioner?

A. I'm not aware of that, but I wouldn't consider that any kind of regular job or full-time job.

Q. But she is able to do it.

A. I'm sure she can do some things for a short period of time, but that's because, you know, when she's not working as the election commissioner, then I guess she can go home and lay down and lay down for two or three days afterwards to get over it.

Q. But you don't know that for sure?

A. I never asked her that, but I'm sure that's what she would say.

Q. So would you agree with me, Doctor, that she is actually not permanently and totally disabled if she can do some type of work?

A. No. I think that she's totally and permanently disabled for work as defined by Social Security, full-time work.

Claimant's Exhibit 1, Deposition of Dr. Michael Molleston at Page 34.

Dr. Molleston referred claimant to Dr. J. Stephen Beam, a family and occupational medicine specialist, who assigned her an impairment rating of 23 percent to the body as a whole. This impairment rating was based on Ms. Stinson's injury and continued pain. Claimant's Exhibit 4, Medical Records Affidavit of Dr. J. Stephen Beam.

Dr. Rahul Vohra, a physical medicine and rehabilitation physician, testified through his medical records. (Claimant's Exhibit 5). He performed a medical examination at the request of the employer/carrier. Dr. Vohra saw Ms. Stinson once, assigned the claimant an impairment rating of 20 percent to the whole body, and recommended a functional capacity evaluation. Further, Dr. Vohra opined, "I suspect she is going to come out at a light level of work." In response to a letter from employer/carrier as to when did he anticipate claimant would be able to return to regular work activities,

Dr. Vohra responded, "Probably never." Employer's Exhibit 10 at Page 3.

SUMMARY OF THE ARGUMENT

The question before this Court is whether the Mississippi Workers' Compensation Commission Order finding Phyllis Stinson permanently and totally disabled is arbitrary and capricious and is not supported by substantial evidence. This Court should affirm the Commission's findings if they are supported by substantial evidence.

The Employer and Carrier urge this Court to act as a trier of facts on issues that have already been determined by the Mississippi Workers' Compensation Commission. The Court should determine whether there is substantial credible evidence to support the determination of the Commission.

Phyllis Stinson sustained a very disabling injury on April 1, 2002. She has been under the care and treatment of Dr. Michael C. Molleston, neurosurgeon, who has concluded that Ms. Stinson is not able to engage in any gainful employment. He has imposed physical restrictions on his patient which would not permit any kind of regular employment. Ms. Stinson is in pain nearly all the time which prevents her from working.

Although Ms. Stinson is an elected Election Commissioner of Greene County, the Commission and the Perry County Circuit Court have concluded that this is not gainful employment. This position does not provide regular income and Ms. Stinson needs the assistance of other commissioners and county workers to perform the tasks required of this position. Moreover, Ms. Stinson has to run for re-election in 2008 and there is no assurance that the voters of Greene County will elect her again to this position.

Further, Ms. Stinson has made numerous applications for other employment despite her

physical condition, and she has been unable to secure other employment through these efforts.

Sufficient factual support exists to support the decision of the Mississippi Workers' Compensation Commission and the Circuit Court of Perry County.

The Full Commission and the Circuit Court carefully considered and weighed the evidence as a whole and found that Ms. Stinson is permanently and totally disabled and is entitled to permanent total benefits.

The Circuit Court's decision finding that the Full Commission order is based on substantial evidence and is not arbitrary or capricious should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

