

**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS**

**WADE SHORT**

**CLAIMANT/APPELLANT**

**VS.**

**NO. 2008-TS-01224**

**WILSON'S MEAT HOUSE, LLC**

**EMPLOYER/APPELLEE**

**AND**

**BRIDGEFIELD CASUALTY INSURANCE COMPANY**

**CARRIER/APPELLEE**

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**BRIEF OF APPELLEES**

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**APPEALED FROM THE CIRCUIT  
COURT OF COPIAH COUNTY, MISSISSIPPI**

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**ORAL ARGUMENT REQUESTED**

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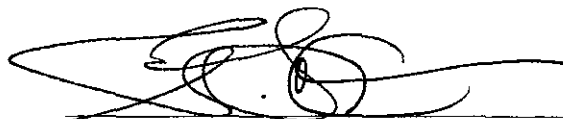
**CARRIER/APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel for the Appellees, Wilson's Meat House, LLC and Bridgefield Casualty Insurance Company, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. Wilson Meat House, LLC - Appellee/Employer
2. Bridgefield Casualty Insurance Company - Appellee/Carrier
3. Peter L. Corson, Esquire, Upshaw, Williams, Biggers, Beckham & Riddick, LLP - Counsel for Employer and Carrier
4. Wade Short - Claimant/Appellant
5. John Hunter Stevens, Esquire, Grenfell, Sledge & Stevens, PLLC - Counsel for Appellant

THIS the 30<sup>TH</sup> day of October, 2008.



**PETER L. CORSON  
UPSHAW, WILLIAMS, BIGGERS,  
BECKHAM & RIDDICK, LLP  
Of Counsel**

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## STATEMENT OF THE ISSUES

1. Whether the Claimant met his burden of proof with regard to an alleged work related injury on December 1, 2005.





Roberts Finds it unreasonable

Roberts Finds Causal connection  
↳ no degree to common

I. Standard of Review

II. BOP - 2 of fact for Comm.

III. Extra Evid.

Wells-Lamant v. Watkins  
247 Miss 379



## STATEMENT OF THE CASE

Mr. Wade Short has been an employee of Wilson's Meat House, a slaughter house and meat processing facility, for approximately 28 years. (T.9) Mr. Short attended high school and reached the 11<sup>th</sup> Grade before dropping out of school. (T.9) Mr. Short has a variety of duties with Wilson's, including working in the cut shop, cutting and wrapping meat, mixing and seasoning and weighing meat products.(T. 10-11,23) Mr. Short also substitutes when possible for regular employees on the "kill floor" in the slaughter house slaughtering hogs and cattle. (T.12, 22-24) Mr. Short's average weekly wage was stipulated at \$460.02, however Mr. Short was paid at an hourly rate and was paid at an additional rate per head when he substituted on the "kill floor". (T.65 )

Mr. Short alleges that he sustained a work related injury on December 1, 2005 while attempting to carry a desk . (T. 14) Mr. Short claims to have lifted the desk on two occasions, first to transport the desk into the building, and next, in an effort to lift the desk through a narrow hallway into an elevator for transport to an office on the second floor of Wilson's, although no witnesses corroborate his story. (T.14-15) There were several other Wilson's employees present at the time of the alleged incident, including Wilson's employees, Mike Welsh, and Willie Keyes and Billy Joe Ragland, as well as Jimmy Jones, a meat inspector employed by the State of Mississippi, all of whom testified at the hearing.

According to the witnesses, Mr. Short did not report a work related accident in December, 2005. It is undisputed that he continued to work for Wilson's in various capacities from December, 2005 until August 9, 2006 when he underwent an elective C5-6 and C6-7 anterior cervical discectomy, with interbody arthrodisis. (T.78; Exh. C1-1 ) During the eight months between the alleged incident and his surgery, Mr. Wilson worked progressively more in

the kill room, specifically requesting the position, where he had an opportunity to earn more money because he was paid by the head, depending on the number of animals killed. (T.26;70) Prior to his surgery, Mr. Short made no complaints of an on the job injury and no effort to request lighter duty work despite the ability to do so.(T.70;79 ) In fact, according to Mr. Short's time records, he actually killed more animals in May, June and July, the months immediately prior to his surgery than the early months of 2006. (Exh. EC-4 ).

