IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2007-WC-02291-COA

BERNITA J. WASHINGTON — APPELLANT/CROSS-APPELLEE

VERSUS

WOODLAND VILLAGE NURSING HOME
d/b/a H.T. CAIN

AND

BRIDGEFIELD CASUALTY
INSURANCE COMPANY — APPELLEE/CROSS-APPELLANT

Appeal from the Circuit Court of Hancock County, Mississippi
Civil Action No. 2007-0037

BRIEF OF APPELLEE/CROSS-APPELLANT WOODLAND VILLAGE NURSING HOME d/b/a H.T. CAIN and BRIDGEFIELD CASUALTY INSURANCE COMPANY

Oral Argument Requested

Karl R. Steinberger, MSB #[redacted]
Stacie E. Zorn, MSB#[redacted]
Williams, Heidelberg, Steinberger &
McElhaney, P.A.
Post Office Box 1407
Pascagoula, MS 39568

IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2007-WC-02291-COA

BERNITA J. WASHINGTON **APPELLANT/CROSS-APPELLEE**

VERSUS

WOODLAND VILLAGE NURSING HOME
d/b/a H.T. CAIN

AND

BRIDGEFIELD CASUALTY
INSURANCE COMPANY **APPELLEE/CROSS-APPELLANT**

CERTIFICATE OF INTERESTED PERSONS

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

1. Appellant/Cross-Appellee, Bernita J. Washington;
2. Appellees/Cross-Appellants, Woodland Village Nursing Home d/b/a H.T. Cain and Bridgefield Casualty Insurance Company;
3. Honorable Virginia W. Mounger, Administrative Law Judge;
4. Counsel for Appellant/Cross-Appellee, James K. Wetzel and the law firm of James K. Wetzel & Associates;
5. Counsel for Appellees/Cross-Appellants, Karl R. Steinberger, Stacie E. Zorn, and the law firm of Williams, Heidelberg, Steinberger & McElhaney, P.A.;
6. Honorable Stephen B. Simpson, Hancock County Circuit Court.

KARL R. STEINBERGER, Counsel for Appellees/Cross-Appellants

IN THE SUPREME COURT OF MISSISSIPPI
2007-WC-02291-COA

BERNITA J. WASHINGTON **APPELLANT/CROSS-APPELLEE**

VERSUS

WOODLAND VILLAGE NURSING HOME
d/b/a H.T. CAIN

AND

BRIDGEFIELD CASUALTY
INSURANCE COMPANY **APPELLEE/CROSS-APPELLANT**

TABLE OF CONTENTS

IN THE SUPREME COURT OF MISSISSIPPI
2007-WC-02291-COA

BERNITA J. WASHINGTON — **APPELLANT/CROSS-APPELLEE**

VERSUS

WOODLAND VILLAGE NURSING HOME
d/b/a H.T. CAIN

AND

BRIDGEFIELD CASUALTY
INSURANCE COMPANY — **APPELLEE/CROSS-APPELLANT**

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES ON CROSS-APPEAL

I. **THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW IN FINDING THAT CLAIMANT SUSTAINED A WORK RELATED INJURY ON DECEMBER 14, 2001.**

II. **THE PUBLIC POLICY OF THE STATE OF MISSISSIPPI MANDATES THAT THE CLAIMANT FORFEITED HER RIGHTS TO FUTURE BENEFITS BY COMMITTING THE CRIME OF WORKERS' COMPENSATION INSURANCE FRAUD.**

STATEMENT OF THE CASE

This cross-appeal arises out of the finding by the Mississippi Workers' Compensation Commission that the Appellant/Cross-Appellee, Bernita J. Washington (hereafter "Claimant"), satisfied her burden in proving she suffered a compensable injury under the Mississippi Workers' Compensation Act. The Employer and Carrier, Woodland Village Nursing Home d/b/a H.T. Cain and Bridgefield Casualty Insurance Company (hereafter "Employer and Carrier"), further appeal the finding by the Circuit Court that there is no public policy exception to the Mississippi Workers' Compensation Act which requires a forfeiture of workers' compensation benefits after a Claimant has been convicted of the crime of workers' compensation insurance fraud.

Claimant allegedly injured her neck and low back in an unwitnessed slip and fall accident while employed with Woodland Village on December 14, 2001. The Employer and Carrier paid medical and indemnity benefits until it was revealed that Claimant had forged medical records in order to stay on part-time, light duty work after being released to full-time work with no restrictions by her treating physician. Claimant received over $4,000.00 in indemnity benefits as a direct result of her forgeries. Ultimately, Claimant plead guilty to the crime of workers' compensation fraud. Consequently, once her fraud was revealed, other circumstances were also revealed which cast doubt on Claimant's credibility and the validity of this claim.

STATEMENT OF FACTS

Claimant began working as a certified nursing assistant at Woodland Village in November, 2000. (Tr., at p. 19)[1] . Claimant's duty was to take care of residents, including answering the call light, rotating residents every two hours, waking residents at 5:00 a.m., and attending to the resident's needs. Id.

In March 2000, shortly before she became employed with Woodland Village, Claimant was involved in a motor vehicle accident in which she injured her neck, shoulder, lower back and hamstring and resulting headaches. Claimant began treatment with orthopedist, Dr. F. Allen Johnston. (Tr., at pp. 21, 34-35). In June 2000, an MRI was performed on Claimant's cervical spine at the request of Dr. Johnston, which revealed disc protrusions in Claimant's neck and back. (Tr., at p. 36; Ex. #11 at p. 16). When applying for employment with Woodland Village, Claimant was told that she would not be hired until she was medically released by Dr. Johnston. On October 25, 2000, despite the fact that she was still suffering from pain due to the car accident, and against the recommendation of Dr. Johnston for further treatment, Claimant obtained a release to return to work because she needed the money. (Tr., at p. 36-38; Ex. #11 at p. 12-17; R.E.10).

On May 23, 2001, shortly before her alleged work injury, Claimant was evaluated by Dr. Johnston and complained that her cervical pain was 7/10 in severity and that she suffered from occasional numbness in the right upper extremity to the wrist. Dr. Johnston diagnosed Claimant

---

1

The Exhibits presented at the administrative hearing on July 20, 2005, will be referenced as "Ex. #__ at p. __." The testimony at the July 20, 2005, administrative hearing will be referenced as "Tr., at p. __." The Record prepared by the Mississippi Workers' Compensation Commission will be referenced as "R., at p. __." Record Excerpts will be referenced as "R.E."

as suffering from multi-level cervical protrusions and recommended Claimant take medication, undergo therapy for strengthening of the neck, undergo nerve conduction studies and consult with another physician. (Ex. #11, at p. 15; R.E. 10). Claimant did not seek additional treatment.

Claimant alleges that on December 14, 2001, she slipped and fell while attempting to assist a resident into a wheelchair and struck her head on a cart. (Tr., at pp. 23-24). Claimant contends that when she fell, she felt pain in her head, neck left arm, back and knee. Id. at pp. 24-25. The accident was unwitnessed. (Ex. #9; R.E. 9).

Claimant was initially evaluated at the emergency room and was then sent by Woodland Village for follow up with internist Dr. Charles Kergosien. Dr. Kergosien prescribed physical therapy for Claimant's neck. (Tr., at p. 25).

Claimant was next evaluated by her family physician, Dr. David Roberts. Id. Dr. Roberts ordered an MRI of Claimant's cervical spine and sent her to be evaluated by neurosurgeon, Dr. Terry Smith. Id., at p. 26. Claimant underwent an anterior cervical fusion performed by Dr. Smith on December 5, 2002. (Ex. #1, pp. 42-43).

