IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

WADE SHORT	CLAIMANT/APPELLANT
V.	NO. 2008-TS-01224
WILSON MEAT HOUSE, LLC	EMPLOYER/APPELLEE
AND BRIDGEFIELD CASUALTY INSURANCE COMPANY	EMPLOYER/APPELLEE

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF COPIAH COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

HON. JOHN HUNTER STEVENS
MSB#[redacted]
GRENFELL, SLEDGE AND STEVENS
1659 LELIA DRIVE
JACKSON MS 39216
TEL NO. (601) 366-1900
FAX NO. (601) 366-1799
ATTORNEY FOR APPELLANT

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VS.	**NO. 2008-TS-01224**
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AND	
BRIDGEFIELD CASUALTY INSURANCE COMPANY	**CARRIER/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Wade Short, 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. Wade Short, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Wilson Meat House, LLC, Appellee;
4. Bridgefield Casualty Insurance Company, Appellee; and
5. Peter L. Corson, Esq., Counsel for Appellees.

THIS the 3rd day of October, 2008.

JOHN HUNTER STEVENS

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STATEMENT OF THE ISSUES

1. Whether the Commission wrongfully found that the Claimant's injury was not work related.

2. Whether the Commission ignored the construction and intent of the Mississippi Workers' Compensation Act.

3. Whether the Commission ignored its own procedural rules in failing to allow additional medical evidence.

STATEMENT OF THE CASE

Claimant was employed by this employer for over twenty-five years and produced overwhelming evidence that he was injured in the course and scope of his employment. The evidence to refute this was speculative, at best. As such, the claim should be ruled as compensable.

STANDARD OF REVIEW

Claimant submits the standard of review *de novo* inasmuch as this involves questions of law. Therefore, the substantial weight of the evidence standard does not apply.

ARGUMENT

Claimant submits that the Administrative Law Judge erred in finding that the Claimant did not prove that he had sustained an on-the-job injury in the course and scope of his employment. The evidence proves the Claimant, a loyal employee for over 25 years, told his physicians about a lifting incident on-the-job, told his employer, and produced a light-duty work excuse which was ignored for a period of almost nine months. The employer and carrier produced no evidence or testimony to refute the Claimant's position as alleged in the Petition. The Petition also alleged a continuing injury from lifting on his job that got worse over time after the initial accident. The evidence as a whole, and each and every witness testified that the Claimant was involved in moving a desk, and all admit that, at a minimum, was helping in the moving of at least a portion of the desk. Absolutely no other witness testified that they could dispute the Claimant's story. As such, based on the well-settled authorities, specifically including, a recent holding by the Mississippi Court of Appeal with strikingly similar facts, the claim is compensable, and the Commission's Order should be reversed.

The facts in this case are simple. The Claimant was in a heavy duty job for the employer in excess of 20 years. The Claimant is functionally illiterate. Some time in December 2005, the Claimant did not remember the exact date he was involved in moving a homemade Cedar desk that

the employees of Wilson's slaughter house had made for the manager of Wilson's Meat House. All of the witnesses confirmed that Mr. Short was involved in the process of unloading and moving the cedar desk which, included the drawers of the desk, from a truck outside up to the second floor of the business. Shortly after the lifting incident, Claimant had severe radiating neck pain and numbness which he attributed to the lifting incident at work. As a result of the severe pain, the Claimant went to the emergency room for treatment. He had no similar problems before this accident. On each and every occasion in the medical records, the Claimant continued to state that the pain and symptoms occurred "after lifting an object while at work". (See Emergency Dept. Treatment Record dated December 12, 2005) (See Ex. C-1). In additional records contained in the University Hospital records, the Claimant gave a history in a nursing record dated December 14, 2005, of having severe pain one week after "lifting heavy desk. The pain was provoked by the lifting". On December 12, an MRI "showed disc herniations centrally at C5-6 and C6-7 and facet hyper". (See Ex. C-1). As a result of going to the hospital that day, the Claimant missed work, and brought a "Instructions to Patient" (work excuse) and gave it to his employer. (See Ex. C-1). The limitations indicated that the Claimant was to do "no lifting over 5 lbs. until cleared up by neurosurgery". This is dated December 12, 2005. Id. The Claimant testified that he brought this to his employer, and the Claimant's employer's office manager, Tammy Stowe, admitted that he brought the light-duty excuse, and admitted to receiving that excuse. (T-81-82). However, Ms. Stowe testified that she had no other knowledge that he got hurt lifting the desk, but did not dispute that Mr. Short did help lifting the desk and instead returned him back to his usual job despite the restrictions.

