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 BRIDGFIELD CASUALTY INSURANCE COMPANY, APPELLEES/CROSS APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI CIVIL ACTION NO. 2007-0037

BRIEF OF APPELLANT/CROSS APPELLEE BERNITA J. WASHINGTON

(Oral Argument Requested)

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d/b/a H.T. CAIN and BRIDGFIELD CASUALTY
INSURANCE COMPANY **APPELLEES/CROSS APPELLANTS**

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.

Bernita J. Washington. (Claimant)	Appellant/Cross Appellee
James K. Wetzel with the law firm of James K. Wetzel & Associates	Counsel for Appellant
Woodland Village Nursing Home d/b/a H. T. Cain (Employer) and Bridgefield Casualty Insurance Company (Carrier)	Appellees/Cross Appellants
Karl R. Steinberger, with the law firm of Williams, Heidelberg, Steinberger & McElhaney	Counsel for Appellees
Honorable Virginia W. Mounger Mississippi Workers' Compensation Commission	Administrative Law Judge
Honorable Stephen B. Simpson Hancock County Circuit Court	Circuit Judge

JAMES K. WETZEL, Counsel for
Bernita J. Washington, Appellant/Cross-
Appellee (Claimant)

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INTRODUCTION

This is an appeal by Bernita J. Washington, who filed a workers' compensation claim against her employer, Woodland Village Nursing Center d/b/a H. T. Cain and its carrier, Bridgefield Casualty Insurance Company. For convenience hereinafter in this brief, the appellant/cross-appellee, Bernita J. Washington, will be referred to as Ms. Washington, and the appellees/cross-appellants, will be referred to as Employer/Carrier.

Ms. Washington is appealing the decision of the Circuit Court and the Workers' Compensation Commission dated December 13, 2007, and January 8, 2007, respectively. (R.E. 10 and 9). The Full Commission order affirmed the decision of the administrative law judge dated January 6, 2006. (R.E.8).

Ms. Washington contends that errors of law and fact were made by the Workers' Compensation Commission which was affirmed by the Circuit Court.

Ms. Washington would submit to this Honorable Court that there were numerous findings of fact made by the administrative law judge and the Full Commission which were erroneous. The administrative law judge and the Commission adjudicated certain issues which were not properly before the Commission. Ms. Washington would submit to this Honorable Court that after a *de novo* review of the evidence in this case as well as the applicable law, this Honorable Court will come to a firm conclusion that the administrative law judge and Commission did not have substantial evidence upon which to base its decision, as it relates to medical benefits that the claimant was entitled to. The Workers' Compensation Commission erred as matter of law in deciding issues that were reserved for a secondary hearing. (i.e., entitlement to permanent partial/permanent total indemnity benefits).

Ms. Washington will hereinafter show unto this Honorable Court how she was denied a fair hearing before the administrative law judge and that the decision of the Full Commission affirming its administrative law judge should be reversed and remanded back to the Commission requiring it to provide medical and indemnity benefits to the claimant in accordance with the facts and law of the case.

FACTS OF CASE

When this matter came on for hearing before the administrative law judge on July 20, 2005, at approximately 1:45 p.m., at the Harrison County Courthouse located in Gulfport, Mississippi, the administrative law explained the following as she appreciated the issues. By Administrative Judge Mounger:

> **All right, the cause number here is H-5941. What I understand the issues are – are we going back to causation, 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 be have to be subject of another hearing if such is found to compensable. Is there anything that I have missed, Mr. Wetzel and Mr. Steinberger?**
> **(Tr. 4-5).**

It was very clear to all parties concerned that any disability (indemnity) benefits would have to be the subject of another hearing if the claim was found to be compensable. The thrust of the Employer/Carrier's argument was that Ms. Washington forfeited her rights to benefits under the Workers' Compensation Act by having committed workers' compensation insurance fraud. At no time did Ms. Washington and the Employer/Carrier in this matter ever bring to the administrative law judge for a decision the question of permanent partial and/or permanent total disability benefits to which she may be entitled once she had reached maximum medical improvement. The primary issue was whether or not the on-the-job injury occurred on the date alleged in the petition to controvert and whether or not additional surgery which had been recommended, should be the responsibility of the Employer/Carrier. (Tr.4).