The Employer and Carrier paid temporary total disability benefits from December 14, 2001 until April 15, 2003, when she was released to part-time, light duty work by her treating physician, Dr. Terry Smith. Claimant returned to work on April 16, 2003, with restrictions, including 35 pound lifting maximum, 45 pound carrying maximum, frequent position changing, and four hour days for the first two weeks. (Ex. #1, p 31).

On June 2, 2003, the Claimant began creating false medical records in which she forged the signature of Dr. Smith in order to present the false record to her employer so she could continue working part-time and light duty, despite having been released to return to full-time work with no restrictions by Dr. Smith on or about May 1, 2003. (Ex. #1 at p. 21; R.E. 5).

On July 19, 2003, Claimant presented to Dr. Smith complaining of back pain. Dr. Smith ordered an epidural steroid injection, which was performed on December 4, 2003. (Ex. #1, at pp. 14, 19).

On October 11, 2003, Claimant again created a forged medical record which continued to limit her to light duty work for four (4) hours per day. (Ex. #1 at p. 16; R.E. 5). This medical record also provided for increased work restrictions.

On December 12, 2003, Claimant created another forged medical record which provided additional false restrictions and which provided that she could only work two to three days in a row for four hours with two to three days off in between. (Ex. #1 at p. 11; R.E. 5).

The Employer received two of these false reports and accepted Claimant's restrictions. This third report generated suspicion by the Employer and Carrier. (R., at p. 95). With regard to the forged medical records Claimant created, she testified that

> A. One day my work asked me for a report. I mean asked me for a report from my doctor. What I did was I just copied my medical report. I copied that report that I had from him, and I did sign his name. That part I did do.
>
> Q. You added in there - - I think you added in those report, several reports, that you were temporarily disabled.
>
> A. I added that to stay at light duty. To stay at light duty. I did that, and it was wrong. I was scared.

(Tr., at pp. 28-29).

On January 6, 2004, Woodland Village called a meeting with Claimant wherein Claimant was told that she needed to obtain a certificate from her treating physician, Dr. Terry Smith, certifying that she is able to work while taking prescription medication. Claimant never

presented Woodland Village with a doctor's certificate,[2] nor did she ever return to Woodland Village after that meeting. Therefore, in February 2004, Woodland Village terminated her employment. Id.

It was always the position of Woodland Village to accommodate employees that had work-related injuries, and in fact, Woodland Village had accommodated Claimant's work restrictions. At all relevant times, Claimant was offered work within the restrictions provided by Dr. Smith. Also, beginning in April 2003 and continuing until January 2004, Woodland Village had available to Claimant 40 hours of work per week which were also offered to her at that time. (Tr., at p. 56-57; Ex. #17; R.E. 11).

On June 27, 2005, Claimant plead guilty in the Circuit Court of Harrison County, First Judicial District, to the crime of Insurance Fraud for those forgeries. Claimant was ordered to pay restitution to the Carrier, and she waived any claim to indemnity benefits which she may have been entitled to during the period of time that she received benefits due to her forgeries of Dr. Smith's records. (Ex. #7 at pp. 1-3; R.E. 8).

Medical Testimony

Four physicians rendered their opinions regarding Claimant's medical condition and need for future treatment, including surgery. Dr. Smith placed Claimant at MMI, with regard to her neck, on April 15, 2003. (Ex. #1 at p. 66; R.E. 5). On July 19, 2003, Dr. Smith noted Claimant had a disc protrusion at L5-S1. (Id., at p. 19). Dr. Smith recommended Claimant

---

2 On December 29, 2003, in reply to a request for information from the Employer, Dr. Smith stated that he had not given the Claimant any medications in many months. (Ex. #1 at p. 6)

undergo back surgery. (Id., at p. 13). Despite his recommendation that Claimant undergo additional surgery, Dr. Smith opined that Claimant could continue to perform full-duty work. (Id., at p. 6). On January 24, 2004, Dr. Smith repeated his recommendation for surgery, but still opined Claimant could perform full-duty work, with the only restriction that Claimant should not roll a water cart for two weeks. (Id., at pp. 3-4).

On July 10, 2004, Dr. Smith submitted his opinion that Claimant suffers from cervical and lumbar disk abnormalities and that if she does not undergo back surgery, her date of maximum medical improvement is July 10, 2004. Dr. Smith qualified his recommendation for surgery by stating that it would not be of significant benefit to her condition. (Ex. #1 at p. 1; R.E. 5). Dr. Smith assigned Claimant a 5% impairment rating to the body as a whole. Id. Dr. Smith stated that if Claimant undergoes surgery, she would be temporarily and totally disabled for approximately 6 weeks, then she could return to her previous job. Id.

Claimant was evaluated by Dr. Moses Jones at the request of the Employer and Carrier on May 27, 2004. Dr. Jones opined that Claimant's cervical spine clearly shows some degenerative changes and postoperative changes from her previous anterior cervical fusion. (Ex. #2, at p. 3; R.E. 6). However, he did not see any acute changes such as a herniated disk or evidence of nerve root compression. Id. Dr. Jones found degenerative changes in Claimant's lumbar region but found no evidence of any neural impingement and nothing that would correlate with Claimant's symptomatology. Id. Dr. Jones opined that Claimant is not a surgical candidate and that surgery would be of no benefit to her. Id. Dr. Jones also opined that Claimant could resume all normal activities. He assigned Claimant a 5% permanent partial impairment to the body as a whole and returned Claimant to full-duty work without restrictions. Id.

An Independent Medical Examination was performed by Dr. Eric Wolfson on February 14, 2005. Prior to the examination, the Employer and Carrier requested Claimant obtain all of her radiology films from Hancock Medical Center to present to Dr. Wolfson. Claimant did not, however, present him with the films of the June 2000 MRI. (Tr., at pp. 44-46; Ex. #22; R.E. 14). Dr. Wolfson testified that, based upon the most recent imaging studies and exams, he does not believe Claimant needs to undergo back surgery. He does, however, believe Claimant needs to undergo revision cervical surgery at C3-4 and C5-6. (Ex. #19 at p. 9, 23-24; R.E. 12). Claimant never told Dr. Wolfson she had previously injured her neck and back in a motor vehicle accident in March 2000. She did not tell him that she was diagnosed as suffering from disc protrusions in her neck and back in June 2000, after Dr. Johnston sent her for an MRI. After being confronted with this information in his deposition, Dr. Wolfson reviewed the radiological report from the June 14, 2000 MRI and rendered his opinion that Claimant's current symptoms are an aggravation or exacerbation of pre-existing neck and back pain. Id.

On her own, Claimant sought the treatment of Slidell, Louisiana neurosurgeon, Dr. Jeffrey H. Oppenheimer.[3] Dr. Oppenheimer diagnosed Claimant as suffering from significant adjacent level disease at C6-7, which he believes is pressing upon Claimant's spinal cord, and

---

3

The Employer and Carrier objected to the introduction of Dr. Oppenheimer's medical records on the grounds that Dr. Oppenheimer is a Louisiana doctor who provided treatment to the Claimant without authorization by the Employer and Carrier. Dr. Oppenhiemer's medical records contain many illegible writings and should not have been admitted without clarification, and his opinions are not relevant in this case.

In addition, the Claimant misrepresents to the Court that the Employer and Carrier would not authorize additional treatment. The Employer and Carrier have not refused medical treatment and contend that medical treatment rendered by the treating physician, Dr. Terry Smith, was always authorized. There was, however, a contested issue for trial whether Dr. Smith's recommendation for lumbar surgery was reasonable and necessary. (R., at p. 32).

lateral recess stenosis at L3-4 and L4-5. Dr. Oppenheimer recommended Claimant be evaluated by an otorhinolaryngologist to document paralysis of her right vocal cord following her initial anterior cervical discectomy and fusion. Dr. Oppenheimer anticipates Claimant will need future cervical surgery and back surgery. (Ex. #20 at p. 2; R.E. 13).

