IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEPARTMENT OF HEALTH/ELLISVILLE
STATE SCHOOL AND MISSISSIPPI STATE AGENCIES
WORKERS' COMPENSATION TRUST — APPELLANTS

V. — NO. 2007-WC-01139

PHYLLIS STINSON — APPELLEE

BRIEF OF THE APPELLANTS

(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 this Court may evaluate possible disqualification or recusal.

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

This the 4th day of October, 2007.

Tameka W. Buck

DIANE V. PRADAT (MSB NO. 4473)
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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The claimant/appellee, Phyllis Stinson, filed her Petition to Controvert on April 1, 2002, alleging that she received an injury to her back due to a fall at work. The employer and carrier/appellants, Department of Health/Ellisville State School and Mississippi State Agencies Workers' Compensation Trust, answered admitting that claimant suffered an injury in the course and scope of her employment but denying the extent of her injuries. A hearing on the merits was held on July 19, 2005, and the Order of the Administrative Judge was rendered on October 7, 2005, awarding permanent total benefits to the claimant with reasonable and necessary medical benefits.

The decision of the Administrative Judge was appealed to the Full Commission by the employer and carrier on October 21, 2005. The Full Commission issued its Order on May 5, 2006, affirming the decision of the Administrative Judge. The decision of the Full Commission was appealed to the Circuit Court of Perry County on June 2, 2006. The Circuit Court issued its Order on June 7, 2007, affirming the decision of the Full Commission. The decision of the Circuit Court was appealed to this Court on July 5 2007.

B. STATEMENT OF THE FACTS

On April 1, 2002, the claimant filed her Petition to Controvert alleging a work related injury to her back from a fall in 2002. Claimant alleged that as a result of her work related injury, she was now permanently disabled. The employer and carrier answered admitting that claimant suffered an injury in the course and scope of her employment but denied the extent of her injuries. The claimant had been paid disability benefits from April 2, 2002, through the date of the hearing. (R. 51). A hearing was held in this matter on July 19, 2005. At the hearing, the claimant and Bruce Brawner, vocational rehabilitation expert, testified live regarding this hearing. Dr. Michael Molleston, Dr.

John Beamon, Dr. Stephen Beam, and Dr. Rahul Vohra all testified through the use of an affidavit and their medical records regarding this claim.

The claimant, who is fifty-seven years old, is divorced and has previously worked for a blanket factory in Waynesboro, a mail order business in Gautier, the Census Bureau, and is currently an election commissioner in Greene County. (R. 21) Claimant testified that from 1991 until 1993, she worked for Ellisville State School at the Ellisville campus, and in 1997, she began working at the Richton campus as a direct care alternate supervisor. (R. 18-19). As a direct care supervisor, claimant testified that she supervised staff and programs for the clients. Claimant stated that she had to physically deal with the clients with sometimes having to restrain them from time to time. (R. 19-20). Claimant stated that she dealt with some ambulatory and non-ambulatory patients in doing personal chores and helping with their personal hygiene. (R. 20).

Claimant testified that she was injured on April 1, 2002, and after which she began receiving treatment from Dr. Beamon. Dr. Beamon prescribed pain medication for claimant and referred her to Dr. Molleston. (R. 23-24). Claimant was treated by Dr. Molleston who ordered that a MRI be done. This was done on April 30, 2002, and it showed a ruptured disc in her back. (R. 25) As a result, claimant underwent surgery on June 10, 2002 at Wesley Medical. (R. 25). Claimant received some sort of relief after her surgery and testified that her condition was not as severe as it was prior to the surgery. (R. 26). It was claimant's testimony that she had pain that began to radiate down her left leg and created numbness in that leg. (R. 26). Since then, claimant testified that Dr. Molleston has recommended another surgery due to adjacent disc syndrome; however, claimant has refused to undergo this second operation. (R. 29-30). Because of this, claimant testified that Dr. Molleston has restricted her from lifting, bending, stooping, or reaching overhead. (R. 30). Claimant testified that she has trouble walking and states that she uses a cane that was prescribed

by Dr. Molleston. (R. 33). Claimant testified that she lives with her daughter, and that she often helps out with the dishes and with cooking. (R. 34-35).

Claimant testified that she was elected to the Greene County Election Commission in 1988 and has been a commissioner since 1988. (R. 36-37). Claimant testified that she is paid $70.00 a day when she works as a commissioner. (R. 37). Claimant testified that over a period of a month, she usually works five days a month; however, during elections, it is much more than that. (R. 37). As a commissioner, claimant testified that she keeps up with the voter rolls, the books, and conducts and holds elections. *Id.* She stated that as a Commissioner she also hires and trains poll workers, packs the supply boxes for the polling places, works at the counting center, and takes the paper ballots from the poll boxes. *Id.* Claimant testified that she cannot handle the metal ballot boxes, or the supply boxes which may weigh forty pounds. (R. 38-39). However, the other commissioners help claimant out whenever they can. (R. 39). Claimant testified that she is not impaired in any other way as for her job as Commissioner. *Id.* Claimant testified that she was recently re-elected to her position as Commissioner in 2004 and anticipates serving out this term of four years until 2008. (R. 40). Claimant testified that she was not receiving any benefits from this job because it is considered a part time job. (R. 40-41). Regarding obtaining other work, it was claimant's testimony that she sought work at several different places but was unsuccessful. (R. 43).

