**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NORTH MISSISSIPPI MEDICAL CENTER** **APPELLANT**

**VS.** **CAUSE NO.: 2008-WC-00040-COA**

**SUSAN STEVENSON** **APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI**

# BRIEF OF APPELLEE

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## 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 Justices of the Supreme Court and/or Judges of the Court of Appeals may evlauate possible disqualification or recusal.

1. Susan Stevenson, appellee herein;
2. Gregory W. Harbsion, attoreny for appellee;
3. North Mississippi Medical Center, appellant herein;
4. William G. Armistead, Sr., attorney for appellant;
5. Honorable Paul Funderburk, Judge, Lee County Circuit Court

**GREGORY W. HARBISON**
**ATTORNEY FOR APPELLEE**

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## STATEMENT OF THE ISSUE

1. The Circuit Court of Lee County correctly determined that the Mississippi Workers Compensation Commission abused its discretion by refusing to allow Claimant/Appellee to reopen her workers compensation claim, in the manner contemplated pursuant to § 71-3-53 of the Mississippi Workers Compensation Act, in order to present new evidence regarding Claimant/Appellee's total and permanent disability, as discovered and diagnosed by her primary physician, shortly after her workers compensation case was comprised and settled.

## FACTS

1.) The Claimant suffered an admitted work related injury on July 13, 2003 to her neck, back and right shoulder.

2.) The case proceeded through the litigation process and the Claimant received medical treatment from several physicians specializing in the treatment of back and neck injuries, including; Dr. Barry Jones a General Practitioner in Tupelo, MS, Dr. James White an Orthopaedic surgeon in Tupelo, MS, Dr. Hunt Bobo, a Neurosurgeon in Tupelo, MS and Dr. Mark Harriman, an Orthopaedic surgeon in Memphis, TN. [R.E. pg. 00051]

3.) Dr. Barry Jones stated he saw the Claimant on December 18, 2003 for her low back pain that in his opinion related to an injury that she claimed to have sustained at work at North Mississippi Medical Center while lifting a shred box. That occurred prior to

an office visit in his office on July 14, 2003. The Claimant had continued to have continuous problems with this and it had created at least a portion of her current disability. Dr. Jones referred the Claimant to see Dr. Jay White as well as Dr. Hunt Bobo for her low back pain. [R.E. pg. 00052]

4.) Dr. James White stated that he did not treat the Claimant for her back problems and could not offer any opinions with regard to these problems. [R.E. pg. 00052]

5). Dr. Mark Harriman stated that the Claimant reached maximum medical improvement on October 21, 2003 and that she was not a surgical candidate. Dr. Harriman also opined that the Claimant could perform a medical records clerk position, full duty even with restrictions. [R.E. pg. 00053]

6.) Dr. Hunt Bobo opined that the Claimant would not need surgery for her July 2003 injury. In the February 24, 2004 visit Dr. Bobo clearly indicates that the Claimants low back problem is a workers' compensation injury. [R.E. pg. 00052-00053]

7.) The Employer/Carrier admitted that all treatment rendered, other than the treatment by Dr. James White, was related to the admitted back injury, authorized, and paid for all said medical treatment, **including Dr. Hunt Bobo**. [R.E. pg. 00055]

8.) In the July 13, 2005 Petition for approval of settlement, both the Employer/Carrier and the Claimant agreed and represented to this Commission that surgery was not indicated or recommended by any treating physicians for the Claimant's low back injury and that all treating physicians were of the opinion that the Claimant could perform the job duties of a medical records clerk. Indeed, based upon the medical evidence at that time, that was a correct assumption. [R.E. pg. 00055]

9.) Accordingly, on July 13, 2005 this Commission entered its Order approving settlement. Obviously, contained in this Order is a recitation of the medical findings as they existed at that time, including, the declaration agreed to by both parties that no physician had anticipated or recommended future surgery and that in the opinion of the treating physicians the Claimant was able to perform the job duties of her employment at the time of injury. [R.E. pg. 00061]

10.) This Commission, at least in part, based its decision to approve the settlement upon that representation of facts made by both parties. [R.E. pg. 00061-00068]

11.) On August 9, 2005 the Claimant presented for **followup** visit with Dr. Bobo for her work related low back injury, no new injury was complained of nor has any new injury been alleged by either party. Dr. Bobo ordered more diagnostic work, namely another MRI, prescribed physical therapy and medication, the same done in February, 2004. [R.E. pg. 00121]