As set forth above, Dr. Allen Johnston treated Claimant for injuries she received in the March 2000 motor vehicle accident. Dr. Johnston diagnosed Claimant as suffering from disc protrusions and cord compressions at C3-4, C4-5 and C5-6, apparent left C5 nerve root impingement at C4-5, and protrusion at L5-S1 with evidence of left S1 nerve root impingement due to disc protrusion and facet arthropathy as a result of the motor vehicle accident. (Ex. #11 at pp. 13, 16; R.E. 10). Dr. Johnston's records confirm that on October 25, 2000, Claimant asked him for a medical release so she could return to work. Clamant was still having pain and stiffness with some radicular pain at that time. Id., at p. 14. Claimant told Dr. Johnston she would follow up with her private physician. At that time, Dr. Johnston felt Claimant was in need of further treatment, but per he wishes, he released her. Id.

In summary, there are competing opinions among those physicians who have examined and/or treated the Claimant. Dr. Terry Smith, Claimant's treating physician, does not believe Claimant needs to undergo additional cervical surgery. He placed Claimant at MMI with regard to her neck injury on April 15, 2003. He does, however, recommend Claimant undergo lumbar surgery, although he believes the surgery will be of little or no benefit to her. Therefore, Dr. Smith placed at MMI on July 10, 2004, with regard to her back even without the surgery.

Dr. Moses Jones, the Employer's Medical Examiner, does not recommend Claimant undergo any additional surgery. Nor does Dr. Jones believe Claimant will receive any benefit from additional surgery.

Dr. Eric Wolfson, the Independent Medical Examiner, believes Claimant needs to undergo revision cervical surgery, but does not believe back surgery is warranted at this time.

Finally, Dr. Oppenheimer believes Claimant needs to undergo additional cervical surgery and back surgery.

Findings of Fact and Decision

A hearing was held before the Administrative Law Judge on July 20, 2005. Contrary to the assertion of the Claimant, the issues presented to the Administrative Law Judge, without objection from either party were:

> whether or not a work-related injury occurred on or about the date alleged in the Petition to Controvert, and if so, the existence, nature and extent of disability attributable thereto, inclusive of the fact that additional surgery has been recommended, and whether or not the Employer and Carrier should be responsible for that surgery.

(Tr., at p. 4). The issue of any result of disability attributable to the additional surgery, if ordered, was reserved for later hearing. Id. This fact is supported not only by the trial transcript but also by the pre-trial statements of both the Claimant and the Employer and Carrier, which provide that existence/extent of permanent disability attributable to the injury is a contested trial issue. (R., at pp. 8, 11, 58, 73; R.E. 15).

The Employer and Carrier presented two additional issues: (1) whether the Claimant forfeited her right to benefits pursuant to the Mississippi Workers' Compensation Act by having committed the crime of Workers' Compensation Insurance Fraud; and (2) if surgery is authorized, which physician will perform the surgery. (Tr., at pp. 5, 9).

On January 8, 2007, the Mississippi Workers' Compensation Commission entered its Order affirming the order of the Administrative Law Judge entered on January 6, 2006, in which it was found in a well-reasoned, written opinion that:

1. Claimant did suffer a work related injury on December 14, 2001. Although the Claimant's credibility and trustworthiness has been tainted by the fact that she committed the crime of Insurance Fraud upon the Employer and Carrier, she appeared to be credible on that point and the recitation of an injury so common in the nursing home environment was a reasonable one. The compensability of the Claimant's cervical injury should stand and that there was sufficient medical testimony to sustain at least an aggravation of the cervical region that has now resolved.

2. The contemplated lumbar surgery for the Claimant should not be borne by the Employer and Carrier at this time without further development as to whether or not the need for surgery is present, whether or not the Claimant is desirous of this surgery, which physician would be asked to perform this surgery and conclusory medical opinions that the surgery is related to the original admitted injury. No temporary total benefits are owed and none are ordered.

3. That claimant has been charged and pled guilty to Insurance Fraud with regard to this particular claim.

4. That Claimant has reached MMI and been given an impairment rating of 5% to the body as a whole. However, Claimant is not necessarily entitled to a finding of permanent disability solely because of her impairment rating. The ALJ delineated the difference between a "medical" disability and an "industrial" disability and set forth precedent that, "Generally, predicating an award on medical or functional disability rather that upon a determination of the extent of loss of industrial use or impairment of claimant's wage earning capacity is in error." Smith v. Jackson Construction Co., 607 So.2d 1119, 1125 (Miss. 1992).

5. The ALJ set forth the burdens placed upon the Claimant in order to establish a prima facie case of "industrial" disability and upon the Employer and Carrier in order to rebut the prima facie case. The ALJ found that, after being terminated from her employment with Woodland Village in February 2004, for forging medical records in order to obtain further indemnity benefits, Claimant did not seek any type of employment. In fact, no doctor has offered the opinion in the claim that Claimant was not able to continue her same employment or another type of employment after February 2004.

6. Claimant was terminated from her employment. She did not leave her employment for any medical reason. As such, the claimant is not entitled to an award for temporary total disability during this period. Claimant has not made any efforts to seek other employment; at all times, Woodland Village had forty (40) hours per week of work available to the Claimant within her restrictions; Claimant lost her job because she committed the crime of Insurance Fraud upon her employer; and had Claimant not committed that crime, she could still be employed by Woodland Village. Because Woodland Village, at all times, had

> available to Claimant a position at the same or greater salary, which position she was terminated from by her own acts, under the applicable law, Claimant is not entitled to an award for permanent disability in this action.
> 7. The ALJ declined to formulate a public policy exception to the workers' compensation fraud statute.

(R., at pp. 91-96).

The Mississippi Workers' Compensation Commission affirmed the decision of the Administrative Law Judge, stating

> The Administrative Law Judge found that Ms. Washington, albeit barely, mustered enough credible evidence to prove she suffered a work related injury on December 14, 2001. The Judge, however, did not award the Claimant any temporary or permanent disability benefits, and refused to order the Employer and Carrier to pay for lower back surgery being sought by Ms. Washington. In the end, we affirm.

(R., at p. 108-109).

Considering the evidence, the arguments of the parties and the applicable law, the Commission agreed with the ALJ's decision on the issues and entered its order affirming the Order of the Administrative Law Judge dated January 6, 2006.

SUMMARY OF THE ARGUMENT

The sole proof provided by the Claimant that she suffered an on-the-job injury on December 14, 2001, was that of her own testimony. Claimant is not competent to prove her claim because her credibility and trustworthiness was destroyed by the fact she committed the crime of Insurance Fraud upon the Employer and Carrier in the procurement of workers' compensation benefits. That crime, coupled with numerous other circumstances set forth herein cast serious doubt on this claim. The Mississippi Workers' Compensation Commission should have rejected the Claimant's testimony as untrustworthy. As such, the Mississippi Workers' Compensation Commission committed an error of law in finding they were duty bound to resolve this doubtful case in favor of the Claimant.

In addition, the Commission should have found that, as a matter of public policy, the Claimant forfeited her rights to workers' compensation benefits by committing the crime of workers' compensation fraud.

STANDARD OF REVIEW

The Commission is the ultimate finder of fact. Mueller Copper Tube Co., Inc. v. Upton, 930 So.2d 428, 434 (Miss.App. 2005); Vance v. Twin River Homes, Inc., 641 So.2d 1176, 1180 (Miss. 1994). Where the Commission adopts the findings of the administrative law judge without presenting its own findings of fact, this Court examines the findings of fact made by the administrative law judge. Upton, 930 So.2d at 434 (citations omitted).