On cross examination, claimant testified that she receives $547.00 per month for social security benefits and PERS disability benefits in the amount of $724.00 per month in addition to receiving workers' compensation benefits. (R. 52). Claimant began receiving social security benefits in September of 2003. (R. 55). Claimant also testified that she has not worked since April of 2002; although, she currently works as an Election Commissioner. (R. 53). Claimant also testified that she sometimes attends training in Jackson, Mississippi as part of her job as an Election

Commissioner. *Id.* It was claimant's testimony that she sometimes has to work six to eight hours a day as Commissioner as opposed to five hours, and that she sometimes works more than five days in a month with up to eleven days at times. (R. 53-54). These particular months where claimant worked up to eleven days were all after her date of injury. (R. 54).

Claimant testified that she ran for the position of Commissioner because she felt she could perform the duties of that position. (R. 55). Claimant testified that she began looking for jobs for the first time in October of 2003. (R. 55). This was one month after she began receiving social security disability benefits. Claimant did not seek work again until November of 2003 and then not until January of 2004. (R. 55). At some places, claimant did not know there were actual positions available; however, she would just inquire. (R. 55-56). From January of 2004, claimant testified that she did not seek employment again until May of 2004 at two different places, then six places again in June of 2004. (R. 56). Claimant allowed ten months to lapse and did not seek employment again until April of 2005 according to her testimony. *Id.* Claimant also testified at the hearing that she sought employment in July of 2005 for possible employment opportunities that was sent to her on or around June 17, 2005. (R. 59). Claimant testified that throughout this entire time she was still receiving social security benefits. (R. 56). Claimant testified that she could possibly lose her social security benefits if she found a job. *Id.*

Claimant testified at the date of the hearing that her last visit with Dr. Molleston was on May 24, 2005; however, she had another appointment scheduled for August. (R. 62).

Bruce Brawner, vocational rehabilitation expert, was called to testify on behalf of the employer and carrier. Mr. Brawner testified that he was asked to conduct a vocational evaluation on claimant to determine her employability around her area. (R. 70). Mr. Brawner met with her and reviewed her age, experience, education, and medical records. *Id.* Regarding the specifics of this

case, Mr. Brawner testified that claimant was a high school graduate with specialty training as a nurse's aid, training in CPR, and also training regarding technical maneuvers for aggressive behavior dealing with individuals. (R. 71). Therefore, Mr. Brawner was of the opinion that claimant's level of education, formal education, is slightly above the average Mississippian, which is 11.2 years. *Id.*

Mr. Brawner testified that claimant had gained skills in supervision, in keeping records, and in entering data in a computer. (R. 71-72). He classified most of the jobs that claimant has previously held as sedentary to medium and ranging from unskilled to skilled. *Id.* He testified that claimant possessed average verbal ability, dexterity, numerical skills, and intelligence. *Id.*

Regarding the employability component, Mr. Brawner testified that his review of the medical records revealed that Dr. Molleston provided no work guidelines only his opinion that he thought claimant was totally disabled, Dr. Vohra's records provided that claimant could perform work of a light classification. (R. 72). Therefore, Dr. Vohra recommended a functional capacity evaluation. *Id.* No other physicians addressed this component according to Mr. Brawner's testimony. *Id.* Thus, Mr. Brawner testified that he outlined jobs according to Dr. Vohra's recommendations. (R. 73). Mr. Brawner also opined that claimant could work. (R. 82).

Mr. Brawner testified that out of claimant's past employment positions, only her employment as a wire puller and as a election commissioner were jobs that she could currently perform with the election commissioner job being a sedentary job and the wire puller position being a light job. (R. 75). Mr. Brawner testified that he identified 13 different jobs for claimant with correspondence dated June 7, 2005, June 16, 2005, June 17, 2005. (R. 76). These jobs included two customer service representative positions at Check Into Cash in Hattiesburg that paid $6.00 to $7.00 an hour; a part-time collector at Assurance Credit in Hattiesburg that paid $6.00 to $7.00 an hour; a temporary customer service representative position at United Credit in Hattiesburg that paid about $8.26 an

hour; a receptionist position in Hattiesburg that paid about $7.67 an hour; a customer service representative at American General in Hattiesburg that paid about $8.39 an hour; a manager/trainee at Tower Loan in Laurel that paid about $10.66 an hour; a customer service representative at Express Cash Advance in Laurel that paid about $8.28 an hour; and, a customer service representative at American General in Laurel that paid about $8.28 an hour; and, a receptionist at Hattiesburg Clinic in Poplarville that paid about $7.67 an hour. *Id.* All of these positions were sedentary and semi-skilled to skilled. *Id.*

Mr. Brawner testified that he checked and found no record that claimant had attempted to find employment at Check Into Cash, Assurance Credit, United Credit, Express Cash, or American General. (R. 77-78).

Claimant testified on rebuttal that she applied at Tower Loan in June or July of 2005, at United Credit in June of 2005, and that she attempted to apply to Assurance Credit but was informed that there were no applications available.

Dr. John Beamon testified through his medical records on behalf of the claimant. Dr. Beamon testified that on April 1, 2002, claimant reported that she had hurt her back at work; therefore, he pursued conservative treatment.