The first notice to Wilson's of Mr. Short's work related claim came with the filing of the Petition to Controvert in August, 2006. (T.78, 83) As of the time of the hearing on January 12, 2007, Mr. Short had failed to keep in communication with Wilson's and his work status was unknown. (T.78-79) Mr. Short remains an employee of Wilson's Meat House however, and a variety of jobs are available upon his return. (T.79-80)

### **STANDARD OF REVIEW**

The appellate standard of review in a workers' compensation case has been long established by Mississippi law. The Mississippi Workers' Compensation Commission is the trier and finder of fact. *Mid-Delta Home Health, Inc. v. Robertson*, 749 So.2d 379 (Miss.Ct.App. 1999). The Court's review of the record in a workers' compensation claim will not determine where the preponderance of the evidence lies when the evidence is conflicting, the assumption being that the Commission, as trier of fact has previously determined which evidence is credible, has weight and which has not. *Oswalt v. Abernathy & Clark*, 625 So.2d 770, 772 (Miss. 1993). This is true even if the evidence on the record would lead the appellate court to a different conclusion as that reached by the Commission. *Sibley v. Unifirst Bank*, 699 So.2d 1214, 1218 (Miss. 1977).

Therefore, a Full Commission Order may only be reversed if it is determined that the Order is clearly erroneous and contrary to the overwhelming weight of the evidence. *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994). Stated differently, the findings and Order of the Workers' Compensation Commission are binding on the appellate court so long as there is no error of law, or an unsupportable finding of fact. *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss.1991).

### ARGUMENT

Following the hearing on the merits, on April 20, 2007 the Administrative Judge issued his opinion denying benefits for lack of causation which was reviewed and affirmed by Full Commission Order on August 30, 2007.(T.39) The Circuit Court subsequently affirmed the Full Commission's Order on June 30, 2008. (Appellant's Record Excerpts at Tab 8) The Administrative Judge prefaced his decision on a finding that Mr. Short's account of how he was allegedly injured was contradicted by three witnesses including an independent witness, Mr. Jimmy Jones, an employee with the State of Mississippi. (T.23-24) The Judge noted several important inconsistencies in Mr. Short's testimony and in the medical records histories submitted regarding the onset of Mr. Short's problems. (T.23) Most importantly, the Administrative Judge found, and the Commission agreed, that neither Dr. Louis Harkey, who performed the claimant's surgery, or any other physician offered an opinion linking Mr. Short's condition to lifting a desk or any other event at work.(T.23-24) Upon hearing the testimony and reviewing the evidence submitted the Judge properly concluded that Mr. Short failed to meet his burden of proof with regard to causation.(T.24)

When the issue is, as it is in this case, whether the claimant sustained a work related injury, Mr. Short bears the burden of proving by a preponderance of the evidence each element

of his claim. *Bryan Foods , Inc., v. White*, 913 So. 2d 1003, 1008 (Miss. Ct. App. 2005); *Hardins Bakeries v. Dependent of Harrell*, 566 So.2d 1261 (Miss. 1990). The necessary elements are (1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the claimed disability *Id.*; *Mississippi Code Annotated* §§ 71-3-3 and 71-3-7. The fact that Mr. Short has cervical problems is not disputed. As the Administrative Judge pointed out, and the Commission affirmed, the threshold issue is whether he was injured at work.(T.24) To warrant compensability, a causal connection between the workplace and the injury must be established by competent medical proof within a reasonable degree of medical probability. *Id.* In this case medical causation was not established by the claimant and compensation was correctly denied.

Not only does the claimant disagree with the Judge's assessment of the witnesses at the hearing on the merits, the claimant has completely failed to address the fatal causation flaw. The claimant takes the position that because this matter was heard on the claimant's Motion to Compel Medical Treatment and Temporary Benefits, it somehow changes the claimant's burden of proof required with regard to causation. (Claimant's Brief at 9) In fact the record indicates that the parties agreed that the first and foremost issue to be addressed at hearing was; "Whether Mr. Short sustained a work related injury to his back on December1, 2005." ( T.14) In a denied claim such as this, *any* hearing to determine an issue of compensability must include evidence of medical causation. *Mississippi Code Annotated* §§ 71-3-3 and 71-3-7; *Harrell v. Time Warner/ Capital Cablevision*, 856 So. 2d 503, 511 ( Miss. Ct. App. 2003).

In addition, the claimant's position that he was somehow rushed to judgment because the hearing was "not a full hearing on the total claim" is equally without merit.(Claimant's Brief at 9-10) The record reflects that the Petition to Controvert was filed with the Commission on

August 30, 2006.(T.9) The case was initially set for hearing on November 27, 2006 and was ultimately heard on January 12, 2007. (T. 11-13) The claimant's Motion was not filed until November 7, 2006 at which time he tendered medical evidence of the claimant's treatment at University Medical Center in support of his motion. (T.7) For the claimant to prevail, the evidence must establish causation between the claimant's alleged injury, and his work at Wilson's Meat House. *Id.* As the Administrative Judge found, and the Commission and Circuit Court correctly affirmed, there was no evidence of causation in this case.