> If there is substantial evidence to support the Commission, absent an error of law, this Court must affirm. On the other hand, where the Commission has misapprehended the controlling legal principles, we will reverse, for our review in that event is de novo.

Smith v. Jackson Constr. Co., 607 So.2d 1119, 1125 (Miss. 1992). See also, Hardin's Bakery v. Taylor, 631 So.2d 201, 204 (Miss. 1994) (citations omitted); Natchez Equipment Co., Inc. v. Gibbs, 623 So.2d 270, 273-74 (Miss. 1993); KLLM, Inc. v. Fowler, 589 So.2d 670, 675 (Miss. 1991) (Court exercises de novo review on matters of law); Shelby v. Peavey Electronics Corp., 724 So.2d 504, 506 (Miss. App. 1998) (citations omitted).[4] In other words, this Court will reverse only where a Commission order is clearly erroneous and contrary to the weight of the credible evidence and will overturn a Commission decision only for an error of law or an unsupportable finding of fact. Weatherspoon v. Croft Metals, Inc., 853 So.2d 776, 778 (Miss. 2003); Vance, 641 So.2d at 1180; Hedge v. Leggett & Platt, Inc., 641 So.2d 9, 12 (Miss. 1994); Georgia Pacific Corp. v. Taplin, 586 So.2d 823, 926 (Miss. 1991).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW AND FACT BY FINDING THAT CLAIMANT SUFFERED A WORK-RELATED INJURY ON DECEMBER 14, 2001.

Miss. Code Ann. § 71-3-7 outlines the burden that each claimant must satisfy in order to receive compensation.

> Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease.

Thus, each claim brought under the Act must satisfy three (3) elements: (1) an injury (or occupational disease); (2) disability; and (3) a causal connection between the injury and the

---

4 The term "substantial evidence" has been defined to mean something more that a "mere scintilla" of evidence but which does not rise to the level of "a preponderance of the evidence". Substantial evidence "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion." Delta CMI v. Speck, 586 So.2d 768, 772-73 (Miss. 1991).

disability. Miss. Code Ann. § 71-3-7. See also, Dunn, *Mississippi Workers Compensation*, § 265 at 322-23 (3d. ed. 1982); Hedge, 641 So.2d at12-13; Strickland v. M. H. McMath Gin, Inc., 457 So.2d 925, 928 (Miss. 1984); International Paper Co. v. Greene, 773 So.2d 399, 401 (Miss. App. 2000) (citing Miss. Code Ann. § 71-3-3).

Generally, the Commission tends to resolve disputed issues of fact in favor of the claimant and is required to construe the Act liberally in favor of the claimant and resolve doubtful cases in favor of compensation. Miss. Code Ann. § 71-3-1. See, Miller Transporters, Inc. v. Guthrie, 554 So.2d 917, 918 (Miss. 1989) (to fulfill purposes of Act, doubtful cases should be resolved in favor of compensation) (citations omitted); Stuart's Inc. v. Brown, 543 So.2d 649, 652 (Miss. 1989) (same) (citations omitted) ; Sharpe v. Choctaw Electronics Enterprises, 767 So.2d 1002, 1006 (Miss. 2000) (liberal construction of Act favors payment of benefits for compensable injuries). However, while the law favors a liberal interpretation, a claimant is still required to prove the claim **by a fair preponderance of the evidence** and **to a legal certainty**. Bracey v. Packard Elec. Div., General Motors Co., 476 So.2d 28, 29 (Miss. 1985) (emphasis added).

The burden of proving a claim beyond speculation and conjecture is on the claimant in a workers' compensation case. Flint Coat Co. v. Jackson, 192 So.2d 395 (Miss. 1966). The burden must be established by reasonable probabilities and not by mere possibilities. Bracey, 476 So.2d at 29). "The burden is not met by a showing that it could have been one way just as well as another." Dunn, *Mississippi Workmen's Compensation*, § 268 (3d. ed.1990). Further, ***when a claimant attempts to satisfy his burden on the basis of his testimony alone, there must be nothing that discredits that testimony, especially if the testimony is uncorroborated by***

surrounding circumstances. Penrod Drilling Co. v. Etheridge, 47 So.2d 1330, 1333 (Miss. 1986) (citing Dunn, *Mississippi Workmen's Compensation*, § 264 (3d. ed. 1982)).

In this case, the critical issue is whether there was an "injury" under the Act and whether the Claimant sustained her burden of proof by a preponderance of the evidence and to a legal certainty. The Claimant has wholly failed to sustain her burden of proof. The only evidence offered by the Claimant on this issue is that of her own testimony. Generally, the claimant is competent to prove her own claim, and her testimony may be accepted without corroboration. V. Dunn, *Mississippi Workmen's Compensation*, Sec. 264, p. 320 (3d ed. 1982) (citations omitted). A claimant's testimony may also be acted upon although it is disputed by other witnesses and if undisputed and not untrustworthy, must be taken as conclusive proof of the fact. Id. at p. 321. However, ***if the claimant is uncorroborated as to the occurrence of a claimed accident and is shown to have made statements inconsistent with the claim, the commission is not bound to accept the testimony as the basis for an award***. Id. (Emphasis added). Further, a claimant's testimony may be rejected by the commission if it proves to be "untrustworthy," as when there are circumstances in evidence casting doubt upon the claim. Id. Finally, Rule 603(a)(2) of the Mississippi Rules of Evidence specifically authorizes evidence of a witnesses conviction of a crime to be admitted and considered by the trier of fact if the crime involves dishonesty or a false statement. Here, the Claimant's credibility and trustworthiness has been tainted, if not destroyed, by the fact that she plead guilty to and was convicted of Insurance Fraud for her conduct in falsifying and forging medical records which allowed her to obtain additional indemnity benefits to which she was not entitled. (Ex. #7 at p. 1).

The Commission misapplied the law by finding they were duty bound to accept this doubtful claim. Claimant's untrustworthiness is compounded by many circumstances in

evidence casting doubt upon this claim. It is uncontested that Claimant injured her back in an automobile accident in March 2000, for which she was actively being treated by Dr. F. Allen Johnston prior to her employment with Woodland Village. When Claimant was initially required to obtain a medical release prior to becoming employed with Woodland Village, she obtained the release against Dr. Johnston's wishes that she continue medical treatment - a condition which undisputedly was not related to her employment. (Ex. #11 at p. 14). When asked to retrieve her MRI films from Hancock Medical Center, the June 2000 films, evidencing pre-existing disc protrusions in her neck and back, were conveniently unable to be located. (Ex. #22). Claimant never disclosed to Dr. Wolfson, who conducted an Independent Medical Examination, that she had pre-existing neck and back problems which arose after her March 2000, automobile accident. (Ex. #19 at pp. 26-29). When the Employer made written inquiry to Dr. Smith whether it was safe for Claimant to be caring for elderly residents while taking pain medication, Dr. Smith replied that he has not given any pain medication to Claimant in many months and that the source of her medication should be explored. (Ex. #1 at p. 6). Then, when Claimant was confronted with this information and asked to obtain a certificate from her prescribing doctor before returning to work, Claimant never came back to work at Woodland Village. Finally, Claimant pled guilty to and was convicted of the crime of Insurance Fraud in the procurement of workers' compensation benefits after she forged at least three medical records in order to remain on part-time, light duty work. (Ex. #7 at p. 1).