The basic position of the Employer/Carrier was that even though they had paid for Ms. Washington's cervical surgery and treatment to the back arising from this on-the-job injury, they were now taking the position that since she had committed insurance fraud during the course of her claim they should not have to pay further medical or indemnity benefits. Employer/Carrier took the position and argued that the Mississippi Supreme Court when confronted with this issue may create a public policy exception to the workers' compensation laws and hold that all workers' compensation benefits are forfeited after conviction of workers' compensation insurance fraud. (Tr 5).

The parties entered into a stipulation that the average weekly wage of Ms. Watkins was $360.14. (Tr.4). Then general exhibits 1 through 17 were entered by both parties. Ms. Washington then introduced Exhibit 18, the medical records affidavit of Dr. Charles Kergosien, and Exhibit 19 which was the deposition of Dr. Eric Wolfson, neurosurgeon. Exhibit 20 was the medical records of Dr. Jeffrey Oppenheimer, neurosurgeon, who had performed an independent medical evaluation at Ms. Washington's request due to her ongoing spinal problems. The Employer/Carrier offered Exhibits 21 and 22. Then the testimony was accepted from Ms. Washington. (Tr.11-17). The only testimony presented by the Employer/Carrier in this case was the introduction of one witness, Starann Lamier, who was the administrator at Woodland Village Nursing Center at the time Ms. Washington was injured.

Ms. Washington testified at the time of the hearing that she was 45 years old, married 25-1/2 years and had three children. She testified that her educational background included high school with two years of college. (Tr.18). At the time of this industrial accident, on December 14, 2001, she was employed at Woodland Village Nursing in Diamondhead, Mississippi and had previously gone to work there in November 2000. She was there until March 2001, when she

left the job at Woodland. She returned to Woodland the summer of 2001 and had worked approximately five to six months as a certified nursing assistant working the night shift when this incident occurred at work. Ms. Washington testified that she used to work six nights a week and off on Friday's. (Tr.19). She testified that from the time she returned to work at Woodlands up until the date of her accident on December 14, 2001, she had not been in any way disciplined and had always been given good performance evaluations. (Tr.22). Ms. Washington testified that prior to going back to work in the summer of 2001, she did miss some work at Woodlands which was approximately March 2000 when she was in a car accident and sought treatment. (Tr.22).

Ms. Washington testified that when she went back to work the last time with Woodland, she had to have a doctor's release before they would hire her back on. She testified that she gave the letter to Woodland from Dr. Alan Johnson and immediately she went back to work in approximately November 2000. She testified that she did not have any treatment for any prior injuries between November 2000 and the date of her accident on December 14, 2001. However, she did go back to see a doctor about the vehicular collision right when they were settling her claim while she was working for Woodland. She testified that she had a New Orleans lawyer located on Canal Street who handled and settled her claim. (Tr. 19-23).

She testified that on December 14, 2001, she was working and it was approximately 5:00 a.m. in the morning, which is the time to wake the residents. She testified that her hall, the 400 hall, had approximately six residents that she had to assist getting out of bed. She testified she had just finished assisting a resident named Ms. Salyeah whom she had to physically get out of the bed and then put her into a wheel chair. Ms. Washington testified that she was pushing her to the dining hall which is not that far, and at that time, there was a nurse named, Nurse Brown

in a Mr. Hatley's room. She testified Nurse Brown alerted Ms. Washington that the resident she was assisting, Mr. Hatley, was getting dizzy. Ms. Washington quickly went to get the wheel chair that was about six rooms from the hall. (Tr.23-24). On the way back, all she can remember is that she woke up and that she was on the floor and her feet were facing the opposite way from the way she was going. (Tr.23-24). A nurse by the name of Ms. Saucier told her that she had been looking for a wet floor sign. Ms. Washington testified that was all she could recall when she woke up and saw Ms. Saucier looking over her face. (Tr.24). She testified when she woke up on the floor, she had struck her head apparently on a cleaning cart when she fell. She testified that she still had the wheelchair arm on the left side of body and was still holding on to it even though she was on the floor. She testified that her thumb was swollen and that she had severe pain in her arm and chest and laid on the floor, eventually getting up. Ms. Washington testified that different co-workers helped her get up and sit in a little lounge that they had for workers to eat in. (Tr.24-25). The next thing she knew Ms. Niles, her supervisor, told her to go to the hospital and she did go to the emergency room at Hancock County Medical Center. (Tr.25). She testified that when she went to the hospital she was complaining of head pain, neck pain, left arm pain, back and knee pain. After having been discharged at the hospital, she came under the care of Dr. Charles Kergosien, an internist, who was also the company doctor. Dr. Kergosien took Ms. Washington off work. On January 7, 2002, Dr. Kergosien released her to return to work where she returned for some period of time. Ms. Washington testified that she was unable to do the work so Dr. Kergosien took her off work and prescribed physical therapy at Quest Rehab. On March 18, 2002, when she went back to Dr. Kergosien, she was again released to return to work. Ms. Washington testified that when she attempted to return again to Dr. Kergosien he was ill and his office referred her to Dr. David Roberts on March 28, 2002.