An appellant court should defer to the administrative agency's fact finding if there is a quantity of credible evidence to support the agency's decision. **Hale v. Ruleville Health Care Center**, 687 So. 2d 1221, 1224 (Miss. 1997). This Court should affirm the Mississippi Workers' Commission's finding of fact if they are supported by substantial evidence. **Vance v. Twin River Homes, Inc.**, 641 So. 2d 1176, 1180 (Miss. 1994). **Guardian Fiberglass, Inc. v. LeSueur**, 751 So. 2d. 1201, 1204 (Miss. Ct. App. 1992). "This highly deferential standard of review essentially means that this Court [Mississippi Supreme Court] and the circuit courts will not overturn a Commission decision unless the decision was arbitrary and capricious." **Hale**, at 687 So. 2d 1225. **Georgia Pacific Company v. Taplin**, 586 So. 2d 823, 826 (Miss. 1991). **Raytheon Aero. Support Servs. v. Miller**, 861 So. 2d 330 (§11) (Miss. 2003) Further, an appellate court will reverse the commission's order only if the court finds that the order is clearly erroneous and contrary to the overwhelming weight of evidence. **Myles v. Rockwell International**, 445 So. 2d 528, 536 (Miss. 1984) **Masonite Corporation v. Fields**, 229 Miss., 524, 91

So. 2d 282 (Miss. 1956) **Riverside of Marks v. Russell**, 324 So. 2d 759, 762 (Miss. 1975). Similarly, an appellant court may not reweigh the evidence and substitute its decision for that of the commission. The court has a duty to defer to the commission when its order can be supported. **Fought v. Stuart C. Irby Co.**, 523 So. 2d 314, 317 (Miss. 1988).

"Further, neither this Court nor the Mississippi Supreme Court is empowered to determine where the preponderance of the evidence lies when the evidence is conflicting. Instead, this Court must affirm the decision of the commission where substantial credible evidence supports the Commission's order" **Barber Seafood, Inc. v. Smith,** 911 So. 2d 454 (§ 27) (Miss. 2005) Id (citations omitted).

Appellate courts' standard of review for decisions of the Workers' Compensation Commission is limited. The appellate courts will reverse an order of the commission when the commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. **Martinez v. Swift Transportation,** 2006-WC-01442-COA (Miss. App. 8-14-2007) **Smith v. Jackson Construction Co.**, 607 So. 2d 1119, 1124 (Miss. 1992) Substantial evidence is defined as more than a mere scintilla, but it does not rise to level of a preponderance of the evidence. **Delta CMI v. Speck**, 586 So. 2d 768, 773 (Miss. 1991).

Doubtful workers' compensation claims should be resolved in favor of an award of compensation to fulfill the beneficial purposes of the law. **Sharpe v. Choctaw Electronics**, 767 So. 2d. 1002, 1006 (Miss. 2000). **Marshall Durbin Co. v. Warren**, 633 So. 2d 1006, 1010 (Miss. 1994).

II. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE CIRCUIT COURT'S OPINION FINDING PERMANENT AND TOTAL DISABILTY

Ms. Stinson has been under the care and treatment of Dr. Michael Molleston since April 16, 2002, 15 days after this admitted injury. Dr. Molleston recommended the required diagnostic tests,

including an MRI which revealed that the claimant had a ruptured disc at the L4-5 level. On June 10, 2002, Dr. Molleston performed a lumbar laminectomy and interbody fusion at the L4-5 level. Ms. Stinson's condition improved for a brief period and she basically returned to her condition before surgery. A lumbar myelogram showed progressive lumbar spinal stenosis at the L3-4 level where the surgery was done. Dr. Molleston concluded that the narrowing was due to "adjacent disk disease."

Dr. Molleston testified that on February 4, 2003 that the claimant was permanently and totally disabled. The basis of this opinion was that she could not lift anything on the job. She should not pick up anything from the ground and that she could only lift 10 to 20 pounds from waist level. According to Dr. Molleston, Ms. Stinson cannot sit longer than 15 or 20 minutes without having to lie down. Dr. Molleston explained that the lifting limitation was necessary to prevent a worsening of her disc problem at L3-4. Dr. Molleston also stated that Ms. Stinson did not have good use of both hands in her condition.

Dr. Molleston stated that it was necessary for claimant to lie down twice in an eight-hour day for about an hour each. Similarly, Ms. Stinson testified that she has to lie down three or four times a day, can stand for only 15 or 20 minutes without experiencing pain.[1] Dr. Molleston specifically prohibited the claimant from engaging in any stair climbing. Ms. Stinson's condition was so severe that Dr. Molleston would not advise that she submit to a functional capacity examination recommended by Dr. Vohra. The functional capacity examination could subject Ms. Stinson to additional injury.