Mr. Short had no similar neck problems before this incident and in fact never even had any

prior Workers Compensation claims in the more than 25 years he worked for the employer.

The Claimant continued to work from approximately December 2005 until August 2006, and continued to complain of pain in the neck. He was required to work in full duty and his condition progressively got worse. All witnesses who testified on behalf of the employer confirmed this. Despite admittedly receiving the light duty work excuse, the Claimant was not provided with any light duty, and performed the usual portions of his job until August 2006 when he finally returned to the University Hospital where Dr. Louis Harkey, a neurosurgeon, undertook immediate neck surgery as a result of the Claimant's severe problems. The Out-Patient Surgical Unit noted that the history given by the Claimant was "53 year old butcher acute onset of b/l hand numbness on December '05/heavy lifting pt. c/o parathesis since." Again, in the pre-anesthesia evaluation before the neck surgery, the HPI history indicated neck pain since 12/05. As of January 11, '06, rehabilitation notes still indicate that pain onset in December 16, '05 pain began while picking up a cedar desk at work. States had to lift the desk over some tables and felt a pop in the left upper trapezius area". (See CL-1).

Claimant would request the Court review of the testimony of Claimant specifically including the cross-examination of the Claimant as the only defense by the Employer Carrier is that if he the Claimant killed many, many hogs and cattle after this accident. Employer further insinuated with no medical testimony to support that could he have injured it working with his wife cleaning storage units or riding a horse, both also occurred after the accident and light duty excuse. The Employer submitted no medical evidence to refute. Their reliance on this information as a defense has no merit. First, there is documented objective evidence that as of December 2005 and January 2006 he had a documented disc problem in fact gave his employer an off work excuse saying he is not to lift

more than five pounds unless cleared by a Neurosurgeon. Claimant amazingly through the use of pain pills continued to do his job with a disc problem does nothing to refute he got hurt on the job as he alleges this. If anything should make his claim stronger that he was that commented to his employer maintained a work ethic that he had for more than 25 years.

Again, all of the medical records unequivocally indicate that the long-term loyal employee consistently indicated that the got hurt by lifting the desk at work. The testimony confirmed this. None of the many witnesses called by the employer and carrier could provide any conflicting evidence which would refute the Claimant's version of the facts as set forth in the Petition to Controvert. The first witness, Mike Welch, the Claimant's supervisor, testified as follows:

Q. You're saying you don't recall whether or not Mr. Short may have helped lift that desk, at least over a table when you were getting it to the elevator, I believe you said.

A. Yes sir.

Q. But you took the drawers out of it so you could get it through the doors and into the elevator?

A. Yeah, to keep it from flopping.

(T. P-51)

Nothing in Mr. Welch's testimony refutes the Claimant's version of the facts. On the contrary, they support the Claimant's version of the facts. He further testified:

Q. And he's been a good employee the whole 28 years he's been there?

A. Well, off and on. He hasn't worked there the whole time. You know, he quit and come back several times.

Q. That's right, and he was gone once - - well, the main time he was gone was two years?

A. Yes, sir.

Q. But he came back?

A. Yes, sir.

Q. And in all that period he's been a good employee?

A. Yes, sir. Really good on the kill floor.

(T. P-52-53)

The next witness called by the employer and carrier was Willie Keyes, who again admitted that Mr. Short was involved in moving the desk, and had no independent knowledge to refute that he hurt his back in the process of moving the desk and drawers on the desk. He testified as follows:

Q. When y'all were lifting this desk, Wade was right there helping. Do you agree with that?

A. He was helping with the drawers. He wasn't helping with the desk.

Q. I'm not talking about helping the whole time. If Mr. Welch testified that it's possible that he could have helped y'all get the thing up over the table, you wouldn't disagree with that if he said that was possible. You just don't remember?