Dr. Michael C. Molleston testified through his medical records and deposition on behalf of the claimant. Dr. Molleston testified that he began treating claimant on April 16, 2002, based on a referral from Dr. Beamon. Dr. Molleston testified that after having claimant undergo a MRI, he recommended and subsequently performed a lumbar laminectomy and interbody fusion at L4-5. Dr. Molleston testified that it was his opinion that claimant was permanently and totally disabled. He testified that he came to this conclusion on February 4, 2003. In Dr. Molleston's deposition, he

testified that claimant could lift 15 or 20 lbs. in her personal life with restrictions of not lifting from floor to waist. Dr. Molleston testified that claimant was restricted from climbing stairs.

Dr. Molleston testified that he referred claimant to Dr. Stephen Beam for an impairment rating, which ended up being twenty-three percent to the body as a whole. After this, it was Dr. Molleston's testimony that claimant had obtained maximum medical improvement a year after surgery on June 10, 2003. Subsequently, it was Dr. Molleston's testimony that on August 19, 2003, that it was medically inadvisable for claimant to undergo a functional capacity evaluation.

Dr. Molleston testified that on November 23, 2003, claimant needed a second surgery at the L3-4 level, and he noted that claimant had not obtained maximum medical improvement. However, again on May 5, 2004, it was Dr. Molleston's testimony that claimant was again at maximum medical improvement unless she decided to proceed with the second operation. Dr. Molleston testified that the herniated disc at L4-5 and the stenosis at L3-4 were causally connected with claimant's work related injury. It was Dr. Molleston's testimony that he was unaware that claimant was working as an election commissioner.

Dr. J. Stephen Beam testified through his medical records on behalf of the claimant. It was Dr. Beam's testimony that claimant has an impairment rating of twenty-three percent to the body as a whole based on her back injury and continued pain. Dr. Beam testified that claimant was at maximum medical improvement as of February 18, 2003.

Dr. Rahul Vohra testified through his medical records on behalf of the employer and carrier. Dr. Vohra testified that claimant experienced primarily mechanical pain from L5-S1 level, was not a candidate for any additional surgery, and was at maximum medical improvement as of March 12, 2004. Dr. Vohra testified that claimant had an impairment rating of twenty percent to the whole body. Dr. Vohra further testified that he thought claimant would end up being able to perform a light

level of work. Subsequently, Dr. Vohra testified that claimant should not do repetitive bending, stooping, and twisting.

The employer and carrier entered into evidence the claimant's wage records from her position of being a commissioner. These records reflect that claimant received $2,380.00 in 2002; $8,820.00 in 2003; and $4,130.00 from January 1 through September 15, 2004, making it a total of $15,330.00.

SUMMARY OF THE ARGUMENT

The central issue in this appeal revolves around the level of review an appellate court may give to an administrative agency's decision, particularly the Mississippi Workers' Compensation Commission. In accordance with case law and local rules, an appellate court serving in this capacity may only review an order of the Mississippi Workers' Compensation Commission only to see if the order was supported by substantial evidence, was arbitrary or capricious, was beyond the power of the Commission, or whether or not the order violated some statutory right of the claimant.

To determine what exactly is "substantial evidence," case law has interpreted this standard to mean more than a scintilla of evidence, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and evidence which is a substantial basis of fact from which the fact in issue can reasonably be inferred.

To determine what exactly is "arbitrary or capricious" case law has interpreted this standard to mean when something is done without reason and a lack of understanding. Additionally, this standard is a less stringent standard than the "substantial evidence" standard.

Based on these two restrictive standards of review, it is evident based on the evidence presented in this case, that the Circuit Court did not base its decision on substantial evidence and that their decision was arbitrary and capricious; therefore, the Circuit Court erred in finding that the claimant is permanently and totally disabled. The Circuit Court failed to provide, in its Order, sufficient evidence [relevant evidence a reasonable mind might accept as adequate to support their conclusion] to justify their finding. In addition to that, the Circuit Court did not consider all of the evidence presented from both sides in this case. The evidence supports the fact that although claimant's treating physician gave an opinion that she is permanently and totally disabled, the evidence proves that he was completely unaware of the fact that the claimant was safely and

comfortably performing her duties as an election commissioner for her county. The evidence supports the fact that no other physician provided the opinion that claimant is permanently and totally disabled. The evidence supports the fact that one physician said claimant could return to work in the light category. The evidence supports the fact that claimant was and has always been performing her job as an election commissioner before her work injury, after her work injury, and at the time of the hearing in this matter. This job as an election commissioner falls in the sedentary work category which is in line and supported by the opinion given by the physician which stated that claimant could work in the light category. Hence, there is a substantial amount of evidence proving that this claimant can work and is not permanently and totally disabled.

Therefore, because the Circuit Court's Order is not based upon substantial evidence and is arbitrary or capricious, the Circuit Court erred in finding the claimant permanently and totally disabled.

ARGUMENT

I. STANDARD OF REVIEW

Before presenting the central issues in this matter, it is appropriate to briefly examine the nature and scope of the courts review of the decisions of the Workers' Compensation Commission. The role of the courts in judicially reviewing decisions of the Workers' Compensation Commission based upon factual findings is appellate only; if the findings of the commission are supported by substantial evidence they are to be affirmed. Presto Mfg. Co. v. Teat, 241 So.2d 661 (Miss. 1970). The Commission is considered the finder of fact with the support of substantial evidence in relation to issues regarding workers' compensation. Vance v. Twin River Homes, Inc., 641 So.2d 1176, 1180 (Miss. 1994) (quoting Fought v. Stuart C. Irby Co., 523 So.2d 314, 317 (Miss. 1988)); Harper v. North Mississippi Med. Ctr., 601 So.2d 395, 397 (Miss. 1992).