Additionally, the testimony, as well as the exhibits, clearly show that Claimant's present symptoms of neck and back pain arose from a March 2000, motor vehicle accident, not an alleged December 14, 2001 work injury. From March 2000 to May 2001, Claimant was treated for neck and back pain as a result of the motor vehicle accident. On June 28, 2000, after

undergoing an MRI on June 14, 2000, Claimant was diagnosed as suffering from cervical disc protrusions with cord compression and nerve root impingement and lumbar disc protrusions with nerve root impingement. (Ex. #11 at pp. 13, 16). The actual films of the June 14, 2000, MRI were not in the packet picked up by the Claimant at the Hancock Medical Center to deliver to Dr. Wolfson for use in his IME. (Ex. #22). During an examination with Dr. Johnston on May 23, 2001, Claimant was complaining of cervical pain which she rated as 7/10. (Ex. #11 at p.15). Claimant has presented no witnesses to corroborate her testimony about an alleged work injury. (Ex. #9 at p. 1). Consequently, it is difficult to find the Claimant's testimony either credible or trustworthy. As noted by the Mississippi Supreme Court, "[a] back injury is not ordinarily a condition in which a patient is taciturn. There is an inclination to sing it praises." Hudson v. Keystone Seneca Wire Cloth Co., 482 So.2d 226, 228 (Miss. 1986).

Where evidence is contradicted, inherently improbable, incredible, unreasonable, or untrustworthy, the claim may be denied. Morris v. Lansdell's Frame Co., 547 So.2d 782, 785 (Miss. 1989). See also, Shoffer v. Vestal and Vernon Agency, 217 So.2d 627, 692-30 (Miss. 1969) (sufficient facts were present to reject claim - no corroboration of claimant's testimony and application for benefits under group policy); Fowler v. Durant Sportswear, Inc., 203 So.2d 577, 578 (Miss. 1967) (testimony of claimant found untrustworthy when uncorroborated). The Claimant's testimony, when considered with the remaining facts disclosed in this case, does not meet the burden placed upon her to establish that she suffered an on-the-job injury on December 14, 2001. The Commission found, "Claimant's claim is doubtful, at best, but we are duty bound to resolve this doubt in her favor." (R., at p. 109). Based upon the foregoing the Commission committed an error of law when it found it was "duty bound" to accept this doubtful claim. As such, the Order of the Commission should be reversed and this claim should be dismissed.

II. THE PUBLIC POLICY OF THE STATE OF MISSISSIPPI REQUIRES THE FORFEITURE OF CLAIMANT'S RIGHT TO BENEFITS UNDER THE WORKERS' COMPENSATION ACT AS A CONSEQUENCE OF HER COMMISSION OF THE CRIME OF INSURANCE FRAUD UPON THE EMPLOYER IN ORDER TO OBTAIN WORKERS' COMPENSATION BENEFITS.

Claimant altered several medical reports of her treating physician, Dr. Terry Smith, in order to induce the Employer to believe she was temporarily disabled so that she could remain on light duty work and continue to receive temporary disability benefits. Claimant plead guilty to the crime of Insurance Fraud in the Circuit Court of Harrison County, Mississippi, First Judicial District. (Ex. #7 at pp. 1-3). As a consequence of her crime, Claimant has been ordered to pay restitution to the Workman's Compensation Carrier in addition to paying certain fines and penalties. Id. Although Claimant has waived any claim to indemnity benefits she was paid during the period of time she committed insurance fraud upon the Employer and Carrier, she is currently seeking permanent disability benefits relative to that time period and temporary and permanent benefits relative to future contemplated neck and back surgery.

In 1998, the Mississippi Legislature created the Insurance Integrity Enforcement Bureau within the Office of the Attorney General. Miss. Code Ann. § 7-5-301, et seq. Section 7-5-303 of the Code prohibits any person from knowingly defrauding any insurance plan in connection with the delivery of insurance benefits. Section 7-5-309 of the Code provides that any individual who knowingly violates § 7-5-303, shall be guilty of a felony punishable by imprisonment, fines and costs. By enacting these sections of the Mississippi Code, the Mississippi Legislature has given clear indication of Mississippi's public policy against insurance fraud.

The Mississippi Workers' Compensation Commission erred as a matter of law by not finding that Claimant forfeited her right to workers' Compensation benefits, including medical

and indemnity benefits, by having committed and been convicted of workers' compensation insurance fraud.

Section 71-3-69 of the Mississippi Code of 1972, as amended, provides:

> Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining or wrongfully withholding any benefit or payment under this chapter is guilty of a felony and on conviction thereof may be punished by a fine of not to exceed Five Thousand Dollars ($5,000.00) or double the value of the fraud, whichever is greater, or by imprisonment not to exceed three (3) years, or by both fine and imprisonment.

Although the statute does not specifically state that a Claimant forfeits his or her benefits by using false or misleading information to obtain benefits, the strong public policy of the State of Mississippi should allow for such forfeiture. At the very minimum, the Court should find that the Claimant forfeits her right to permanent disability benefits which may emanate as a result of her fraud.

This Court has the power to carve out a public policy exception that allows the termination of benefits when a Claimant commits workers' compensation insurance fraud. For instance, in McArn v. Allied Bruce-Terminix Co., Inc., 626 So.2d 603, 607 (Miss. 1993), i.e., the whistle blower case, the Mississippi Supreme Court carved out a narrow public policy exception to the longstanding, common law, employment-at-will doctrine when the employee refuses to participate in an illegal act or is discharged for reporting illegal acts of his employer. The Mississippi Supreme Court arrived at this public policy exception by analyzing prior cases in which employees were terminated under certain bad faith circumstances and in which the Court held the employees had no recourse for their termination. The Employer and Carrier are aware of the statutory nature of the current workers' compensation statute and of the issues involving separation of powers of the judiciary and the legislature and fully anticipate the Claimant will

counter with that argument. But, in McArn, the Court went so far as to hold that the public policy exceptions apply even when there is "privately made law governing the employment relationship." Id.

In addition, in Long v. McKinney, 897 So.2d 160 (Miss. 2004), the Mississippi Supreme Court evaluated the Mississippi Wrongful Death Statute and promulgated procedure to be followed in wrongful death litigation, despite the lack of provisions in the statute, stating it was their "constitutional responsibility" to scrutinize the Statute for matters which are judicial and to establish the procedure to be followed in wrongful death litigation. Long, 897 So.2d at 163. The Court went so far as to hold that where provisions of the Long decision conflict with the Wrongful Death Statute, the Long provisions shall control. Id., at p. 164.

Likewise, in the present action, this Court should consider the position of the Employer and Carrier and the citizens of the State of Mississippi. The Claimant has pled guilty to and been convicted of the crime of Insurance Fraud. From the outset of this case, Claimant has either committed acts, or suspicious circumstances have arisen which cast serious doubt upon Claimant's credibility and the validity of this claim. To say that Claimant's credibility has been tainted is an understatement. Nevertheless, under the present statutory scheme, the Employer and Carrier must still provide benefits to the Claimant for alleged injuries she suffered as the result of an alleged, uncorroborated work injury.

Additionally, the present statute does not provide for the repayment of benefits which were received as a result of the fraud.[5] "It is axiomatic that the entire purpose of the creation of

---

5

It is uncontested that Claimant has been ordered by the Harrison County Circuit Court to repay Employer and Carrier for the benefits received as a result of her fraud.

such public policy exceptions is to further the public policy of the state of Mississippi." Rosamond v. Pennaco Hosiery, Inc., 942 F.Supp. 279, 286 (N.D.Miss. 1996). "If we are to have a law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward their lawlessness at the unjust expense of their innocent victims." Id. If Claimant is entitled to receive further worker's compensation benefits, despite her fraudulent acts, not only will Claimant's unlawfulness will be rewarded by the Court, but the Court will also send the message to the citizens of our State that despite committing a fraud upon one's employer, benefits will still be paid without scrutiny.