(Tr.25). Dr. Roberts ordered an MRI of the neck and the test was carried out at Hancock Medical Center on April 3, 2002. On April 20, 2002, Dr. Roberts referred her to Dr. Terry Smith, a neurosurgeon. (Tr.26). On May 29, 2002, Dr. Smith opined and testified that she had spinal stenosis as well as a disc protrusion in her neck. (R.E.13). On May 29, 2002, he wrote a note: "To whom it may concern: light duty." Ms. Washington testified she could not perform these duties. Dr. Smith recommended some epidural blocks which were later performed by Dr. Jeffrey Oppenheimer and Dr. Brian Dix. Ms. Washington returned to Dr. Smith saying it did not help her and a return to work on August 24, 2002, with restrictions, was entered, but Woodland said "no" since surgery was contemplated for her. (R.E.13). On December 5, 2002, an anterior cervical corpectomy and fusion at C4-C5 was performed followed by a regime of physical therapy. Dr. Smith, in his medical records, (R.E.13), sent a note to Dr. David Roberts, wherein he advised Dr. Roberts that she was six weeks out from anterior cervical corpectomy and fusion making good progress, that she still has a weak voice, although she has good and bad days with it. He advised Dr. Roberts that she still has soreness in the back of her neck and medial left shoulder and felt that her continued symptoms were muscular and therapy he thought was going to go a long way toward helping these out. Dr. Smith ordered a functional capacity evaluation by a physical therapist, Matt Capo. On April 15, 2003, Dr. Smith indicated a return to work with restrictions. On April 26, 2003, Dr. Smith stated that Ms. Washington had been back to work and she stated that her supervisor told her to return back because when she returned to work she developed pain in the back of her neck which "hits her head" and she says she is getting blurry vision. (R.E.13). Ms. Washington testified he gave her a muscle relaxer and would see her back as needed.

On July 19, 2003, Dr. Smith also prepared another medical record following his evaluation on that date advising that in April 2003, he had released her to return to work but she was still having pain in the anterior aspect of her neck and also pain in her lower back with associated tingling in the legs. On examination, she had mild tenderness to palpation over the muscles of her neck and lower back. He wrote a prescription for physical therapy and also stated that she has a disc protrusion at L5/S1 in her lower back. He advised her at that time about the possible treatments, namely living with it, trying therapy, having steroidal injections or having surgery and she wished to proceed with the epidural injection to the back which she had not had before. He advised he would have that performed and then have physical therapy do additional work on her neck. Dr. Smith's records indicate that she returned on October 11, 2003, and that she was still having pan in the right upper trapezius muscle at the base of her cervical spine, that she has disc protrusions at L5/S1 and she will have an epidural injection in her back in the next few weeks. She has had no improvement following the physical therapy of the cervical spine. Dr. Smith requested that Quest Rehab provide her with home tens unit for pain control and advised she was only capable of light duty. On December 4, 2003, according to the records of Dr. Terry Smith, a lumbar steroidal injection was performed in the lower back and she returned on December 12, 2003, for an evaluation by Dr. Smith and advised that the steroidal injection that was performed did not help. She stated to Dr. Smith that her pain got worse and that she went to the Hancock Medical Center emergency room because she was having severe pain in her buttocks that was going down her left leg. He mentioned on December 12, 2003, that she was ready to proceed with surgery for the disc protrusion to the left in her lumbar spine and explained the risks, benefits and alternatives and requested she sign a consent to proceed form with surgery so he could get workers' comp approval. (R.E.13).