A. No, sir. I don't remember.

(T. P-60)

Therefore, nothing in Mr. Keyes' testimony again refutes the Claimant's version of the facts. Jimmy Jones was also called by the employer and carrier, also does not refute the Claimant's

version of the accident. His testimony went as follows:

Q. Now, you testified that you didn't see them carry the desk up until they got out of the elevator up by Mr. Wilson's office?

A. Yeah.

Q. So you weren't even around whenever they were bringing it from outside through the door?

A. That's correct.

Q. So Mr. Keyes and Mr. Welch have already testified that they don't remember whether or not Mr. Short helped them lift the desk at any point. And Mr. Short told his physicians back shortly after this occurred in January of '06 that he hurt his back and neck lifting a cedar desk at work. It was a cedar desk that you saw?

A. Right.

Q. And this was the desk that Mr. Welch built?

A. That's correct.

Q. And Mr. Short told the doctors back in January of '06 that he had to lift the desk over some tables and he felt this pop that we've been talking about. Now, these tables would have been downstairs where you weren't at the time that this happened?

A. I'm assuming, yes, sir.

Q. So you're not aware of any evidence to refute that that occurred as Mr. Short said, are you?

A. No. Downstairs, I didn't see any of that.

(T. P-69-70)

Significantly, Mr. Jones testified confirming the Claimant's testimony that the employer continued to work Mr. Short after this accident, clearly in violation of the light-duty restrictions the office manager, Tammy Stowe, admitted to receiving back in December of '05. His testimony is as follows:

Q. Now, you testified that after December of '05 up until August that Mr. Short continued to do his job every day, and he was doing it full duty. Is that what you observed?

A. On the kill floor.

Q. Yeah, and that's a lot of heavy lifting?

A. On the kill floor, it is.

Q. Now, I'm showing you a work excuse that's already part of the evidence that talks about some restrictions on Mr. Short of no lifting over 5 lbs. until cleared up by neurosurgery, and that's dated December 12th of '05. Would it be safe to say that what you've been testifying to about what you observed up until August of '06 that you saw him lifting weights that were a lot more than 5 lbs?

A. On the kill floor, he was.

(T. P-70)

This confirms that the Claimant's condition had already manifested itself, and an MRI had already showed a significant herniated disc requiring light duty restrictions, which were ignored by the employer. The Claimant continued to try to work from December of '05 until August of '06 when he finally had to have immediate surgery by Dr. Harkey. His injury progressively got worse by the Employer's refusal to abide by the restrictions further worsening the injury.

The last witness, Billy Joe Raglan, testified on behalf of the employer and carrier, and again provided no evidence or testimony to refute that the Claimant's injury occurred as described in the Petition to Controvert. He testified as follows:

Q. Mr. Raglan, you weren't there the whole time they were moving the desk from the truck all the way up to Mr. Wilson's office, were you?

A. No, sir. I was talking about when I saw them with the desk, I was sitting down over there and they came in with the desk. Wade had two empty drawers in his hand.

(T. P-76)

Nothing in Mr. Baglan's testimony refutes, in fact, his testimony supports Claimant's version in that he admits that Mr. Short was involved in the moving of the desk and even saw him carrying the drawers from the desk. Mr. Raglan further testified about an incident involving a horse; however, this has no relevance on the bearing of the facts since this occurred after Mr. Short was

diagnosed with a herniated disc in December of '05, but he further testified that Mr. Short talked repeatedly about his hands going to sleep and this was all the time, including before and after the horse incident, and there is no other medical evidence or testimony whatsoever indicating that the horse incident had any causative factor in his herniated disc that he was diagnosed with and given light restrictions in December of '05.