Dr. Molleston continued to maintain this opinion when his deposition was taken on September 8, 2004. He further opined that the claimant's physical condition had regressed to the point that it was prior to the June 10, 2002 surgery.

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1 Compensation may be awarded for disabling pain without positive medical testimony as to physical cause. **Morris v. Lansdell's Frame Co.**, 547 So.2d 782, 785 (Miss. 1989).

Dr. Molleston has treated Ms. Stinson over a period of four years. He has recommended various diagnostic tests and performed surgery on this patient. As a board certified neurosurgeon, he is well qualified to render an opinion as to the claimant's ability to work.

Ms. Stinson's condition clearly meets the definition for total and permanent disability as defined by settled case law:

> "In order for one to be totally disabled within the meaning of a health or accident policy, it is not necessary that he be wholly incapacitated to perform any duty incident to his usual employment or business, but, if the insured is prevented by his injury or illness from doing the substantial acts required of him in his business, or if his physical condition is such that, in order to effect a cure or prolongation of life, common care and prudence require that he cease all work, he is totally disabled within the meaning of such policies. **M. T. Reed Construction Co. v. Martin**, 215 Miss. 472, 477-78, 61 So.2d 300, 303, 1952. **Ard v. Marshall Durbin Cos.**, 818 So.2d. 1240, 1248 (Miss. App. 2002). **Piggly Wiggly v. Houston**, 464 So.2d. 510, 512 (Miss. 1985).

See also Dunn, Mississippi Workers' Compensation 3rd Ed., Section 86, Page 102, 103. [[I]f he is prevented by his injury from doing the substantial acts required of him in his usual occupation, or if his resulting condition is such that common care and prudence require that he cease work, he is totally disabled within the meaning of the statute.]

While employer/carrier claims that the medical evidence is contradictory on whether or not Ms. Stinson has sustained a permanent total disability, it is respectfully submitted that both Dr. Molleston and Dr. Vohra reached basically the same conclusion. Dr. Vohra concluded on July 13, 2005, a few days before the hearing on the merits that claimant would never be able to return to work. Dr. Beam only performed an evaluation for an impairment rating and he did not treat claimant for her injuries.

If there is a conflict in the opinions of the physicians in this case, the opinion of the treating physician is entitled to greater weight than the opinions of physicians who have evaluated claimant only

once. **Johnson v. Ferguson**, 435 So.2d. 1191 (Miss 1983). **Clements v. Welling Truck Service, Inc.**, 739 So.2d. 476 (Miss. App. 1999).

Additionally, total and permanent disability may be found in spite of sporadic earnings, if the employee's injuries are such as to disqualify her from regular employment. **Roling v. Hatten & Davis Lumber Company**, 226 Miss., 732, 741, 85 So.2d 486, 489 (Miss. 1956). It is well established that an employee's performance of occasional work will not preclude a finding of permanent and total disability, provided the employee, "is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Id. at 742, 489.

In **University of Mississippi Medical Center v. Smith**, 909 So.2d 1209 (Miss. App. 2005), the Mississippi Court of Appeals ruled that the employee was totally and permanently disabled despite the fact that he was doing occasional work. The Court noted that Smith's severe and debilitating headaches limited him from full-time work because he had to lie down during the headaches and take narcotic medication for pain relief.

Through over 30 employment applications and inquiries, Ms. Stinson has demonstrated that she is unable to obtain work in the same or similar employment at a salary comparable to her wages before the accident. Dr. Molleston had advised claimant not to engage in any major physical exertion because this may cause another disc rupture. Employer/carrier admits that claimant cannot return to her job as an alternate care supervisor. While she continues to perform some light paperwork in her elected position as an election commissioner, she is unable to perform this job without aid and assistance of other commissioners. Ms. Stinson has no assurance that she will continue to receive help from her colleagues. **O'Neal v. Multipurpose Mfg. Co.**, 243 Miss. 775, 781, 140 So.2d. 860, 863 (1962).