On December 14, 2003, Dr. Smith admitted her to Gulf Coast Medical Center for the lumbar disc abnormality with left radiculopathy and his planned procedure was a lumbar microdiscectomy and foraminotomy. Dr. Smith's records indicated that on January 24, 2004, that Bernita Washington came back in for evaluation and that he was still awaiting worker's comp approval for the back surgery. During this visit, she advised Dr. Smith that she went to the emergency room for neck pain and the hospital referred her to Dr. Crowder who ordered an MRI scan under her health insurance for her neck. She advised Dr. Smith during this visit that she hurts in her mid low back and that she has an odd sensation in the left anterior thigh. Dr. Smith advised that he reviewed the MRI scan that Dr. Crowder obtained and that he did not totally agree with the radiologist's reading of the cervical MRI and did not feel that any additional cervical surgery would be of help and was still awaiting authorization for surgery on the low back. He gave her a release to return back to work at regular duty but no pushing a water cart for two weeks because this caused her pain to be enhanced. (R.E.13).

After the last visit of January 24, 2004, the Employer/Carrier would not authorize the lumbar surgery nor would they authorize further cervical treatment. On July 10, 2004, Dr. Terry Smith in answering certain questions propounded to him by the attorney for the Employer/Carrier, stated the following:

> July 10, 2004
>
> Mr. Karl R. Steinberger
> Post Office Box 1407
> Pascagoula, Mississippi 39568-1407
>
> RE: Bernita Washington
>
> Dear Mr. Steinberger:

This will answer questions posed in your June 4, 2004, letter to me.

Ms. Bernita Washington's diagnoses are cervical and lumbar disk abnormalities. her prognosis for further recovery is poor, though she has made a good deal of recovery. If she does not undergo surgery, her maximum medical improvement date is today. If she does not undergo surgery, based on the 4th Edition AMA Guides. I agree with Dr. Moses that her impairment rating is 5%. She should not significantly change should she have surgery. I do not agree with Dr. Jones that she is not a surgical candidate; if I thought otherwise, I would not have ethically signed her up for surgery. Should she have surgery she would be temporarily and totally disabled for approximately six weeks, then could return to her previous job. Dr. Moses returned Ms. Washington to her regular duties with no restrictions.

Sincerely yours,

Terry C. Smith, M.D.
Neurological Surgery

TCS:njp

(MWCC Exh. G#1, pg 1) (R.E.13).

Prior to the July 10, 2004, narrative of Dr. Terry Smith, the Employer/Carrier requested Ms. Washington undergo an employer's medical evaluation at the Jackson Neurosurgery and Spine Clinic in Jackson, Mississippi and was directed to Dr. Moses Jones for this evaluation. He took a clinical history from Ms. Washington and conducted a physical examination. Dr. Jones indicated his impression on this date was as follows: "I have reviewed the patient's MRI study from 5/7/2002, pre-operatively as well as from 1/20/2004, in the cervical region and 2/2/2004, in the lumbar region. Clearly her cervical spine shows degenerative changes and post-operative changes from her previous anterior cervical fusion. However, at this point I do not see any acute changes such as herniated disk or evidence of nerve root compression. There is some canal narrowing, but certainly not to the degree that she has neural impingement and certainly nothing

that would correlate with her symptomalogy. At this point I see no objective evidence to suggest that surgical intervention would be of value. From a strictly objective and neurosurgical viewpoint, I see no reason the patient should not be able to resume all normal activities. I do not see a significant abnormality in her lumbar spine. In her cervical spine, she has had a good surgical procedure with the normally expected results. On the basis of all of the above, I feel that she can resume all normal activities and should have a 5% permanent partial impairment to the body as whole on the basis of her cervical spine operation. She can return to work with restrictions." (R.E.14).

When the Employer/Carrier would not authorize further treatment by Dr. Terry Smith, she was evaluated by Dr. Jeffrey Oppenheimer, neurosurgeon, on June 24, 2004. After a full physical examination and history taken from her on that date, Dr. Oppenheimer recommended a CT myelogram of the lumbosacral spine and nerve conduction studies of the upper and lower extremities. His impression was that she was suffering from lumbar and cervical radiculopathy, worse on the left. (R.E.15).