12.) On September 27, 2005 the Claimant again presented for followup visit with Dr. Bobo for her work related low back injury. Dr. Bobo reviewed the recently taken MRI film and stated "no neuro-compression is appreciated other than the possibility of that L5 nerve root in the foreman, which does not bear out on sagittal views." Again, physical therapy and medications continued and a "**standing myelogram and CT scan**" was ordered. It is significant to note that this is the first time a **myelogram** was done on Claimants low back and the first time a **standing myelogram and CT scan** was done. No surgery was recommended. [R.E. pg. 00122]

13.) Dr. Bobo's opinion changed radically after the **standing myelogram and CT scan** was done. The standing myelogram showed "a complete block at L3-4 while lying

flat on the table or standing. It opened up some when she laid on her back with the CT scan and slightly with flexion on flexion and extension views. She still had a near complete block even on seated flexion with subluxation of 4 on 5 that increased with flexion and subluxation of 3 on 4 and high-grade stenosis at 4-5 on CT even worse then 3-4 where the complete block was. [R.E. pg. 00123]

14.) Based upon the above new medical findings, only available after the **standing myelogram and CT scan** were completed, Dr. Bobo's impression changed from that which is stated in the above paragraph (7.) And was relied upon by the Commission in its approval of the settlement in this case, to the following: "She is 100 % disabled with or without the surgery because of her back and mechanical back problems that would not respond to medications and therapy." It should be noted at this point the only back problem Dr. Bobo ever treated the Claimant for was the work related back injury he noted in his February 24, 2004 record. [R.E. pg. 00123]

15.) At this point Dr. Bobo did recommend surgery to the claimant. Dr. Bobo recommended fusion at the L3-4 level and the L4-5 level with cases and possible bone graft from the iliac crest. [R.E. pg. 00123]

16.) The Claimant filed her Motion to Re-open Claim and was heard on said Motion on August 29, 2006 via telephone conference call. The Administrative Judge ruled that there was no indication in Dr. Bobo's notes as to the causal connection between claimant's back condition which warranted surgery and for the 2003 work accident, that the Claimant's Motion is not well taken and is therefore, denied on September 18, 2006. [R.E. pg. 00090-00091]

17.) The Claimant Petitioned for Review of Appeal to the Full Commission and also filed a Motion to Introduce New Evidence, the deposition of Dr. Hunt Bobo. The Commission, on February 8, 2007, denied both the Claimant's Petition for Review and Motion to Introduce New Evidence without opinion and that Claimant's Motion to Introduce New Evidence is denied. [R.E. pg. 00103]

18.) The Claimant appealed the Commission's ruling to the Lee County Circuit Court. Lee County Circuit on December 3rd, 2007 reversed the Commission. The rationale and findings of the Lee County Circuit Court will be discussed in detail below and are available in its Opinion Order [R.E. pg. 00161-00164]

19.) The Employer filed its appeal with this Court as a result of the Lee County Circuit Court's opinion.

## SUMMARY OF APPELLEE'S ARGUMENT

Subsequent to---and as a direct consequence of—a radical change by her treating physician in regard to his prognosis of her prospects for long-term recovery from the low back injury she had suffered while at work on July 13, 2003, Claimant/Appellee, Susan Stevenson (hereinafter usually "Susan"), sought to reopen her workers compensation case shortly after her claim had been compromised and settled. Susan's effort in this regard fully comported with § 71-3-53 of the Mississippi Workers Compensation Act, which provides that the Mississippi Workers Compensation Commission (MWCC) retains continuing jurisdiction in matters involving *inter alia* "a change in conditions or mistake in a determination of fact" that is brought before the MWCC by "any party in interest...at any time prior to one (1) year after the last payment of compensation[.]"

Upon having her effort rebuffed by both the Administrative Law Judge (ALJ) and the Full Commission, Stevenson appealed the matter to Lee County Circuit Court which, upon finding that the refusal to reopen Susan's case to be an "abuse of discretion" on part of the ALJ and the Full Commission, reversed those decisions.