Although there is evidence that Mr. Short treated for his cervical condition at UMC in the months prior to his August, 2006 surgery, as the Administrative Judge correctly noted, Mr. Short was far less than clear in his history concerning the onset of an injury.(T.23) On January 9, 2006 Mr. Short stated that he had experienced pain for three months, since about the first week in October, 2005, and on July 3, 2006 he indicated that the pain had started more than a year earlier.( T.20-21,23;Exh. Cl-1) Although the claimant apparently received a work excuse from UMC in mid January 2006 after a diagnosis of degenerative cervical stenosis, he was also apparently given a work excuse from physical therapy which released him to full duty work two weeks thereafter.(Exh. Cl-1)

The Claimant relies in large part on *Adolphe LaFonte v. Earine Ayers*, (206-WC- 01681 COA, June 12, 2007, in support of his argument for compensation. The *Adolphe* case is hardly comparable to Mr. Short's case and is easily distinguished. First, unlike *Adolphe*, in this case the Commission did not rely on the claimant's failure to provide timely notice as the basis for denial of benefits, although it was affirmatively raised as a defense. In *Adolphe*, benefits were awarded and affirmed at the Full Commission and Circuit Court levels and a finding of *causation* was established. *Id.* at 6. On appeal, the employer and carrier questioned the Commission's finding

that the claimant was credible, the credibility of the neurosurgeon, and the failure to give timely notice of the alleged incident. *Id.* at 3.

In *Adolphe*, the Commission affirmed the administrative judge's finding that, "the claimant presented as a credible and compelling witness". *Id.* at 4. Hardly the finding of Judge Henry in Mr. Short's case, where he pointed out important discrepancies in the claimant's testimony and the records as to the onset of the claimants degenerative problems. (T.23) In addition, in *Adolphe*, the Commission affirmed the administrative judge's finding that "claimant's treating physician found a causal connection between the workplace injury and her current condition". *Id.* In Mr. Short's case, the precise reason for the denial of benefits by Judge Henry is the failure to establish medical causation.(T.23)

Moreover, unlike *Adolphe*, the witnesses for the employer and carrier unequivocally stated that Mr. Short never indicated that he was injured on the job.(T. 45-46;56-57;65-66) To the contrary, a State meat inspector, Jimmy Jones, testified that Mr. Short actively and steadily sought more work on the higher paying "kill floor", in the eight months between the date of the alleged incident in December, 2005 and Mr. Short's surgery in August, 2006, with no complaints of any physical limitations. (T.65-66 )

In addition, both Mike Welch and Willie Keyes each testified that they carried the desk in question, both from the truck to the building and then into the elevator and to the second floor office.(T. 40-42;54-55 )Both independently testified that the area on the first floor was too narrow for three people to maneuver the desk, and that Mr. Short only carried the drawers. (T.41-42;54-55) Mr. Jimmy Jones likewise testified that Mr. Short was not involved in carrying the desk when it was carried onto the second floor with Mr. Welch and Mr. Keyes. His

testimony was consistent with all of the other witnesses that Mr Short was carrying drawers.  
(T.62-63)

The Administrative Judge had the benefit of observing and evaluating each of the witnesses first hand. Both the Administrative Judge and the Commission clearly weighed the credibility of the witnesses with the fact that the testimony of the claimant and the medical evidence presented at the hearing contained serious inconsistencies concerning the onset of the alleged injury. In addition to weighing the testimony, the Judge properly found and the Commission agreed, that the claimant failed to meet his burden on *causation*. In the claimant's medical history as reflected in the record, there are conflicting references as to the onset of the claimant's problems with his degenerative condition on various dates, some references months earlier than the alleged lifting incident. Likewise, there is absolutely no opinion or even a mention by the claimant's medical providers that a lifting incident at work in December, 2005 was, within a reasonable degree of medical probability, the cause of the claimant's cervical injury. Medical causation is an *absolute prerequisite* to a finding of compensation and the Administrative Judge properly denied compensation based on the claimant's failure to meet his burden of proof. *Harrell v. Time Warner/ Capital Cablevision*, 856 So.2d 503, 571 (Miss. Ct. App. 2003).