On July 19, 2004, Dr. Oppenheimer evaluated her again after her myelogram, EGM and nerve conduction studies and it was his opinion that she had significant adjacent level disease at C6-7 which he believed was pressing on her spinal cord in her neck and a lateral recess stenosis at L3-4 and L4-5 in her back. It was his opinion at that time that she be evaluated by an otorhinolaryngologist to document the paralysis of her right vocal cord following her initial anterior cervical discectomy and fusion. He was of the opinion that she would need another C3-4, C4-5, C5-6 and C6-7 anterior cervical discectomy and fusion with platting, replacement of her old plate at the previous surgery site, and she would also need a staggered L3 through 5 decompressive laminectomy in her lower back. (R.E.15). Following the evaluation by Dr.

Oppenheimer, the Employer/Carrier requested another employer medical exam even though they had one previously performed in Jackson, MS by Dr. Moses Jones. This time they selected Dr. Eric Wolfson whom Ms. Washington agreed to. Dr. Wolfson performed the evaluation on February 14, 2005, taking the pertinent history and reviewed her past medical history and performed a physical examination. Dr. Wolfson, who is a neurosurgeon, also reviewed all pertinent radiology films and diagnostic tests as well as the notes of Dr. Terry Smith, Dr. Jeffrey Oppenheimer, medical records from Hancock Medical Center and all reports from Compass Imaging. His professional impression and opinion was (1) persistent cervical radiculopathy status post anterior cervical discectomy and fusion at C4-5 performed December 5, 2002; post-operative complication of dysphagia and voice hoarseness; and (2) lumbar disckogenic pain syndrome. He testified in the discussion portion: (1) to a reasonable degree of medical certainty Ms. Washington's intractable cervical radiculopathy as well as resultant surgery was a result of her work injury of December 14, 2001. The patient's complications post-surgery as well as future cervical surgery would also be related to the above injury as future planned cervical surgery would be secondary to adjacent level disease, a common sequella of anterior cervical fusion surgery; and (2) with regard to the patient's low back pain, lumbar diskogenic pain, the management as well as future treatment may include low back surgery and would also be the result of the work injury. He was of the opinion that Ms. Washington would need further testing prior to surgical management of her low back pain in the form of a lumbar discogram and had not reached maximum medical improvement for her low back or cervical complaints and that she was currently a surgical candidate for additional anterior cervical surgery. (R.E.16).

Against this testimony, the administrative law judge beginning at page 15 of her decision stated the following:

Upon evaluation of all testimony, lay and medical, and based upon a preponderance of the evidence supported by applicable law, I hereby render the following findings of fact:

1. Claimant did suffer a work related injury on or about the date alleged in the Petition to Controvert, named December 14, 2001. Although there were no witnesses to this incident, the claimant appeared to be credible on that point and the recitation of any injury so common in the nursing home environment was a reasonable one. Consequently, the employer and carrier provided to the claimant temporary total disability benefits as well as medical services and supplies for the resolution of this injury. Employer and Carrier would remain responsible for all the past medical benefits incurred by the claimant that are deemed reasonable and necessary with regard to the admitted cervical injury. 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). Although admittedly the claimant's credibility and trustworthiness has been tainted by the facts as presented, the compensability of the claimant's cervical injury should stand. There is sufficient medical testimony to sustain at least an aggravation of the cervical region that has now resolved. (Emphasis added.)

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. The question of any further surgery and/or responsibility of the employer and carrier for same should be carefully scrutinized noting that the trier of fact has the authority to accept the opinions of an employers' medical examiner as opposed to the treating physician. Hardaway Co. v. Bradley, 887 So. 2d 23 (Miss. 2004).

6. ... 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. (Emphasis added.).
(R.E.8).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW IN DECIDING LEGAL ISSUES THAT WERE NOT PROPERLY BEFORE ITS ADMINISTRATIVE LAW JUDGE FOR DECISION.

IV. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW AND FACT IN UPHOLDING THE ADMINISTRATIVE LAW JUDGE'S DECISION AND DETERMINING THAT CLAIMANT WAS NOT ENTITLED TO PERMANENT DISABILITY BENEFITS DUE TO THE FACT THAT SHE DID NOT MAKE REASONABLE EFFORTS TO FIND ALTERNATIVE EMPLOYMENT.

The administrative law judge (when the matter came on for hearing) outlined the issues for adjudication as follows:

> BY ADMINISTRATIVE LAW JUDGE MOUNGER:
>
> All right, the cause number here is H-5941. What I understand the issues are – are we going back to causation, 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 be have to be subject of another hearing if such is found to compensable. Is there anything that I have missed, Mr. Wetzel and Mr. Steinberger?
> (Tr. 4-5).

