

**IN THE SUPREME COURT OF MISSISSIPPI**

**WADE SHORT**

**CLAIMANT/APPELLANT**

**VS.**

**NO. 2008-TS-01224**

**WILSON'S MEAT HOUSE, LLC  
AND**

**EMPLOYER/APPELLEE**

**BRIDGEFIELD CASUALTY INSURANCE COMPANY**

**CARRIER/APPELLEE**

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**BRIEF OF APPELLEES  
ON WRIT OF CERTIORARI**

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

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## **STATEMENT OF THE ISSUE**

1. **Whether the Mississippi Workers' Compensation Commission abused its discretion in denying Mr. Short's June 11, 2007 Motion to Supplement the Record.**

COME NOW, the Appellees, Wilson's Meat House and Bridgefield Casualty Insurance Company, and at the request of this Honorable Court by Order of March 1, 2010, files this supplemental Brief of Appellees on Writ of Certiorari addressing the following issue:

**Whether the Mississippi Worker's Compensation Commission abused its discretion in denying Mr. Short's June 11, 2007 Motion to Supplement the Record**

**ARGUMENT**

On June 11, 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) There is absolutely no viable reason why the Administrative Judge could not have been provided with the evidence before the hearing on the merits. 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 evidence, the claimant's motion and the objection of the employer and carrier with supporting memoranda from both parties, the Commission exercised its discretion in denying the claimant's motion and properly excluded the proposed supplemental evidence.(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). The claimant has not provided any evidence that would show an abuse of discretion by the Commission. After reviewing all of the other evidence, including the medical evidence submitted

by the claimant at the hearing, the Commission's ruling was proper in that the claimant failed to comply with the Commission Rules regarding submission of supplemental evidence.

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." Moreover, with regard to a motion for introduction of additional evidence, Procedural Rule 9 specifically requires that any such motion "shall state with particularity the nature of such evidence, the necessity therefor, *and the reason it was not introduced at the evidentiary hearing.*"

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, and failed to comply with the standard required by Procedural Rule 9. As Dr. Harkey had been the claimant's primary treating physician for more than five months before the hearing, there is simply no good reason why the evidence could not have been offered prior to the hearing. 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 (30) days prior to the scheduled hearing. The prehearing statement may suffice as notification under this Rule.
2. A copy of the medical records *shall* be attached to the written notice.

None of Dr. Harkey's medical records were attached with the supplemental affidavit. Only a self serving letter solicited by the claimant's attorney. Subpart 2 of Procedural Rule 9 states in pertinent part that the medical records *shall* be attached to the written notice. 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 admitted the UMC medical records prior to the hearing, and had ample opportunity to obtain an opinion regarding causation from Dr. Harkey by deposition of affidavit *prior* to the hearing on the merits. Dr. Harkey performed Mr. Short's surgery and had been treating the claimant for *over five months* at the time of the hearing. Obtaining and attempting to admit an opinion by letter solicited specifically by counsel on the issue of causation after receipt the Judge's decision without the regularly kept medical records 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 11, 2007, some ten months following the Petition to Controvert, and approximately seven months following the "emergency motion".

The medical records from UMC were timely submitted by the claimant and reviewed by the Administrative Judge and the Commission. Dr. Harkey had performed surgery on the claimant in August 9, 2006, and had been treating the claimant for over five months at the time of the hearing in January 2007. Over nine months had passed when the May 15, 2007 request came to Dr. Harkey for a "letter." There was insufficient proof of causation at the hearing and inconsistencies in the record as to date of onset. This is precisely why the Commission rules mandate that the proof via affidavit be submitted prior to hearing, and that the attorney's may not craft an affidavit tailored to their respective positions. There was ample time to depose Dr. Harkey prior to the hearing if either party felt the need for clarification of records or an opinion. There is absolutely no reason why the claimant could not have accomplished that in the five months following the claimant's surgery. 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 to admit the supplemental evidence.

In addition, 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 from the medical records when this case was heard. The May 27, 2007 letter was in essence crafted by the claimant's counsel and is highly prejudicial to the employer and carrier. Procedural Rule 9 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. Dr. Harkey's supplemental letter is tantamount to the claimant's counsel crafting a favorable affidavit regarding causation, or deposing Dr. Harkey in the absence of counsel for the employer and carrier. The letter is not part of Dr. Harkey's records, it is was a response to a specific solicitation from Mr. Short's counsel. To admit the "letter" after the fact, is prejudicial in that it denies the employer and carrier the right to cross examination or to seek another medical opinion if warranted.

### **CONCLUSION**

The Commission made a determination that causation was lacking, based upon an assessment of all of the testimony and evidence presented to the Administrative Judge at the hearing. Included in its consideration were medical records in evidence, 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 and exercised sound discretion in denying the Motion to Supplement the Record.


Respectfully submitted, this the 22nd day of March, 2010.

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 on Writ of Certiorari* to:

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SO CERTIFIED, this the 22nd day of March, 2010.

  
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