On June 8, 2007, five months after the hearing on the merits and after receiving an unfavorable ruling, the claimant submitted a motion to supplement the record to include a May 23, 2007 letter addressed to claimant's counsel from Dr. Louis Harkey in an effort to establish causation *after the fact*.(T.27-30) The employer and carrier properly filed their objection to the claimant's Motion to supplement the record regarding the letter. (T. 31-35) After review and consideration of the claimant's motion and the objection of the employer and carrier with

supporting memoranda from both parties, the Commission denied the claimant's motion and properly excluded Dr. Harkey's letter written at the request of claimant's counsel.(T. 39)

A refusal by the Commission to hear additional evidence is discretionary and will not be reversed on appeal absent a showing of a clear abuse of discretion. *Mid Delta Home Health, Inc., v. Robertson*, 749 So. 2d 379 (Miss. Ct. App. 1999); *Smith v. Container General Corp.*, 559 So. 2d 1019, 1023 (Miss. 1990); *Day Detectives, Inc., v. Savell*, 291 So. 2d 716,723 (Miss. 1974). In this case, the claimant has admitted that the Commission holds the discretion as to whether or not to admit the new evidence. ( Appellant's brief at 11) The claimant has not provided any evidence that would show an abuse of discretion by the Commission. The claimant's argument is simply premised on the Commission's failure to consider the claimant's supplemental evidence, when in fact the Commission reviewed all of the other evidence, and entertained the motion and responses submitted by counsel before denying the motion.

Procedural Rule 9 specifically requires that "all testimony and documentary evidence *shall* be presented at the evidentiary hearing before the administrative judge". With regard to any new evidence presented to the Full Commission the Rule is equally clear. Procedural Rule 9 provides in pertinent part that "where additional evidence is offered on the review before the Full Commission, it shall be admitted *in the discretion* of the Commission." In this case, the claimant failed to present this proposed medical proof at the hearing on the merits of the case, despite ample opportunity to do so. In using its discretion in denying the Motion, the Full Commission's decision was absolutely consistent with Rule 9. Nothing within the purview of Procedural Rule 9 requires that the Commission admit new evidence raised after the hearing on the merits has been decided. The Full Commission was acting well within their discretion in denying the claimant's Motion.

As additional basis for exclusion, the May 23 letter is an improper medical record outside of the definition provided by Procedural Rule 9. Neither the letter from Mr. Stevens to Dr. Harkey nor any notes or other records of any treatment on January 18, 2007 are attached with the affidavit as required by Procedural Rule 9. Procedural Rule 9 specifically sets out the criteria necessary for use of medical records and affidavits in lieu of direct testimony at the hearing or by definition. Procedural Rule 9 in pertinent part states that:

1. The party wishing to introduce such medical records shall notify opposing parties and the Commission by written notice served at least thirty days prior to the scheduled hearing. The prehearing statement may suffice as notification under this Rule.

This was a hearing on compensability. The primary issue is whether Mr. Short sustained a work related injury to his back on December 1, 2005. Medical causation is therefore an essential element of proof. The claimant had ample opportunity to obtain an opinion regarding causation from Dr. Harkey by deposition or affidavit *prior* to the hearing on the merits. Dr. Harkey had been treating the claimant for *over one year* at the time of the hearing on the merits. Suffice it to say the claimant could have obtained an opinion with regard to causation from Dr. Harkey at least thirty days prior to the scheduled hearing. Obtaining and attempting to admit an opinion by letter on the issue of causation after receipt of the Judge's decision is absolutely contrary to the requirements of Procedural Rule 9.

On April 20, 2007 the Administrative Judge rendered an opinion denying compensation for want of causation, recognizing specifically that testimony as well as the medical proof submitted by the claimant was conflicting and that the claimant's credibility was questionable.(T.23) In affirming the Judge, the Commission recognized that the medical proof included various dates of onset ranging over a period of more than a year. (T.20-21;23) The

claimant's solicitation of an opinion from Dr. Harkey came, according to Dr. Harkey's letter, not until May 15, 2007, almost one month after the Judge's opinion and approximately nine months after the Petition to Controvert was filed. The Motion to Supplement the record was filed by the claimant on June 8, 2007, some ten months following the Petition to Controvert, and approximately seven months following the "emergency motion". The medical records were timely submitted. Dr. Harkey had been treating the claimant for well over one year before the claimant's May 15, 2007 solicitation. Not only was there ample time to depose Dr. Harkey, but the Commission was well within its discretion in relying on the medical evidence and testimony submitted at the hearing in denying this claim, and in denying the claimant's motion for supplemental evidence.