The evidence overwhelmingly supports that the Claimant had an on-the-job injury. Liberal construction of the Workers' Compensation Act requires that this Court find this injury as compensable, and the total and complete lack of any conflicting or any evidence to support that this did not occur on the job. To rule any other way would be clear speculation and conjecture. The Claimant, subsequently after the Administrative Law Judge's Order, produced a report from Dr. Harkey again confirming that this injury was a result of the lifting incident described by Mr. Short. (See Proposed Cl. Ex. 4). Since the evidentiary rules are relaxed, this should be admitted and further support that the Claimant's injury is work-related, and should be found compensable. The Claimant has filed a motion to supplement pursuant to the rules. The Claimant did not have this evidence available at the time of hearing, which was specifically the result of and the basis of the emergency motion for hearing filed by the Claimant shortly after the Petition was filed. Copies of that motion are documented in the file. The initial hearing was undertaken even before significant discovery solely as a result of the emergency motion to compel filed by the Claimant shortly after the Petition was filed. Only after a hearing was had on the motion did the Judge request oral testimony that was basically only on the motion to compel, and not a full hearing on the total claim. As a result, Claimant did not have all of the medical testimony available, only what was in the record at the time of the hearing. As such, Rule 8 should allow for the Claimant to submit the medical

records which will respond to the question raised in the Judge's Order on the emergency motion. Due to the fact that the Claimant was put in a destitute position since he did not have any funds to pay medical bills or basic living expenses such as food and shelter, he was forced to pursue an emergency hearing, even without complete medical.

The procedural rules of the Commission clearly allow for the Claimant to submit additional evidence before the Full Commission hearing. Claimant timely submitted this evidence before the Full Commission hearing and the employer and carrier had no evidence to show any type of prejudice. Procedural Rule 8 allows that the General Rules of Evidence shall be relaxed so that introduction of any relevant and competent evidence pertained to the issues. The liberal construction of the Act further supports that this evidence should have been considered by the Commission. Claimant, at the time of the hearing, was still obtaining treatment and was still not at maximum medical recovery and, in fact, the only reason for the hearing was that it was based on an emergency motion filed by the Claimant.

Procedural Rule 8 provides:

> In compensation hearings, the general rules of evidence shall be relaxed so as to permit the introduction of any relevant and competent evidence pertaining to the issues that would throw light on the matter in controversy.

(Rule 8 of the Procedural Rules of the Miss. Workers' Comp. Comm.).

Procedural Rule 9 further provides that:

> Where additional evidence is offered on review before the Full Commission, it shall be admitted into the discretion of the Commission. A motion for introduction of the additional evidence must be made in

> writing at least 5 days prior to the date of the hearing of review by the Full Commission. Such motion shall state with particularity the nature of such evidence, the nature thereof, and the reason it was not introduced at the evidentiary hearing.

(See Procedural Rule 9)

The Claimant timely filed the motion for introduction of evidence, and obviously has a more than reasonable explanation for why the information was not even available at the time of the emergency hearing since the Claimant was basically starving and without any financial income whatsoever or medical treatment by payment for medical expenses, it was impossible for him to appropriately get this evidence before the Administrative Law Judge. Further, it is obvious from a review of the Administrative Law Judge's findings, he put great weight on the fact that we did not have such a statement from the physician despite clearly multiple occasions in the medical records indicating the cause and fact of the Claimant's pain was the on-the-job injury. Clearly, the Full Commission has discretion in whether or not to admit such evidence. Clearly, their consideration to refuse this obviously relevant and pertinent evidence which obviously was unrefuted by any medical testimony whatsoever is a clear violation of not only Procedural Rule 8, but also Procedural Rule 9. The Act requires that the Commission itself is a finder of fact, not even the Administrative Law Judge. For the finder of fact in this case, the Commission, who refused to even consider or to ignore such clearly relevant evidence ignores clear terms of the Act, this Court and the justice process as a whole. It obviously cannot be interpreted that rulings like this will obviously make ineffective the right for the Claimant to have an emergency hearing on his claim inasmuch as Claimants would be afraid to pursue such a hearing when and unless and until they have reached

MMI and have all the proper medical documentation. Clearly in this case the Claimant had no reasonable alternative since his claim was refused and he had undergone an emergency surgery and the proof in the medical records were not disputed. However, the Administrative Law Judge apparently put much weight on the fact that there was not an opinion from the doctor as to the causation which obviously would have some affect on the Administrative Law Judge's findings. This is flat incoherent error on behalf of the Full Commission which requires reversal.