Under this highly deferential standard of review, Supreme Courts and intermediate courts will not overturn a decision of the Workers' Compensation Commission unless said decision is arbitrary and capricious. Hale v. Ruleville Health Care Ctr., 687 So.2d 1221, 1224 (Miss. 1997). Intermediate appellate courts are governed by the same rules and endowed with the same powers applicable to courts of appeal under appellate tradition. Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So.2d 601, 603 (Miss. 1968). However, the function of the Circuit Court, Court of Appeals, and Supreme Court, on appeal from rulings of Workers' Compensation Commission, is to determine whether there exists a quantum of credible evidence which supports the lower decision, and not to determine where preponderance of the evidence lies when evidence is conflicting, given that it is presumed that the Commission, as trier of fact, has previously determined which evidence is credible and which is not. Hale v. Ruleville Health Care Ctr., 687 So.2d 1221, 1224 (Miss. 1997)

In relation to this matter, the employer and carrier will show that the Order of the Circuit Court awarding permanent and total benefits in this claim is not based on substantial evidence, is arbitrary and capricious, and is contrary to purpose and intent behind the Workers' Compensation Act. Therefore, the employer and carrier submit that the Order of the Circuit Court should be reversed.

II. THE CIRCUIT COURT ERRED IN FINDING THE CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

The employer and carrier submit that the Circuit Court erred in finding the claimant permanently and totally disabled. The evidence provided at this hearing included testimony from the claimant, Bruce Brawner, a vocational rehabilitation expert, Dr. Michael Molleston, Dr. John Beamon, Dr. Stephen Beam, and Dr. Rahul Vohra. In reviewing this evidence, along with the exhibits entered into evidence closely, it is evident that the claimant should not have been awarded a permanent total award because the medical evidence supported the fact that she is employable and the labor market near her residence was sufficient enough for her to obtain employment. In addition to that, the employer and carrier submit that the claimant has been employed since the date of her injury as an election commissioner for her county. For all these reasons, the employer and carrier take the position that the Order of the Circuit Court should be reversed.

A. The medical evidence does not support a finding of a permanent and total award in this claim.

The medical evidence provided on behalf of the claimant's position does not support a finding of a permanent and total award in this claim. The claimant put on testimony though medical records from Dr. John Beamon, Dr. Michael Molleston, and Dr. Stephen Beam. The claimant put on testimony though deposition from Dr. Michael Molleston.

In workers' compensation cases, a claim of incapacity to earn wages, and extent thereof, must be supported by medical findings. Goodlow v. Marietta-American, 919 So.2d 149 (Miss. Ct. App. 2005). Therefore, unless common knowledge suffices, medical evidence must prove not only the existence of a disability, but also its causal connection to employment. Howard Industries, Inc. v. Robinson, 846 So.2d 245 (Miss. Ct. App. 2002). It is necessary to establish medical causation by expert testimony in all but the elementary workers' compensation cases. Walker Mfg. Co. v. Butler, 740 So.2d 315 (Miss. Ct. App. 1998). Issues with reference to alleged back injuries are properly within the province of medical experts. Cole v. Superior Coach Corp., 106 So.2d 71 (Miss. 1958). Thus, medical findings are required to uphold awards of permanent disability in any degree based upon the occurrence of back injuries. Davis v. Scotch Plywood Co. of Mississippi, 505 So.2d 1192 (Miss. 1987).

In the case *sub judice*, there exists contradictory medical evidence centered around the fact of whether or not claimant is permanently disabled from working.[1] Thus, the extent of claimant's injury is the main issue. Pertinent to this issue, specifically, is the testimony of Dr. Rahul Vohra, Dr. Michael Molleston, and Dr. Stephen Beam. Claimant has relied on the testimony of Dr. Michael Molleston who has stated that claimant is permanently and totally disabled and cannot return to work. Yet, the employer and carrier would like to point out that Dr. Molleston has testified that claimant could lift 15 or 20 lbs. in her personal life, and that ***he was not aware that claimant was actually working as an election commissioner when he rendered this opinion***. Dr. Molleston, thus, failed to take into consideration the fact that claimant could actually perform a job, and that she was

[1]Causation was not an issue in this claim.

comfortably able to perform the activities required of her election commissioner position without suffering from disabling pain from her alleged disabling injury.

Dr. Molleston referred claimant to Dr. Stephen Beam for an impairment rating. Dr. Beam did not opine that claimant was permanently and totally disabled; he opined that claimant had an impairment rating of twenty-three percent to the body as a whole.

Dr. Rahul Vohra examined claimant and testified that claimant was not permanently and totally disabled. He testified that claimant was at maximum medical improvement, did not need any additional surgery, and that claimant had an impairment rating of only twenty percent to the body as a whole. Regarding restrictions, Dr. Vohra testified that claimant could perform work that is classified in the light level category. Dr. Vohra further testified that claimant should not do repetitive bending, stooping, or twisting. Dr. John Beamon did not provide an opinion regarding the extent of claimant's injury.

Taking into consideration all of the above medical evidence and the fact that Dr. Molleston was unaware of the fact that claimant was indeed actually working when he rendered his opinion regarding the extent of claimant's alleged disability, it is clear that claimant is capable of performing some level of work. The employer and carrier concede that Dr. Molleston's opinion may have carried more credence if this particular claimant was not currently working when he rendered his opinion regarding the extent of her alleged disability. However, this just was not the case. In fact, claimant's actions of working and safely and comfortably performing her job as an election commissioner, ***clearly contradict*** Dr. Molleston's opinion that she cannot do any kind of work. Claimant has admitted that she can perform her duties as an election commissioner, and although it is a part-time position, it is still gainful employment.