Moreover, subpart 7 of Procedural Rule 9 indicates that "the Commission intends for this rule to pertain to narrative notes and reports composed and generated by the physician in the ordinary course of medical practice." The May 23, 2007 letter generated by Dr. Harkey came at the specific request of claimant's counsel, according to the letter, by written request of May 15, 2007. The contents of claimant's request have not been disclosed, although it appears clear that the claimant's counsel requested specific information as well as an opinion regarding causation that was otherwise absent when this case was heard. The May 27, 2007 letter was in essence crafted by the claimant's counsel and is therefore improper. The Rule specifically precludes opinions composed by counsel, and is intended to apply only to notes and reports composed and generated by the physician in the ordinary course of medical practice. The letter is not in compliance with Procedural Rule 9.

Subpart 2 of Procedural Rule 9 states in pertinent part that "a copy of the medical records shall be attached to the written notice." The claimant's attempt to establish causation after the

fact with Dr. Harkey's letter must fail here as well. No "medical records" have been provided at all concerning a January 18, 2007 visit with Dr. Harkey. Dr. Harkey's May 23, 2007 letter is obviously a response to a direct solicitation by claimant's counsel. It is not a medical record generated in the usual course of Dr. Harkey's practice and is therefore improper pursuant to Procedural Rule 9.

Finally, any consideration by the Full Commission of Dr. Harkey's letter resulting in an award of compensation would have violated the employer and carrier's procedural due process rights and the concept of fundamental fairness. *Robinson Property Group, Ltd. Partnership v. Newton*, 975 So. 2d 256 (Miss. Ct. App. 2007); *Mississippi Employees Retirement System v. Wright*, 949 So.2d 839 (Miss. Ct. App. 2007). Had the Commission arbitrarily accepted the May 27, 2007 letter in determining Compensation, it would have prevented any rebuttal or cross examination by the employer and carrier and would have therefore violated the employer and carrier's procedural due process rights.

The Commission instead made a determination that causation was lacking, based upon its assessment of all of the testimony and evidence presented to the Administrative Judge at the hearing. Included in its consideration were the witnesses' accounts of the alleged incident as well as a review of the conflicting medical reports as to the nature and onset of the claimant's condition. Based upon the evidence presented, the Commission acted well within its discretion in denying the claimant's motion. There is no evidence of an abuse of discretion by the Commission. To the contrary, the admission of the letter, procured long after the hearing would have allowed the claimant to use the back door in an effort to manufacture causation despite having had ample time and opportunity to produce the evidence prior to a hearing. The Commission, in its discretion correctly affirmed the Administrative Judge's finding that the

evidence at hearing was insufficient to meet the claimant's required burden of proof that a work related incident of December 1, 2005 was the cause of the claimant's medical condition.


### CONCLUSION

In determining whether Mr. Short sustained a work related injury to his back on December 1, 2005 it is essential that the claimant meet his burden of proof. Within those essential elements of proof, the claimant must establish by credible medical evidence, a causal connection linking Mr. Short's condition to a lifting incident of December, 2005 at the work place. In addition to testimony and evidence of the claimant's questionable credibility, the fact remains that the claimant has failed to meet his burden of proof with regard to medical causation. In the six months following the filing of his Petition to Controvert this claim, the claimant had ample opportunity to produce credible evidence establishing medical causation linking his injury to the alleged events of December 1, 2005. As the Administrative Judge correctly found and the Full Commission affirmed, the medical records offered no opinion linking Mr. Short's condition to a lifting incident of December 1, 2005. For the above reasons, the Full Commission Order should be affirmed, and benefits denied.

Respectfully submitted, this the 30<sup>th</sup> day of October, 2008.

WILSON'S MEAT HOUSE, LLC and  
BRIDGEFIELD CASUALTY  
INSURANCE COMPANY, Appellees

BY:

  
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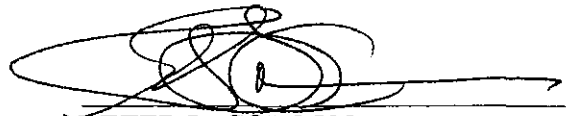
CERTIFICATE OF SERVICE

I, Peter L. Corson, the undersigned counsel of record for Employer and Carrier, do hereby certify that I have this day mailed via United States Mail, postage fully prepaid, a true and correct copy of the *Brief of Appellees* to:

Honorable Lamar Pickard  
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Hazlehurst, Mississippi 39083

John Hunter Stevens, Esquire  
Post Office Box 16570  
Jackson, Mississippi 39236-6570  
Attorney for Claimant

SO CERTIFIED, this the 30<sup>TH</sup> day of October, 2008.

A handwritten signature in black ink, appearing to be 'P. Corson', written over a horizontal line.

PETER L. CORSON