As set out above in the facts of this case, it was very clear to all parties concerned that any claim for permanent partial and/or permanent total disability benefits would have to be the subject of another hearing if the claim was found to be compensable. As stated earlier, the thrust of the Employer and Carrier's argument before the Commission and now is that Ms. Washington forfeited her rights to benefits under the Workers' Compensation Act by having committed workers' compensation fraud. At no time did Ms. Washington and/or the Employer/Carrier in

this matter ever bring to the administrative law judge for adjudication the question of permanent partial and/or permanent total disability benefits to which she may be entitled to once she had reached maximum medical improvement. As alluded to above, Ms. Washington had three neurosurgeons, Dr. Terry Smith, Dr. Jeffrey Oppenheimer and Dr. Eric Wolfson, all who agreed immediate cervical surgery was necessary. Also, all three doctors concurred that after neck surgery, that lower back surgery should be contemplated as well.

For whatever reason, the administrative law judge in this matter went on to adjudicate the issue of whether Ms. Washington was entitled to permanent partial or permanent total disability benefits and forever cut off her right to a claim for these benefits by her decision. In paragraph 6 of her Findings of Fact and Conclusions of Law, the administrative law judge, confirmed by the Commission, stated the following:

> 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.E. 8).

As this Honorable Court can readily ascertain, the administrative law judge, as affirmed by the Commission, its fact finder, denied any benefits to Ms. Washington for permanent disability benefits or permanent loss of wage earning capacity. If this adjudication were to be affirmed after Ms. Washington is granted the additional cervical surgery and lumbar surgery, she may be precluded permanent partially or permanent totally disabled. She has only had one cervical surgery and three neurosurgeons were advocating surgery other than Dr. Moses (the first surgeon selected by the Employer/Carrier to perform an employer's medical exam) who felt like additional surgery was not warranted. This adjudication in regards to indemnity benefits is very

similar to the seminal case of *Monroe v. Broadwater Beach,* 593 So. 2d 26 (Miss. 1992), wherein this Court reversed the circuit court and the workers' comp commission when the administrative law judge, who originally heard the case, denied the claimant permanent disability benefits because she had failed to put on any proof regarding same. The same argument was made by counsel for Judy Monroe that the administrative law judge erred as a matter of law when he specifically stated that the April 16, 1987, hearing was limited to whether Monroe was suffering from improper medical treatment or lack of medical treatment, and then proceeded to make findings on maximum medical improvement and apportionment. The Honorable Supreme Court found that the averments by the compensation commission and circuit court was error and should be reversed. In its reversal, this Honorable Court stated the following:

> An administrative law judge many not announce a limited purpose of a hearing, require the litigants to argue under limitation, and then decide the whole of the case including time of maximum medical improvement and recovery, apportionment and compensation. The claimant is entitled to know: "This hearing is 'it'; now was my time to put on my total case and expect a final decision." The ruling as rendered below assumes totality of the evidence and finality of result and indeed leaves us unsure as to additional proof and additional depositions. The commission or administrative law judge might not perceive additional evidence or legal precedent, but we have a diligent and imaginative bar. Left unfettered, Monroe's case may be more completely developed than intended. Certainly a claimant cannot be lead into a partial hearing and have the whole claim determined. Monroe did not waive error as suggested by the employer. The administrative law judge's change of direction was error. Monroe is entitled to a full hearing on her claim.

Clearly, the Workers' Compensation Commission has erred as a matter of law in making decisions regarding permanent disability benefits when Ms. Washington had not fully reached maximum medical improvement in contemplation of additional cervical and lumbar surgery which all doctors, including the employer's medical doctor, agreed was related to her on-the-job injury in this matter. Even the administrative law judge in her decision, pages 15 and 16, stated,

"There is sufficient medical testimony to sustain at least an aggravation of the cervical region that has now resolved." (R.E.8). However, the claimant will show hereinafter how this particular finding of fact is erroneous because the aggravation of the cervical region has not been resolved because three neurosurgeons have stated she is in need of surgery.

II. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW AND FACT IN FINDING THAT CLAIMANT WAS NOT IN NEED OF FURTHER CERVICAL SURGERY.

III. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW AND FACT IN FINDING THAT CLAIMANT'S CONTEMPLATED LUMBAR SURGERY "SHOULD BE SCRUTINIZED BY THE EMPLOYER AND CARRIER, AND AT PRESENT, ANY LUMBAR SURGERY IS NOT TO BE CONSIDERED THE RESPONSIBILITY OF THE EMPLOYER AND CARRIER HEREIN."

This Honorable Court has stated on numerous occasions, that the Workers' Compensation Act should be given liberal interpretation and where there is doubt, the cases should be resolved in favor of compensation. *See, Walton v. McClendon*, 342 So. 2d 732 (Miss. 1977). In *Deemer Lumber Co. v. Hamilton,* 52 So. 2d 634 (1951), this Court stated:

> We have repeatedly held that the Workers' Compensation Act is to be liberally construed. All courts agree that there should be, according to the Workers' Compensation Act, a broad and liberal construction that doubtful cases should be resolved in favor of compensation, and the main purpose which this Act seeks to serve leaves no room for narrow or technical construction.
>
> The Mississippi Supreme Court stated in *Marshal Durbin v. Warren,* 633 So. 2d 1006 (Miss. 1994): "It has been the long standing rule of this court that doubtful cases must be resolved in favor of compensation so as to fulfill the beneficent purpose of the statute." *See, Barham v. Collum Forest Products Center, Inc.,* 453 So. 2d 1300, 1304 (Miss. 1984); *Big Two Engine Rebuilders v. Freeman,* 379 So. 2d 888, 889 (Miss. 1980); *Evans v. Continental Grain Co.,* 372 So. 2d 265, 269 (Miss. 1979).

Further, this Honorable Court has announced: "Questions of whether an injury arose out of or in the course of employment as required by statute is a conclusion of law, and if doubtful, should be resolved in favor of compensation." *Bolivar County Gravel Co. v. Dial,* 634 So. 2d 99, 103 (Miss. 1994).

As this Honorable Court is also aware in its judicial review of the findings of the Mississippi Workers' Compensation Commission, it also extends to a determination of whether the Commission's decision is clearly erroneous. The standard for that test provided by this Honorable Court in *Central Electric Power Assn. v. Hicks,* 110 So. 2d 351, 356 (Miss. 1959), is as follows:

> A finding of fact that is clearly erroneous when, although there is slight evidence to support it, after a review of the entire evidence in the record, the court is left with a definite and firm conviction that a mistake has been made by the Commission in it finding of fact and its application of the Act. *Id.,* at 357.

This Court further noted:

> In reviewing awards of denials of compensation benefits, the court shall examine the record to determine whether the salutary policies and humane purposes of the Compensation Act are being carried in the particular case; and further, whether the Act is receiving the broad and liberal construction which the statute requires, without over-emphasis on technicalities and on "form over substance." *Id.,* at 357.

When reviewing compensation cases on appeal, this Honorable Court has noted that the function of the circuit court is to determine whether there is substantial, credible evidence which supports the facts in determination by the Commission. However, this Honorable Court has also noted that the substantial evidence rule does not require a circuit court or this Supreme Court to act as a "rubber stamp" every time a workers' compensation case is appealed. Although great weight is given to the findings of the Workers' Compensation Commission, the Workers' Compensation Act does provide court review of questions of law and fact. *See, Bechtel*

Construction Co. v. Bartlett, 371 So. 2d 308, 401 (Miss. 1979). When the issue is one of law rather than fact, there is a *de novo* standard of review. *Shelby v. Peavy Electric Corp.,* 724 So. 2d 504, 506 (Miss. Ct. App. 1998).

Ms Washington would contend and submit to this Honorable Court that after a review of all the evidence and the record in this matter, the Workers' Compensation Commission erred as a matter of law in affirming the order of the administrative law judge wherein the Commission upheld the administrative law judge's finding that the claimant was not in need of further cervical surgery.