On the other hand, taking this fact into consideration with Dr. Vohra's opinion that claimant can work in the light work category clearly coincides with claimant's actions of currently working as an election commissioner. This position falls into the sedentary work category. The employer and carrier submit that if a claimant is permanently and totally disabled as claimant has alleged in this case, then he or she should not be able to work at all contrary to what this claimant has been doing. Therefore, the employer and carrier aver that even though Dr. Molleston has found this claimant permanently and totally disabled, this claimant is capable of doing some kind of gainful employment evidenced by her doing so. And in accordance with Dr. Vohra's opinion, claimant is capable of some kind of work in the light category.[2] Claimant has held herself out to the community as being capable of performing this job as an election commissioner; therefore, she should not be allowed to also claim that she is permanently and totally disabled.

In the Order of the Administrative Judge dated October 7, 2005, the Administrative Judge referenced Dr. Vohra's records wherein he was asked when did he "anticipate Ms. Stinson will return to regular work activities," and Dr. Vohra responded "probably never" as support regarding the extent of claimant's injuries; however, the employer and carrier submit that Dr. Vohra was not giving an opinion regarding the extent of claimant's injuries with this response. The employer and carrier take the position that Dr. Vohra responded in this way because he thought the claimant would never return to work whether or not he said she could. The employer and carrier aver that Dr. Vohra would not provide an opinion that claimant was at maximum medical improvement, could work in the light category, provide restrictions for her, and give her an impairment rating of 20% and then

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[2]The employer and carrier do not take the position that this claimant has not suffered any loss of wage earning capacity because claimant's current wage records clearly show that she has suffered a limited amount; however, the employer and carrier submit that this claimant has voluntarily shown that she is capable of performing some kind of gainful employment.

turn around and opine that she can never work again, thus saying that claimant is permanently and totally disabled. The employer and carrier submit that in reviewing Dr. Vohra's record as a whole supports the position that Dr. Vohra is of the opinion that claimant is capable of gainful employment and thus not permanently and totally disabled.

B. The labor market was sufficient enough to obtain employment in the category recommended for claimant post injury.

The employer and carrier submit that the labor market was sufficient enough to obtain employment in the category recommended for claimant as set out in the medical evidence above. Workers' compensation claimant seeking disability benefits has a burden of proof to make out a prima facie case for disability, after which the burden shifts to the employer to rebut or refute claimant's evidence; after the burden shifts, evidence indicating suitable employment was available to claimant becomes relevant and admissible. Ford v. Emhart, Inc., 755 So.2d 1263 (Miss. Ct. App. 2000). Therefore, in order for the claimant to establish a prima facie case for disability, the burden is on the claimant to prove a medical impairment, and that the medical impairment resulted in a loss of wage-earning capacity. Guardian Fiberglass, Inc. v. LeSueur, 751 So.2d 1201 (Miss. Ct. App. 1999).

The employer and carrier involved the services of a vocational rehabilitation expert, Bruce Brawner, to assist claimant in her search for employment near her residence that coincided with the recommendations set out in the medical evidence. Bruce Brawner testified live at this hearing regarding his examination of claimant, claimant's transferrable skills, claimant's employable assets, and possible employment opportunities in and around her area.

Mr. Brawner testified that he relied on Dr. Vohra's opinion regarding the job opportunities that he located for claimant. He further testified that he identified 13 different jobs for claimant that

fell within the sedentary category. These jobs included two customer service representative positions at Check into Cash in Hattiesburg that paid $6.00 to $7.00 an hour; a part-time collector at Assurance Credit in Hattiesburg that paid $6.00 to $7.00 an hour; a temporary customer service representative position at United Credit in Hattiesburg that paid $8.26 an hour; a receptionist position in Hattiesburg that paid $7.67 an hour; a customer service representative at American General in Hattiesburg that paid about $8.39 an hour; a manger/trainee at Tower Loan in Laurel that paid about $10.66 an hour; a customer service representative at Express Cash Advance in Laurel that paid about $8.28 an hour; and a customer service representative at American General in Laurel that paid about $8.28 an hour; and a receptionist at Hattiesburg Clinic in Poplarville that paid about $7.67 an hour.

Taking into consideration the medical opinion that claimant is capable of working and in accordance with the law set out in Ford v. Emhart, Inc., 755 So.2d 1263 (Miss. Ct. App. 2000), the employer and carrier submit that these positions were available for claimant in addition to her current job of working as an election commissioner for the county.