In urging this Honorable Court to reverse the circuit court's decision and reinstate the Commission's order refusing to reopen this case, Appellant, NMMC, argues that "(a)ll relevant evidence regarding [Susan's] physical ability and health was presented to the Commission before the settlement". Appellant's Brief at page 5. Additionally, NMMC contends that: "Claimant's 'new evidence' (of a changed condition) demonstrates only a possible continued deterioration of Claimant's physical condition, not a change in conditions warranting the re-opening (sic) of her claim[]", such that Susan can not establish a "causal connection" between her work injury and her present lower back maladies through the

records of her treating physician, Dr. Hunt Bobo. *Id.*, pp. 6-7. This argument, however, contradicts itself. Even if the changes are nothing more that a "continued deterioration of Claimant's physical condition" the change is still causally connected to the work injury, *i.e.* it is a continuation of the injury, and the change is still material in two ways: 1. Surgery was recommended after said change, and 2. Dr. Bobo's opinion as to Stevenson's ability to work completely changed. Also, both of these changes were clearly not contemplated in the settlement of the claim or presented to the Commission before the settlement because they did not exist at that time! Therefore all parties, the Claimant, the Employer and the Commission were mistaken in the determination of facts involved in the settlement. Even as Appellant propagates that position to this Court, however, NMMC is simultaneously opposing the very evidentiary vehicle though which its notions in such regard might be most readily disabused, *i.e.,* the deposition of Dr. Bobo. See Appellant's Brief at pp. 13-17. This glaring inconsistency and discrepancy in Susan's former employer's present position and argument was, of course, negated via the Lee County Circuit Court's determination that the Commission's refusal to reopen Susan's case to permit her to depose Dr. Bobo, constituted an abuse of the Commission's discretion.

## ARGUMENT

### A. STANDARD OF REVIEW

The general rule is that there must be substantial evidence to support the Commission's findings. *Natchez Equip. Co. V. Gibbs*, 623 So. 2d 270, 274 (Miss. 1993). Deference is given to the Commission's findings of fact when the are supported by substantial evidence. *Id.* However, this Court has held, "Upon proper proof of 'change of

conditions' or 'mistake in the determination of facts,' the Commission must not abuse its discretion or arbitrarily refuse to reopen and review a case pursuant to that statute." *Henton v. North Mississippi Medical Center,* 317 So. 2d 373, 375 (Miss. 1975). This Court has also held that the deference given can be lost if, as in this case, the [Commission] only provides a conclusory order. *Broadway v. International Paper, Inc.*, No. 2007-WC-00104-COA (Miss. App. 2008). The *Broadway* Court stated:

> Normally, we would defer to the Commission's determination of whether or not Broadway met his burden of proof that he experienced a change in circumstances. However, administrative agencies may lose their highly deferential standard of review. Our supreme court has stated, "[i]f an agency does not disclose the reason upon which its decision is based, the courts will be usurped of their power of review over questions of law." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 324 (Miss. 1992) (citation omitted). "It is a logical and legal prerequisite to intelligent judicial review in these cases that the [Commission] favor us with more than mere conclusory findings. *Id.*

Finally, the issue before this Court in this case is not a question of fact but is a question of law. *Id.* The facts are not in dispute. The Appellant/Employer, the Appellee/Claimant and the Commission all agree as to what facts were presented to the Commission at the time of settlement, and all agree as to the facts presented following Dr. Bobo's performance of the Myelogram with standing CT scan and his complete reversal of his previous opinions as to surgery and ability to work in any capacity. In *Broadway* the Court held:

> "[T]he decision to reopen a case is within the Commission's discretion." *Staples v. Blue Cross & Blue Shield, Inc.*, 585 So. 2d 747, 749 (Miss. 1991). However, the two issues brought before this Court in this case are not questions of fact. Instead, we are presented with questions of statutory interpretation, which are questions of law. Therefore, the standard of review in this case is de novo. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 721 (¶5) (Miss. 2002).

*Broadway v. International Paper, Inc.*, No. 2007-WC-00104-COA (Miss. App. 2008), *See also, University of Mississippi Medical Center v. Smith*, 909 So. 2d 1209, 1218 (Miss. App. 2005).

Applying this reasoning to the present matter, Appellee respectfully submits that, while the Lee County Circuit Court obviously did not employ the precise language quoted here when reversing the ALJ and the Full Commission, that appellate tribunal, nevertheless, did—implicitly and presciently—apply the principles enunciated therein, as it correctly found that both the hearing judge and the affirming commission engaged in an abuse of discretion when denying Appellee's, Susan Stevenson, statutorily based motion to reopen her workers compensation case without sufficient and articulatable reason, all to the detriment of Ms. Stevenson.

**B. MISTAKE IN A DETERMINATION OF FACT.**

Mississippi Code §71-3-53 grants the Commission the ability to reopen claims such as this present matter. §71-3-53 reads in part;

> "Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation."