To show how erroneous this finding is by the administrative law judge and Commission, one need only look to the medical testimony outlined above of Dr. Terry Smith, her original treating physician, who was recommending surgery at the time this matter was heard; the testimony of Dr. Jeffrey Oppenheimer, the neurosurgeon whom the claimant saw to get an independent medical examination; and the medical testimony of Dr. Eric Wolfson who was the last doctor to examine her right before the hearing at the request of the employer. Dr. Wolfson performed the evaluation on February 14, 2005, reviewed all of her past medical history and conducted a very thorough physical examination. His impression and opinion was (1) that she was suffering with persistent cervical radiculopathy, status-post anterior cervical discectomy and fusion at C4-5 performed on December 5, 2002; post-operative complication of dysphagia and voice hoarseness; and (2) lumbar discogenic pain syndrome. Dr. Wolfson testified in the discussion portion: (1) to a reasonable degree of medical certainty, Ms. Washington's intractable cervical radiculopathy as well as resultant surgery was a result of her injury of December 14, 2001; the patient's complications post-surgery as well as future cervical surgery would also be related to the above injury as future planned cervical surgery would be secondary

to adjacent level disease, a common sequella of anterior cervical fusion surgery; and (2) with regard to the patient's low back pain, lumbar discogenic pain, the management as well as future may include low back surgery and would also be the result of the work injury. Dr. Wolfson was of the opinion that Ms. Washington would need further medical testing prior to surgical management of her low back pain in the form of a lumbar discogram and had not reached maximum improvement for her low back or cervical complaints; and she was currently a surgical candidate for additional anterior cervical surgery. (R.E.16).

When this Honorable Court reviews the decisions of the administrative law judge and Full Commission, it is almost impossible to believe that the administrative law judge, after reviewing the medical testimony of all three neurosurgeons, could possibly hold in her decision that (1) the claimant had reached maximum medical improvement; and (2) that the administrative law judge in light of this medical testimony could make the following statement, "There is sufficient medical testimony to sustain at lease a aggravation of the cervical region that has now resolved." (p. 16 of ALJ decision.) (R.E.8).

The only doctor that has stated that no further surgery was recommended was Dr. Moses Jones who only saw her on one occasion and this went against the overwhelming weight of the testimony which the administrative law judge did not even weigh. Had the administrative law judge weighed the medical testimony and found that Dr. Moses Jones was more credible of belief than that of her treating physicians, Dr. Terry Smith, neurosurgeon or Dr. Jeffrey Oppenheimer, the neurosurgeon that Ms. Washington chose, or Dr. Eric Wolfson, the second employer medically selected neurosurgeon, then there could be some support for the Commission's decision. Ms. Washington's contention is that the administrative law judge and the Commission acted arbitrary and capriciously by disregarding competent medical testimony

submitted by the claimant through these three medical neurosurgeons. At no time did the administrative law or the Commission make any findings of fact relative to their testimony. Further, there is no medical testimony that would indicate any prior injuries that Ms. Washington may have ever sustained were the cause of her current complaints. The Employer/Carrier in this matter had the burden to prove that any of the injuries sustained or complained of were caused by prior mishaps or other occurrences. There was no such testimony from either of the two neurosurgeons that they chose, Dr. Moses or Dr. Wolfson, or from Dr. Terry Smith or Dr. Oppenheimer.

What is very important in this case is that the administrative law judge and Commission must be reversed in terms of finding of fact which is erroneous "that there was sufficient medical testimony that the aggravation of the cervical region had now been resolved." There is absolutely no testimony regarding a mere aggravation. In fact, all the testimony indicates the sole proximate cause of the neck and back injury was the December 14, 2001, work-related accident. There is no testimony from the Employer/Carrier through its medical doctors that would indicate that there were any prior injuries which may have been aggravated by the December 14, 2001, on-the-job admitted injury.

CONCLUSION

Ms. Washington would request this Honorable Court to reverse the actions of the Workers' Compensation Commission and its administrative law judge and find that there was no substantial evidence upon which to base its decision that the cervical injury had been resolved. Ms. Washington would request this Honorable Court to reverse the Commission and find that she had not reached maximum medical improvement since surgery was still contemplated for not only her neck but also her back, and to reverse the Commission on its finding of fact and conclusion of law that she was not entitled to permanent disability benefits when this particular issue was not properly before the Workers' Compensation Commission and the administrative law judge for adjudication.

Respectfully submitted, this the 16 day of April, 2008.

BERNITA J. WASHINGTON, Claimant/Appellant-Cross Appellee

BY: _____

JAMES K. WETZEL, Her Attorney

CERTIFICATE OF SERVICE

I, James K. Wetzel, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to: Karl R. Steinberger, Esquire, with the law firm of Williams, Heidelberg, Steinberger & McElhaney, at their usual mailing address of P. O. Box 1407, Pascagoula, MS 39568-1407; 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.

THIS the 16th day of April, 2008.

JAMES K. WETZEL, ESQUIRE

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