Considering these issues, the Commission certainly should have allowed this additional evidence to be admitted and made part of the record. The fact that it was not considered requires reversal as a question of law. This matter, therefore, should be remanded to the Administrative Law Judge and the Commission's Order should be reversed.

The Mississippi Court of Appeals addressed similar issues recently in *Adolphe Lafonte v. Earmie Ayers* (No. 206-WC-01681-COA decided June 12, 2007). Similar, if not identical, defenses were asserted in that case wherein the employer and carrier said the Claimant failed to give prompt actual notice of the injury within 30 days as required by the Act, and the employer as here further testified that they did not believe that the Claimant got hurt on-the-job. However; the company witnesses, just like as in the instant case, did not deny that the Claimant had an injury on-the-job, but stated that they could not remember. The Court of Appeals upholding the findings of the Commission found that there was no uncontradicted testimony presented by the employer and carrier to refute the Claimant's version of the facts. They further relied on the liberal construction of the Act wherein, "doubtful cases should be resolved in favor of compensation so as to fulfill the beneficial purposes of the statute." Quoting *Miller Transporters vs. Guthrie, 554 So.2d 917, 198 (Miss. 1989).* The Commission was in error in its failure to follow the law as enunciated in *Adolphe*

Lafonte. The Commission's findings essentially amount to a judicial overruling of the clear intent language of the Act. The Commission is required to liberally construe the Act and their own rules to effectuate the beneficent purposes of the Act. In this case, that law was clearly ignored, a question of law. As such, the law requires reversal.

CONCLUSION

The Commission erred in its failure to find this claim compensable as required by the Act. Multiple witnesses all confirmed that Mr. Short was involved in the movement of a 200 lb. desk and none of the witnesses refute Mr. Short's recollection of what occurred. None of the witnesses refute the believability of the Claimant, and in fact, all indicate that he was a good dependable employee, and a hard worker and worked for this company for over 25 years. The employer, through the testimony of the office manager, Tammy Stowe, admits that she received a work excuse indicating that the Claimant should not lift any more than light-duty. (T. P-81) The evidence unequivocally from the employer further admits that they had him working full duty doing heavy manual work in excess of this 5 lb. restriction after he had been diagnosed with a herniated disc knowing full well that he should not be doing that type of work until cleared by a neurosurgeon. The witnesses called by the employer and carrier acknowledged that he repeatedly discussed numbness in his arms and neck pain throughout the period. He continued to work until August of '06 when he underwent immediate surgery by Dr. Harkey, and again, at all times he told his medical providers that the problem came from a lifting incident at work. He clearly had no incentive to provide false testimony as wildly speculated by the employer and carrier. The exhibits produced by the Claimant show that he repeatedly testified that his problems started from lifting an object at work. The objective evidence supports the Claimant's testimony. The claim should be found compensable and the

Commission's Order should be reversed, and this case returned to the Administrative Law Judge for a determination of the extent of temporary total disability and permanent impairment, if any. To rule otherwise would defy the intent and logic of the Act.

Respectfully submitted, this the 2nd day of October, 2007.

WADE SHORT, APPELLANT

BY: _____

JOHN HUNTER STEVENS

John Hunter Stevens, Esq. ([redacted]
GRENFELL, SLEDGE & STEVENS, PLLC
1659 Lelia Drive
Jackson, MS 39216
(601) 366-1900 Telephone
(601) 366-1799 Facsimile

CERTIFICATE OF SERVICE

I, John Hunter Stevens, attorney for the claimant, in his individual capacity, do hereby certify that I have this day served a true and correct copy of the *Appellant's Brief to the Supreme Court* via U.S. mail, postage prepaid, to the following:

Honorable Lamar Pickard
P. O. Box 310
Hazlehurst, MS 39083

Peter L. Corson, Esq.
P. O. Box 9147
Jackson, MS 39286-9147

THIS the 2nd day of October, 2008.

_____

JOHN HUNTER STEVENS