The Employer and Carrier concede that most states which do provide for the forfeiture of benefits do so by statute. However, it is believed that, if confronted with the situation, the Mississippi Supreme Court would carve out the urged public policy exception. Therefore, the Court is urged to at least take a stand on this issue in order to allow the Mississippi Supreme Court an opportunity to make much needed law on appeal.

To aid the Court in its determination on this issue, a review of several state's scheme is relevant. For instance, pursuant to La.R.S. 23:1208, Louisiana employs the following standard to determine whether a Claimant has forfeited his or her benefits: (1) there is a false statement or misrepresentation, (2) willfully made, and (3) it is made for the purpose of obtaining or defeating any benefit or payment. Darby v. Gilbert Richard, Inc., 838 So.2d 141, 149 (La.App. 3 Cir. 2003). However, false statements that are inadvertent or inconsequential do not result in forfeiture. Id. In Darby, the Claimant had so highly inflated his estimated weekly wages, the Court found that reason alone warranted a forfeiture of all compensation benefits under La.R.S. 23:1208.

In Sjostrand v. N.D. Worker's Comp. Bureau, 649 N.W.2d 537 (N.D. 2002), under a statute that provides for reimbursement of benefits paid and forfeiture of additional benefits for making a false statement in an attempt to secure payment, the claimant's benefits were terminated after he was videotaped engaging in activities inconsistent with the representation of his physical condition given to his treating physicians.

On the other hand, California does not terminate all benefits when the claimant commits a fraud in order to obtain benefits. Rather, the statute bars any compensation directly emanating from or connected with the fraudulent misrepresentation. In Farmers Ins. Group of Companies/Truck Ins. Exchange v. Board, 104 Cal.App.4th 684, 128 Cal.Rptr.2d 353 (Cal.App.2d 2002), where the Claimant fraudulently obtained $84,000.00 by submitting stolen medical footwear purchase slips from a defunct store, he was ordered to pay restitution at the rate of $100 per month, and all benefits relating to the fraud were terminated.

In Vermont, the Commissioner is granted discretion to require forfeiture of all or a portion of workers' compensation benefits. In Butler v. Huttig Building Products, 830 A.2d 44 (Vt. 2003), the claimant was left paralyzed after a 1000 pound glass door fell on his head at a loading dock. The claimant subsequently committed the fraudulent acts of falsifying two medical notes from one of his doctors, falsifying three receipts for physical therapy, in which he sought reimbursements for overpayments allegedly made, falsifying mileage reimbursement requests on eight separate dates for medical treatment never received and exaggeration of his symptoms to health care providers. The Commissioner terminated all of the claimant's benefits, including his permanent disability benefits. On appeal, this was found disproportionate to the claimant's fraud. "Forfeiture must be no harsher than necessary to deter fraudulent claims and to ensure that the employer does not pay for a benefit to which the injured worker is not entitled

under the Act." Id. at 48. While the court was satisfied the claimant forfeited his right to further medical or temporary disability benefits, denial of his permanent disability went beyond the bounds of discretion. The court did not believe the intent of the statute was to relieve an employer from its obligation under the Act to provide permanent disability benefits to an injured worker where the permanent nature of the worker's injury is undisputed. Nor did the court believe that so denying permanent disability benefits would further the intent of the statute to "cull out" false claims where the claim of permanent disability is not in fact false.

In the present case, the only evidence presented of the occurrence of a work-related injury is the testimony of the Claimant. That testimony has been so tainted by inconsistencies, as set forth above, that it is doubtful whether she even suffered a work injury. Further, the permanent nature of Claimant's alleged disability has been resolved by the Commission. Clearly, Claimant did not establish that she is permanently disabled and the Commission correctly found that she is not permanently disabled. Therefore, even if the Court is inclined to follow the Vermont scheme, the Employer and Carrier submit that the Claimant has forfeited her right to receive any workers' compensation benefits. Whether the Court is inclined to follow the harsher rule of Louisiana or the less stringent rule of California, a stand must be taken on this issue. The Court is urged to send out the message that workers' compensation insurance fraud will not be tolerated. Contrary to the opinion of the Administrative Law Judge and the Mississippi Workers' Compensation Commission, this is the perfect forum in which to formulate the public policy of the State of Mississippi with regard to workers' compensation fraud. Therefore, the Court is urged to find that Claimant has forfeited her right to receive any benefits in relation to this claim.

The Court should also consider those cases in which claims have been denied because the injuries were occasioned by the "indiscretions" of the employees. See, Brooklynn Steam

Laundry v. Watts, 214 Miss. at 635, 59 So.2d 294, 299 (1952) (employee was killed because his assailant believed he was having an affair with his wife); Sanderson Farms, Inc. v Jackson, 911 So.2d 985, 990 (Miss.App. 2005) (employee's injuries were the result of a personal vendetta); Total Transp., Inc. v. Shores, 968 So.2d 456, 463-464 (Miss.App. 2006) (employee's injuries did not arise because of his employment where he went on extended escapade which exposed him to risks not usually associated with his employment). "No public policy would be served by compensating an injury or death originating with the employee's personal indiscretions, whether real or fancied." Big 2 Engine Rebuilders v. Freeman, 379 So.2d 888, 891 (Miss. 1980). As this Court stated in Total Transportation, "To grant compensation in this case would be contrary to public policy and would effectively erase the 'because of his employment' requirement from the Mississippi Workers' Compensation Act. 968 So.2d at 466, *aff'd* 968 So.2d 400 (Miss. 2007).

This Court has addressed the public policy of the State of Mississippi on numerous occasions in prior decisions. This case is no different. To allow compensation for a claim after the claimant has been convicted of the crime of insurance fraud is contrary, if not in complete degradation, of the public policy of the State of Mississippi. Therefore, the Court is urged to carve out an exception as set forth herein.

REPLY TO BRIEF OF APPELLANT/CROSS-APPELLEE

I. THE COMMISSION DID NOT DECIDE ISSUES THAT WERE NOT PROPERLY BEFORE ITS ADMINISTRATIVE LAW JUDGE FOR DECISION.

Procedural Rule 5 of the Mississippi Workers' Compensation Commission provides that, "Before a matter can be set for hearing on the merits, each party must submit a pre-hearing statement ... completed in all respects ... The completed statement shall follow the form prescribed by the Commission and set forth: I. The contested issues; II. Stipulations which will avoid unnecessary proof; ..."

Both the Claimant and the Employer and Carrier submitted Pre-Hearing (Pre-Trial) Statements as required by the Procedural Rules of the Commission. Both submitted the issue of, "Existence/extent of permanent disability attributable to the injury," to the Commission for decision. (R., at p. 8, 14, 58). The Claimant submitted an Amended Pre-Trial Statement on or about March 4, 2004, in which she supplemented her list of expert witnesses. Claimant's Amended Pre-Trial Statement did not modify any of the issues presented by her original Pre-Trial Statement. (R., at p. 24-25). At the hearing on July 20, 2005, the administrative law judge recited the issues as follows, without objection:

> whether or not a work-related injury occurred on or about the date alleged in the Petition to Controvert, and if so, the existence, nature and extent of disability attributable thereto, inclusive of the fact that additional surgery has been recommended, and whether or not the Employer and Carrier should be responsible for that surgery. And/or any result of disability will have to be the subject of another hearing if such is found to be compensable.

(Tr., at p. 4-5).