C. The claimant did not seek re-employment with reasonable efforts.

The employer and carrier take the position that claimant did not search for employment with reasonable and diligent efforts. Mississippi has the long standing rule that when a claimant is faced with proving disability and a loss of wage earning capacity, he or she must make reasonable efforts to obtain other employment. Thompson v. Wells-Lamont Corp., 362 So.2d 638, 641 (Miss. 1978). What constitutes a reasonable effort to obtain employment is a matter not of easy definition, and what might be a reasonable effort in one situation might not be so in another. Id. There could be situations where the efforts to find a job by the claimant may be a mere sham, less than reasonable, or without proper diligence. Id. (See also, Park Inn Intern v. Hull, 739 So.2d 487 (Miss. Ct. App. 1999). The factors to consider in deciding whether the workers' compensation claimant has made

an attempt to find employment are (1) economic and industrial aspects of the local community, (2) the jobs available in the community, and (3) the claimant's general educational background, including work skills, and the particular nature of the disability for which compensation is sought. Moore v. Independent Life and Accident Ins. Co., 788 So.2d 106, 114 (Miss. Ct. App. 2001). The employer and carrier submit that they assisted claimant in finding other employment, and it is unfair to award her permanent and total disability benefits when there was no affirmative action by claimant to become gainfully employed. This position is taken by the employer and carrier although the employer and carrier also take the position that claimant was already employed as an election commissioner addressed *infra*.

The claimant in the case at bar, testified that she sought employment for the first time post injury in October of 2003. This was one month after she began receiving social security benefits. Claimant did not seek work again until November of 2003 and then not again until January of 2004. From January of 2004, claimant did not attempt to find work again until May of 2004, then June of 2004. Claimant did not look for work again for another ten months until April of 2005, then in July of 2005, the month of her hearing. Throughout this entire time, claimant was receiving social security disability benefits, and she testified that she knew that if she found employment, she could lose her social security disability benefits.

The employer and carrier take the position that claimant was not actively seeking employment because she knew doing so could possible lead to losing her social security benefits.[3] A thorough review of her search process clearly shows that claimant made unreasonable efforts to

[3]Claimant is receiving social security benefits in the amount of $547.00 per month and $724.00 per month from PERS.

locate a job. Over a course of three years, claimant made six attempts to locate employment with there being almost a one year gap at one point. This simply is not due diligence.

Mr. Brawner testified that in his follow up on some of the places he identified as potential employers for claimant, he was informed by Check Into Cash, Assurance Credit, United Credit, Express Cash and American General that there was no record that claimant had ever been to these places in search of a position. Claimant alleged that she did apply to United Credit and attempted to apply to Assurance Credit; however, again, this was not reflected in Mr. Brawner's report or his testimony.

D. Alternatively, the claimant is employed as an election commissioner of Greene County.

The employer and carrier argue, as an alternative position, that claimant is working as an election commissioner which was identified by Mr. Brawner as being a sedentary job and in line with Dr. Vohra's opinion that she can work in that capacity. The employer and carrier entered into evidence claimant's current wage statement as an election commissioner. It proved that claimant made an average weekly wage of $99.62 from September 15, 2003, through September 15, 2004, and an average weekly wage of $119.77 from April 1, 2002, through September 15, 2004. Therefore, this was not a case of no wage earning capacity as is the case in most cases where the claimant is found to be permanently and totally disabled. There is evidence that the claimant was making some wages, even if it was not the total amount that she made while working for the employer, thus making her partially disabled. The employer and carrier assert that this claimant received these benefits in addition to the social security benefits in the amount of $547.00 per month and the PERS benefits in the amount of $724.00 per month.

In the case of Howard Industries, Inc. v. Robinson, 846 So.2d 245 (Miss. Ct. App. 2002), the Court provided the rule that a period of approximately four years that began the claimant's on the job compensable back injury could not be characterized as temporary total disability, for purposes of calculating workers' compensation benefits, where claimant was gainfully employed during most of that time period. Although Howard deals with a situation centered around an award of temporary total disability benefits, the same rule could be applicable in this situation. Claimant alleged that she was injured and basically permanently disabled since April of 2002; however, the claimant was working as a commissioner making about $119.77 per week. Therefore, she was gainfully employed during most of the time period from April of 2002 until July of 2005, the date of the hearing. She had steady income coming into her household from this position of being an election commissioner for the county.

Claimant testified that she sometimes has to work six to eight hours a day as a commissioner, and that she sometimes has to travel to Jackson for training as part of her job. Claimant testified that she ran for the position of election commissioner and for re-election of that position because ***she felt she could perform the duties of that job***-which again is classified as a sedentary position. The employer and carrier asks the question what makes this sedentary position of being a commissioner for six to eight hours a day different from the other sedentary positions identified by the Mr. Brawner? Furthermore, the employer and carrier asks the question doesn't these actions by claimant contradict the opinion of Dr. Molleston that she is disabled?

It is likely that the claimant will assert that claimant's position as election commissioner is only a sporadic position and should not be considered employment. However, the employer and carrier assert otherwise. Claimant testified to working as a commissioner since 1988, and that she is paid $70.00 per day. Claimant testified that she has worked up to eleven days per month with it

possibly being more than that during election time. Claimant testified that she keeps up with the voter rolls, the books, conducts and holds elections, hires and trains poll workers, packs supply boxes for polling places, works at the counting center, and takes the paper ballots from the poll boxes. Claimant testified that she has this position until 2008 when her term expires. Taking all of this into consideration, the employer and carrier assert that this is not sporadic employment that presents itself on an occasional, off and on, basis. This is a sedcntary job; although it possibly can be classified as part-time, nonetheless, it is a job that claimant will definitely have until 2008. Furthermore, if the claimant is safely and comfortably capable of performing activities such traveling to Jackson, keeping up with the voter rolls, the books, conducting and holding elections, hiring and training poll workers, packing supply boxes for polling places, working at the counting center and taking the paper ballots from the poll boxes for eight hours a day, then she is definitely capable of performing the other sedentary positions that was available to her in her area. Some of the other sedentary positions did not even require as much as the election commissioner position does as far as the necessary activities that she must perform. Claimant is working and is capable of performing other sedentary to light work as recommended by Dr. Vohra; therefore, the employer and carrier argue that she is not permanently and totally disabled.