(Injured worker does not have any "assurance that he will continue to be the beneficiary of the employer's magnanimity."). Clearly if Ms. Stinson's colleagues ceased to assist her, she would be unable to continue in this office and unable to make the small amount of income she is receiving on a sporadic basis.

Further, Ms. Stinson has run for this elective office. There is no guarantee that she will continue to serve in this capacity since she has to run for office every four years. Her medical condition may deteriorate to the point that she is unable to perform the clerical aspects of this position. As an elected official, Ms. Stinson has no boss or supervisor other than the voters of Greene County.

Ms. Stinson respectfully submits that the Court take note of the sporadic nature of the income she receives from this position as an indication of her lack of wage earning capacity. In the year 2002, she was unable to work any in this position for about seven months and received only $2,380.00 as an election commissioner.

Employer/carrier attributes undue emphasis to the relatively small amount of income Ms. Stinson has received as an election commissioner position as an indication of her present wage earning capacity. "'Disability' means incapacity because of injury to earn the wages which the employer was receiving at the time of injury in the same or other employment, which the extent thereof must be supported by medical findings." Miss. Code Ann. § 71-3-3(1). Disability involves a physical injury combined with a loss of wage earning capacity. **I. Taitel and Son v. Twiner**, 247 Miss. 785, 792, 157 So.2d 44, 46 (Miss. 1963).

In evaluating loss of wage earning capacity, it is important that we emphasize that disability is determined by comparing the employee's pre-injury wages with the employee's **post-injury capacity** to earn wages in the open labor market. **Karr v. Armstrong Tire and Rubber Co.**, 216 Miss 132, 137,

61 So.2d 789, 792 (Miss. 1953). Ms. Stinson's average weekly wages from the Ellisville State School position were $375.30 before her injury. She has no wages from this employer after her injury. Ms. Stinson earned income from both Ellisville State School and Greene County before her industrial injury. Now she is struggling trying to make some money from this second part-time position only because she has the aid and assistance of other commissioners. In **McGowan v. Orleans Furniture, Inc.**, 586 So.2d. 163, 167 (Miss. 1991), the Supreme Court ruled that the Commission should consider the evidence as a whole, including education, training, inability to work, failure to be hired elsewhere, continuance of pain, and other related circumstances, in evaluating loss of wage earning capacity.

III. THE CLAIMANT MADE REASONABLE AND DILIGENT EFFORTS TO SECURE EMPLOYMENT

Ms. Stinson was terminated from her employment because she was physically and medically unable to continue her employment after the subject injury. See Claimant's Exhibit 7. Ellisville State School's failure to reinstate Ms. Stinson after she reached maximum medical improvement establishes a prima facie showing that Ms. Stinson is totally disabled. **Jordan v. Hercules, Inc.**, 600 So.2d 179 (Miss. 1992) held that an employer's refusal to rehire or reinstate an injured employee who has reached maximum medical improvement provides the prima facie showing necessary to meet the employee's burden of proof of total permanent disability. Id. **600 So.2d at 183**. The burden then shifts to the employer who must show that the employee only suffered a partial disability or no disability at all. In this case, the employer/carrier has not shown that Ms. Stinson sustained only a partial disability or no disability.

Additionally, the employer has not offered Ms. Stinson another job within her restrictions. The Employer's Certification of Job Requirements outlined the physical exertions required of a direct care

capacity as a direct consequence of her injury and disability. Dr. Michael Molleston concluded on February 8, 2003 that Ms. Stinson was permanently and totally disabled and could not engage in any gainful employment. Dr. Molleston further agreed with Dr. Stephen Beam that the claimant sustained 23 percent whole body impairment. It should be noted that Dr. Vohra only "suspected" that the claimant would be able to engage in employment at the light level. Dr. Vohra did not reach a firm medical opinion because the functional capacity examination was never done. Dr. Vohra never rendered an opinion based on a reasonable degree of medical probability that the claimant was able to work at the light level. When asked specifically by the employer/carrier, Dr. Vohra responded that claimant would probably never be able to engage in regular work.