The Claimant most certainly sought permanent disability benefits at the hearing before the administrative law judge. Otherwise, she would not have placed the issue before the judge in her Pre-Trial Statement, and the judge would not have recited the issues as "whether or not a

work-related injury occurred on or about the date alleged in the Petition to Controvert, ***and if so, the existence, nature and extent of disability attributable thereto***," . . . The Claimant made no objection to the issues as stated by the administrative law judge because her argument did not arise until she was denied permanent disability benefits. By reading the issue as stated by the administrative law judge, only one logical conclusion can be reached - the only issue reserved for later hearing is that of any disability she incurs as a result of lumbar surgery, if authorized and if Claimant elected to go forward with the surgery.

The Claimant cites Monroe v. Broadwater Beach Hotel, 593 So.2d 26 (Miss. 1992) in support of her argument on this issue. In Monroe, the Claimant filed a motion requesting the Commission order the Employer and Carrier to provide additional medical treatment. Id, at 29. Having specifically stated that the hearing in the matter was limited to whether the Claimant was suffering from improper medical treatment or lack of medical treatment, the administrative law judge made findings on MMI and apportionment. Id. This case is distinguishable. Here, the administrative law judge recited the issues set forth by the parties, including existence/extent of permanent disability, and rendered her findings accordingly, with notice to all.

Section 71-3-53 of the Act allows for the reopening of a claim within one year of the date a compensation order has been issued or a claim has been rejected. It is the Employer and Carrier's position that the Commission correctly found the Claimant was at MMI with regard to her alleged neck and back injuries and that she is not entitled to permanent disability benefits. However, once this matter is resolved by this Court, whether the resolution be in favor of the Claimant or the Employer and Carrier, she can still reopen her claim for benefits within one year of a final judgment. Therefore, if there is a change in condition or mistake of fact, a request for

temporary and/or permanent disability could be made. The Commission must be affirmed on this issue because its decision was not based upon an erroneous matter of law.

II. THE WORKERS' COMPENSATION COMMISSION CORRECTLY DECIDED THAT THE CLAIMANT WAS NOT ENTITLED TO PERMANENT DISABILITY BENEFITS DUE TO THE FACT THAT SHE DID NOT MAKE REASONABLE EFFORTS TO FIND ALTERNATIVE EMPLOYMENT.

Although there is conflicting testimony regarding Claimant's need for further surgery, Claimant's treating physician, Dr. Terry Smith, and the Employer's Medical Examiner, Dr. Moses Jones have both opined that, even without surgery, Claimant has reached MMI. (Ex. #1 at p. 1; Ex #2 at p. 3). The Commission correctly found that, after reaching MMI, Claimant made no efforts to locate alternative employment. Further, the Commission correctly found that, although Claimant was assigned a 5% impairment rating to the body as a whole, she is not entitled to a finding of permanent disability solely because of the impairment rating. The Commission correctly stated the law as it relates to medical versus industrial disability and the particular burdens of proof placed on the Claimant and the Employer and Carrier. (R., at pp. 93-95). The Commission found that, after being terminated from her employment with Woodland Village in February 2004, Claimant did not seek any type of employment. No doctor has offered the opinion that Claimant was not able to continue her same employment or another type of employment after February 2004. It is uncontested that Claimant was working 40 hours per week until she was terminated. No physician had taken her off work. At all times, the Employer had forty (40) hours per week of work available to the Claimant within her restrictions. She lost her job because she committed the crime of Insurance Fraud upon her employer, not because of her inability to work. Had Claimant not committed that crime, she could still be employed by Woodland Village. (R., at p. 95, Ex. #17). The Commission further found that the law is clear,

if the claimant does return to a position at the same or greater salary, then there is a presumption she has no loss of wage earning capacity. International Paper Co., Inc. V. Kelley, 562 So.2d 1298 (Miss. 1990). Id. The Commission found that "Because Woodland Village, at all times, had available to claimant a position at the same or greater salary, which position she was terminated from by her own acts, under the applicable law, claimant is not entitled to an award for permanent disability in this action." (R., at p. 95). The Commission's opinion regarding permanent disability benefits was based upon substantial evidence, including medical testimony, and a correct recitation of the law. Lankford v. Rent-a-Center, Inc., 961 So.2d 774, 777 (Miss.App. 2007)(claimant continued in his usual employment until his dismissal for reasons unrelated to his injury). Given this Court's limited scope of review, the Commission must be affirmed on this issue.

III. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT CLAIMANT IS NOT IN NEED OF FURTHER CERVICAL SURGERY.

IV. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT THE EMPLOYER AND CARRIER ARE NOT RESPONSIBLE FOR CONTEMPLATED LUMBAR SURGERY AT THIS TIME.

Four physicians have rendered opinions regarding Claimant's need for future surgery, including cervical and lumbar surgery.

Cervical Surgery[6]

Regarding Claimant's need for future cervical surgery, Claimant's treating physician, Dr. Terry Smith, does not believe Claimant needs to undergo additional cervical surgery. In fact, Dr.

6

The Employer and Carrier maintain that Claimant failed to sustain her burden of proof and did not show that she suffered a work-related injury.

Smith placed Claimant at MMI with regard to her neck on April 15, 2003. (Ex. #1 at p.66). The Employer's Medical Examiner, Dr. Moses Jones, opined that Claimant was not a surgical candidate and that surgery would be of no benefit to her. (Ex. #2 at p. 3). However, Dr. Jeffrey Oppenheimer, who Claimant sought treatment from on her own, *anticipates* Claimant will need to undergo additional neck surgery.[7] Dr. Eric Wolfson, who performed an Independent Medical Examination, believes Claimant will need revision cervical surgery. (Ex. #19 at p. 9).

The Commission was faced with the opinions of four medical providers - two of whom opine Claimant will not need additional cervical surgery and two of whom opine that Claimant will need additional cervical surgery. The Commission accepted the opinion of the physicians who concluded Claimant was not a candidate for further cervical surgery.

Lumbar Surgery

The Commission was faced with a similar scenario regarding Claimant's need for future lumbar surgery. Dr. Terry Smith opined that Claimant was a surgical candidate, but that surgery would not be of significant benefit to her. (Ex. #1 at p.1). Even without surgery, Dr. Smith placed Claimant at MMI and gave her an impairment rating of 5% to the whole person. Dr. Jeffrey Oppenheimer *anticipates* that Claimant will need back surgery. (Ex. #20 at p. 2).[8] However, Dr. Moses Jones opined that Claimant was not a surgical candidate and that surgery

---

7 The Employer and Carrier would restate their objection to the introduction of the medical records of Dr. Oppenheimer on the grounds that he is a Louisiana doctor who provided treatment to the Claimant without authorization by the Employer and Carrier, Dr. Oppenheimer's medical records contain many illegible writings and should not have been admitted without clarification, and his opinions are not relevant in this case.

8 The Employer and Carrier restate their objection to the introduction of the medical records of Dr. Jeffrey Oppenheimer, as set forth above.

would be of no benefit to her. (Ex #2 at p. 3). Dr. Eric Wolfson opined that there are no indications from the most recent imaging studies that Claimant needs the low back surgery and that further diagnostic studies need to be conducted prior to any surgical management of low back pain. (Ex. #4 at p. 4; Ex. #19 at p. 23-25). Again, the Commission had the opinions of four medical providers - two of whom opine Claimant needs surgery and two who do not. The Commission accepted the opinion of the physicians who concluded Claimant was not a surgical candidate for lumbar surgery at this time.