In University of Mississippi Medical Center v. Smith, 909 So.2d 1209 (Miss. Ct. App. 2005), the Mississippi Court of Appeals ruled that the employee was permanently and totally disabled despite the fact that he was engaging in occasional carpentry work for people. 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. Yet, in the instant case, claimant does not have just occasional work like Smith doing little odd and in jobs. She has been

elected to a position as an election commissioner and she is expected to perform that job by the voters. Claimant basically has a job that she has to report to every month.

Claimant will probably argue that the following rule is applicable to her case. "An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled" Rolling v. Hatten and Davis Lumber Co., 85 So.2d 486, 487 (Miss. 1956). However, the employer and carrier take the position that this claimant is not so injured that she can perform no services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for her does not exist. This claimant is fully capable of performing sedentary work. This is despite the fact that her co-workers sometimes assist her. The claimant can still perform sedentary work, and she has adequate vocational assets to allow her to perform sedentary work that is not limited in quality, dependability or quantity.

III. THE ORDER OF THE CIRCUIT COURT IS NOT BASED ON SUBSTANTIAL EVIDENCE AND SHOULD BE REVERSED.

The Order of the Circuit Court is not based on substantial evidence and should be reversed. The employer and carrier aver that the Circuit Court gave substantial credence to Dr. Molleston's medical opinion, despite the fact that claimant is currently working as an election commissioner. The Mississippi Supreme Court has said that the reviewing court will reverse the Commission's decision when it finds the decision was "based on findings of fact which are contrary to the great weight of the evidence" and that "the general rule is that a decision of the Commission on disputed issues of fact will be affirmed, where there is ***substantial and reasonable*** evidence in the record to support the Commission's findings of fact." Central Elec. Power Ass'n v. Hicks, 110 So.2d 351, 356 (Miss. 1959).

The Court has defined substantial evidence as "more than a scintilla of evidence," "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and "evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred." Id. (See also, Smith v. City of Jackson, 792 So.2d 335 (Miss. Ct. App. 2001)). In reviewing a record to determine whether there is substantial evidence to support an order of the Workers' Compensation Commission, the appellate court must look at all evidence on both sides. Harpole Bros. Const. Co. v. Parker, 253 So.2d 820, 822 (Miss. 1971). Additionally, in relation to this substantial evidence standard, this standard depends heavily on case law. Dunn, Mississippi Workers' Compensation § 289 (3d ed. 1982 & Supp. 1990).

In the instant case, the employer and carrier submit that the claimant's case lacked substantial evidence. The employer and carrier concede that in workers' compensation jurisprudence, there is a general preference for the opinions of the treating physicians over those of a physician retained by the employer and carrier to perform an employer's medical examination of the claimant. However, the Mississippi Court of Appeals has stated that when a case has two testimonies from two medical experts that are in conflict with one another, the Workers' Compensation Commission is entitled to weigh the two testimonies and render its decision accordingly, provided that the acceptance of one testimony over that of another does not result in a decision which will be clearly erroneous and contrary to the overwhelming weight of the evidence. Attala County Nursing Center v. Moore, 760 So.2d 784, 788 (Miss. Ct. App. 2000).

In the case *sub judice*, the lower court has accepted the testimony of one medical expert over that of another, and this decision is clearly erroneous and contrary to the overwhelming weight of the evidence. Only one doctor opined that claimant was permanently and totally disabled; yet, he was unaware of the fact that claimant was performing work activity as an election commissioner

when he rendered this opinion. The other doctors, including the one retained by the employer and carrier, all did not state that claimant was permanently and totally disabled. These doctors' opinions all coincide with the fact that claimant can perform a sedentary to light level job. Thus, there exists substantial evidence that claimant is not permanently and totally disabled. Hence, the lower court accepted the testimony of this one treating physician whose opinion was based on mere speculation, mere possibility and on what he thought was a claimant who was unable to perform any kind of work. He was not aware that claimant could work and was actually working as an election commissioner.

When an expert's opinion is based upon an inadequate or incomplete examination, that opinion ***does not carry as much weight and has little or no probative value*** when compared to the opinion of an expert that has made a thorough and adequate examination. Marshall Durbin Co. & Liberty Mutual Ins. Co., v. Warren, 633 So.2d 1006, 1010 (Miss. 1994). The instant case can be contrasted with the case of Harpole Bros. Construction Co. & U.S.F.& G. v. Parker, 253 So.2d 820 (Miss. 1971). In Harpole, there were two competing medical testimonies given by a treating physician and an expert retained by the employer and carrier. However, the medical testimony of one doctor was supported by other evidence; while the other medical expert's testimony was not. The Court noted that with regard to the expert's testimony that was not supported by any other evidence, **if it was considered in isolation, it might have amounted to substantial evidence, but when it is considered with the other evidence from both sides in the case, it loses much of its character and does not amount to substantial evidence**. Id. at 823. Moreover, in Shippers Express & Liberty Mutual Ins. v. Chapman, 364 So.2d 1097 (Miss. 1978), the Court held that the **substantial evidence necessary to support a finding of the Commission may not be found from a small part of all of the evidence, and all of the evidence is necessary to be considered because**

the Workers' Compensation Act is to be administered justly and reasonably. Id. at 1099-1100. This Court held a physician's testimony, taken in isolation, might amount to substantial evidence supporting a finding by the Workers' Compensation Commission; however, when considered with the entire evidence it is possible that it could lose much of its character and not rise to the position of substantial evidence.