Employer/carrier and claimant stipulated that the testimonies of Carley Walley, Karen Stinson, Vicki McLain and Greene County Circuit Clerk, Scharlotte Fortinberry, would corroborate Ms. Stinson's testimony relative to continuous pain and permanent physical restrictions. Claimant testified that she is in continuous pain and has had only three pain free days since her injury. Therefore, there is considerable lay testimony that the claimant is not able to engage in gainful employment.

Bruce Brawner assisted the claimant in her employment efforts, however he did not consider the restrictions outlined in Dr. Molleston's deposition in his recommendations. Had Mr. Brawner considered Dr. Molleston's permanent restrictions and Dr. Vohra's revised opinion, he would have reached a conclusion that Ms. Stinson could not do regular employment.

The claimant applied for over 28 jobs including four jobs recommended by Mr. Brawner. The claimant also registered with the Mississippi Employment Service in Hattiesburg. Obviously Ms. Stinson conducted a diligent and thorough search for employment. Employer/carrier did not establish that the claimant's search for other jobs was a sham.

The evidence was uncontradicted that Ms. Stinson has major problems walking, sitting, standing, lifting and uses a cane prescribed by Dr. Molleston, and she has to lie down for 30 to 45 minutes three or four times a day. An individual with these restrictions and limitations is unable to engage in gainful employment.

While Ms. Stinson continues to serve in the elected office of Greene County Election Commissioner, the uncontradicted testimony offered was that she is unable to perform all of the physical duties of this office. Other commissioners and county workers assist in the performance of the duties of this office. The Full Commission and the Circuit Court correctly concluded that this limited and part-time work did not represent regular employment and would not disqualify her from being totally and permanently disabled. Employer/Carrier claims that Dr. Michael Molleston was not aware that Ms. Stinson was an election commissioner. Dr. Molleston was advised of this position and concluded that this was not regular employment and that Ms. Stinson was permanently and totally disabled.

Claimant respectfully submits that the Full Commission and the Circuit Court correctly considered and weighed the evidence as a whole and properly found that the claimant is permanently and totally disabled and is entitled to permanent total workers' compensation benefits. The Full Commission+ Order is based on substantial evidence, is not contrary to the overwhelming weight of the evidence, and is not arbitrary and capricious.

The Mississippi Supreme Court has provided the following standard in reviewing orders of the Mississippi Workers' Compensation Commission:

> "We do not sit as triers of fact; that is done by the Commission. When we review the facts on appeal, it is not with an eye toward determining how we would resolve the factual issues were we the trier of fact; rather, our function is to determine whether there is substantial credible

evidence to support the factual determination by the Commission.

South Central Bell Telephone Co. v. ADEN 474 So. 2d 584, 589 (Miss. 1985)

CONCLUSION

Claimant/Appellee respectfully requests that this Court affirm the decision of the Circuit Court of Perry County, Mississippi.

Respectfully submitted this the 29th day of October, 2007.

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CERTIFICATE OF SERVICE

I, PERCY W. WATSON, attorney for the claimant/appellee, in the above styled and numbered matter, hereby certify that I have this the 29th day of October, 2007, mailed a true and correct copy of the foregoing Brief of the Claimant/Appellee to Diane V. Pradat Esq., and Tameka Wilder Buck, Esq., attorneys for the employer/carrier, at their regular mailing address, Wilkins, Stephens & Tipton, P.A., Post Office Box 13429, Jackson, MS 39236-3429, Judge Mark Henry, Administrative Judge, Miss. Workers' Compensation Commission, Post Office Box 5300, Jackson, MS 39205, Judge Robert Helfrich, Circuit Court Judge, Post Office Box 309, Hattiesburg, MS 39403, by United States mail postage prepaid.

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