The Commission functions as the finder of fact in workers' compensation cases and is entitled to evaluate and assess the evidence and testimony of witnesses, including medical experts, especially when that evidence is conflicting. DeLaughter v. South Central Tractor Parts, 642 So.2d 375, 378 (Miss. 1994) (citing Gibbs, 623 So.2d at 273; Walker Manufacturing Co. v. Cantrell, 577 So.2d 1243, 1246 (Miss. 1991); Hardin's Bakeries v. Dep. of Harrell, 566 So.2d 1261, 1264 (Miss. 1990)). See also, Miss. Code Ann. § 71-3-47 (Commission is charged with responsibility of making findings of fact); Dunn, *Mississippi Workmen's Compensation*, § 284 , 361-63 (3d. ed. 1982) (same). Accordingly, the Commission may accept or reject the Administrative Judge's findings. Moore v. Independent Life and Accident Ins. Co., 788 So.2d 106, 112 (Miss. App. 2001) (citing Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings, 419 So.2d 211, 213 (Miss. 1982)). When the facts are reviewed on appeal,

> it is not with an eye toward determining how [the appellate court] would resolve the factual issues were [they] the triers of the fact; rather, [the Court's] function is to determine whether there is substantial credible evidence which would support the factual determination made by the Commission. If there be such substantial credible evidence, [the Court is] without authority to disturb that which the Commission has found, even though that evidence would not be sufficient to convince [the appellate court] were [it] the factfinders.

South Central Bell Telephone Co. v. Aden, 474 So.2d 584, 589-90 (Miss. 1985) (citing Staple Cotton Serv. Assoc. v. Russell, 399 So.2d 224, 228-29 (Miss. 1981); King & Heath Constr. Co. v. Hester, 360 So.2d 692, 694 (Miss. 1978)). Accordingly, the Commission's findings are subject to "normal, deferential standards upon review". Gibbs, 623 So.2d at 273.

Further, the probative evidence of any witness's testimony, whether lay or expert, is determined by the finder of fact. McCarty Farms, Inc. v. Kelly, 811 So.2d 250, 254 (Miss. App. 2001) (citing McGowan v. Orleans Furniture, Inc., 586 So.2d 163, 167 (Miss. 1991)); Miller Transporters, Ltd. v. Reeves, 195 So.2d 95, 100 (Miss. 1967) (Commission could accept or reject testimony of expert witness since determination of facts is clearly within province of Commission). "[T]he interpretation of evidence and the resolution of ambiguities and apparent conflicts are matters peculiarly within the province of the Commission as trier of facts, ..." Alumax Extrusions v. Wright, 737 So.2d 416, 421 (Miss. App. 1999). See also, Raytheon Aerospace Support Serv. v. Miller, 861 So.2d 330, 336 (Miss. 2003) (Commission properly considered treating and examining specialists versus general practitioner and chose to accept version of treating and examining specialist who did not see any of claimant's disabilities as total or permanent); Sibley v. Unifirst Bank for Savings, 699 So.2d 1214, 1219 (Miss. 1997) (weight and credibility of medical evidence is issue properly resolved by Commission); Wesson v. Fred's Inc., 811 So.2d 464, 469 (Miss. App. 2002) (where there is conflicting medical testimony, Commission has responsibility to apply expertise and determine which evidence is more credible) (citation omitted); Pickering v. Cooper Tire and Rubber Co., 792 So.2d 298, 300-01 (Miss. App. 2001) (it is role of Commission to weigh credibility of witnesses and decide what weight and worth to give to evidence; the Court may not substitute its own views as to what part of evidence it might find more convincing if there is substantial supporting evidence) (citation

omitted); Ford v. Emhart, Inc., 755 So.2d 1263, 1266 (Miss. App. 2000) ("Where two or more qualified medical experts reach different conclusions, we 'will not determine where the preponderance of the evidence lies when the evidence is conflicting, the assumption being that the Commission, as the trier of fact, has previously determined which evidence is credible, has weight, and which is not.'") (citation omitted).

Further, the Mississippi Supreme Court ruled on the issue of conflicting testimony stating, "Where medical expert testimony is concerned, this Court has held that whenever the expert evidence is conflicting, the court will affirm the commission whether the award is for or against the claimant." Kersh v. Greenville Sheet Metal Works, 192 So.2d 266, 268 (Miss. 1966). The Commission, as fact-finder, is entitled to weigh the competing testimonies and render its decision accordingly, provided that the acceptance of the testimony over that of the other did not result in a decision which was clearly erroneous. Baugh v. Central Miss. Planning and Dev., 740 So.2d 342 (Miss.App. 1999), Moore, 788 So.2d at 112-13. See also, Ladnier v. Shoney's Inn, 751 So.2d 1099, 1103 (Miss. App. 1999) (citations omitted) (issue of causal connection is one for medical experts and commission as trier of fact and where there is conflict of qualified and substantial medical testimony decision of commission for or against award is final and must be affirmed on review).

The Commission reviewed the entirety of the evidence and determined that the Employer and Carrier should remain responsible for all past medical benefits incurred by the Claimant that are deemed reasonable and necessary with regard to the cervical injury. The Commission determined that lumbar surgery should not be authorized at this time due to the conflicting medical opinions regarding its necessity, whether or not the Claimant is desirous of the surgery,

which physician would be asked to perform the surgery and the lack of conclusory medical opinions that the surgery is related to the original work injury.

The Workers' Compensation Act serves a purpose of restoring a claimant to the maximum usefulness she can attain under her physical impairment allegedly resulting from an injury. In this case, Claimant has reached MMI and additional surgery is neither needed nor will it serve any benefit to the Claimant. When faced with the competing opinions of four physicians, the Commission, as trier of fact, weighed the evidence and made a decision that is supported by substantial evidence and was not in error. As such, the Commission must be affirmed on these issues.

CONCLUSION

As set forth in the Cross-Appeal, the Employer and Carrier maintain that the Mississippi Workers' Compensation Commission committed manifest errors of law and fact by finding that the Claimant sustained a work related injury on December 14, 2001, and that the Commission must be reversed. The Employer and Carrier additionally maintain that the Commission should have created a public policy exception to Section 71-3-69 of the Mississippi Code of 1972, as amended, and should have found that the Claimant forfeited her right to workers' compensation benefits, including medical and indemnity benefits, by committing the crime of workers' compensation insurance fraud. However, in the event the Court is not inclined to reverse the decision of the Commission on Cross-Appeal, the decision should be affirmed as to the issues raised by the Claimant on appeal because the Commission based its decision upon substantial evidence and did not commit any errors of fact or law.

Respectfully submitted,

WOODLAND VILLAGE NURSING HOME d/b/a H.T. CAIN and BRIDGEFIELD CASUALTY INSURANCE COMPANY

BY: _____
KARL R. STEINBERGER, MSB NO. 7830
STACIE E. ZORN, MSB NO. 101225

CERTIFICATE OF SERVICE

I, Karl R. Steinberger, of the law firm of Williams, Heidelberg, Steinberger & McElhaney, P.A., do hereby certify that I have this day mailed via United States mail, first-class, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee/Cross-Appellant to James K. Wetzel, Esquire, at his usual business address of Post Office Box I, Gulfport, MS 39502, and to the Honorable Virginia Mounger, Administrative Law Judge, Mississippi Workers' Compensation Commission, P.O. Box 5300, Jackson, MS 39296-5300 and to the Honorable Stephen B. Simpson, Hancock County Circuit Court Judge, P.O. Drawer 1570, Gulfport, MS 39502.

SO CERTIFIED this the 15 day of May, 2008.

_____
KARL R. STEINBERGER

KARL R. STEINBERGER (MSB [redacted]
STACIE E. ZORN (MSB [redacted]
WILLIAMS, HEIDELBERG,
STEINBERGER & McELHANEY, P.A.
711 Delmas Avenue
P.O. Box 1407
Pascagoula, MS 39568-1407
Telephone: (228) 762-8021
Facsimile: (228) 762-7589