In this case, claimant has only provided medical testimony of one physician that supports her claim of being permanently and totally disabled, and if considered in isolation, this evidence may have been enough to rise to the position of substantial evidence. However, if one reviews the evidence as a whole and from both sides, then Dr. Molleston's opinion loses much of its character and does not rise to the level of substantial evidence. Thus, only one medical expert has provided the opinion that claimant is permanently and totally disabled and incapable of work, however, as stated *supra*, this same medical expert was completely unaware that the claimant was working when he rendered this opinion. No other doctor opined that claimant is permanently and totally disabled. Therefore, the employer and carrier aver that because Dr. Molleston rendered an opinion regarding the extent of claimant's disability that is completely contrary to that of claimant's actual actions regarding work, his opinion should not carry as much weight when compared to the claimant's actions of performing a sedentary job and the other doctors' opinions, the other evidence in this case. Her actions of performing a sedentary job coincide with the other doctors' opinions. Dr. Molleston failed to obtain an adequate work history from claimant prior to rendering his opinion. The evidence in this case should be considered as a whole. Substantial evidence is needed to support the Commission's decision; however it is not present in this case. Therefore, the Order of the Circuit Court should be reversed.

IV. THE ORDER OF THE CIRCUIT COURT IS ARBITRARY AND/OR CAPRICIOUS AND SHOULD BE REVERSED.

When a Commission's findings is not supported by substantial evidence, it is also considered arbitrary and/or capricious. Bradford Seafood Co. v. Alexander, 785 So.2d 321, 324 (Miss. Ct. App. 2001). Thus, an appellate court may interfere with an agency's decision only where the agency's finding is arbitrary and capricious. Raytheon Aerospace Support Services & Liberty Mutual Ins. Co. v. Miller, 861 So.2d 330, 335 (Miss. 2003). Arbitrariness and caprice are in substantial part a function of the presence vel non of credible evidence supporting the agency decision. Id. Where there is such evidence, the reviewing court has no authority to interfere with the decision of the Mississippi Workers' Compensation Commission. Id.

In the instant case, based on all of the arguments discussed *supra*, there is clearly a lack of substantial evidence supporting the Circuit Court's Order; therefore, clearly the Circuit Court's Findings are arbitrary and capricious. Because of this, the Order of the Circuit Court should be reversed.

V. THE PURPOSE AND INTENT OF THE WORKERS' COMPENSATION ACT WARRANTS REVERSAL OF THIS CLAIM

In reviewing all the evidence submitted in this claim, the employer and carrier submit that this was not a doubtful case. The employer and carrier concede that the Mississippi Supreme Court has indeed recognized that doubtful cases should be resolved in favor of the claimant; however, the Court has also recognized that the Act should be given a construction which is fair to all parties. See, Georgia-Pacific Corp. v. McLaurin, 370 So.2d 1359, 1361 (Miss. 1979) ("the 'liberal construction' of The Workmen's Compensation Act [does not] permit the disregard of traditional notions of fair play and substantial justice in the adversary proceedings contemplated by the Act."). Furthermore, the Mississippi Legislature specifically included this "fairness" principle in the Act in

Miss. Code Ann. § 71-3-1 (1972) which states, "[t]his chapter shall be fairly construed according to the law and the evidence." A liberal construction of the Act would not be enough to justify a finding in favor of claimant on this issue of whether or not she is entitled to a permanent and total award. As the Supreme Court noted in Speed Mechanical, Inc. v. Taylor, 342 So.2d 317, 319 (Miss. 1977), "Our rule is that we liberally interpret the workmen's compensation law in favor of claimant in doubtful cases, but we cannot amend a statute or excuse non-compliance with prerequisite conditions imposed by the legislature." (Emphasis added) (See also, Ingalls Shipbuilding Corp. v. Byrd, 60 So.2d 645, 651-52 (Miss. 1952) ("A denial of this award, however harsh it may be construed by an employee, points up the purpose of the Act to grant compensation under liberal interpretation, but at the same time to require, in the interest of the carrier and the employer, compliance with prerequisite conditions."); Brookhaven Steam Laundry v. Watts, 59 So.2d 294, 299 (Miss. 1952) ("In holding that the claimants are not entitled to recover in this case, we do not lose sight of the fact that the Workmen's Compensation Act . . . should be given a liberal interpretation in order to effect its salutary purposes . . . But we must also not lose sight of the fact that it is the duty of the court to construe the Act as it is written.")).

Thus, in accordance with this Court's powers, the employer and carrier respectfully request that the Circuit Court's Order be reversed hence finding that the claimant is not permanently and totally disabled and is capable of some kind of gainful employment .

CONCLUSION

It is evident that the Circuit Court erred in finding the claimant permanently and totally disabled, in failing to base their decision upon substantial evidence, and in failing to make their decision with reason or understanding. Therefore, the employer and carrier respectfully request this

Court reverse the Order of the Circuit Court and find that the claimant is not permanently and totally disabled and that she is capable of some kind of gainful employment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tameka Wilder Buck, attorney for Appellants, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing ***Brief of the Appellants***, to:

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This the 4th day of October, 2007.

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