It is clear that a mistake was made in the determination of fact in the Commission's July 13, 2005 Order Approving Settlement. At the time that this Order was signed all parties, including the Claimant and all her doctors, thought no surgery was necessary for her work related back injury and that she could perform all job duties other

than manual labor. [R.E. pg. 00055]. It was not until the Claimant's January 13, 2006 office visit with Dr. Bobo, **following the standing myelogram and CT scan**, that surgery was ever recommended. [R.E. pg. 00123] It was not until this January 13, 2006 office visit following the standing myelogram and CT scan that the full extent of the Claimant's admitted back injury was appreciated. [R.E. pg. 00123] This is quite different from the scenario that took place in *Davis v. Scotch Plywood Co. Of Miss.* In *Davis*, the change in evidence did not change the opinions of any of the treating physicians. *Davis v. Scotch Plywood Co. Of Miss.* 505 So.2d 1192, 1198 (Miss. 1987). The new evidence in *Davis*, the thermogram, was not evidence of a change in Davis' condition because none of the doctors changed their opinions. The expert testimony in *Davis* remained the same as presented to the Commission even after the new evidence of the thermogram. *Id.* Obviously that is not the case with Ms. Stevenson's evidence. Indeed, for this reason, the present case is quite different from the situation presented in *Davis*, wherein, as Appellant correctly notes, the Mississippi Supreme Court affirmed the Commission's refusal to entertain information gleaned by one of that claimant's physicians pursuant to a post-settlement procedure—a thermogram—which was performed by Davis' doctor, *Scotch Plywood* at 1195, on the basis that the thermogram was "merely new evidence", *Id.,* at 1198, which did not change Davis' physician's opinion that Davis did not need surgery. In the present case, in contrast, Dr. Bobo's opinion regarding Ms. Stevenson's need for surgery as well as her ability to resume any employment, changed radically as direct result of the standing myelogram and CT scan.

Therefore, while in each instance the respective claimants underwent a post-settlement medical procedure /examination (the thermogram, and the standing myelogram

and CT Scan, respectively), only one of those examinations—the standing myelogram and CT Scan—wrought a significant and profound change in the opinion of the treating physician, here, Dr. Bobo, with regard to his patient/workers compensation claimant's need for corrective surgery and Ms. Stevenson's ability to resume any employment.

The Mississippi Workers Compensation Commission's abject refusal to consider such significant indicia of Claimant/Appellee's profound change in circumstance subsequent the standing myelogram and CT Scan ordered and preformed by Dr. Bobo, thus clearly was, as the Lee County Circuit Court correctly found in reversing the MWCC's decision, in direct contravention of § 71-3-53 of the Mississippi Workers Compensation Act.

This case is a perfect example as to why the continuing jurisdiction of the Commission §71-3-53 was included in the Act. No one knew at the time of the settlement that the Claimant's back was injured to this extent or that it would require such surgery. Both parties admitted a back injury occurred on July 13, 2003. Both parties agreed that Dr. Jones, Dr. Bobo and Dr. Harriman treated the claimant for her admitted back injury and both parties agreed that at the time of settlement that none of the physicians recommended surgery and that the physicans were of the opinion that she could do the job of medical records clerk. Both parties were mistaken. As a result, based upon the mistaken representations made to the Commission, its Order of July 13, 2005 was materially mistaken. [R.E. pg. 00061].

In this regard the Mississippi Supreme Court has explicitly found:

> As Professor Larson stated, there are bound to be many occasions when thorough and skillful diagnosis (referring to doctors) misses some hidden compensable condition. Certainly, under the hurried conditions that the Commission is forced to

> work there are bound to be mistakes in determination of facts even when the positions are occupied by competent men. This is the reason for judicial review.

*Mason v. Bailey Lumber Co.*, 401 So. 2d 696, 705 (Miss. 1989)(*quoting* 3 Larson, The Law of Workmen's Compensation § 581.52). This is clearly exactly what happened in this case. Both parties made the factual representations to the Commission at the time of settlement based upon the medical diagnosis existing at the time. However, as Professor Larson so eloquently stated, " In the nature of things, there are bound to be many occasions when even the most thorough and skillful diagnosis misses some hidden compensable condition, *either by award or settlement,* when the only fault lies in the imperfections of medical science. [Emphasis supplied]." *Id.* Due to the imperfections of medical science the severity of Stevenson's work injury was not discovered until after the settlement. False representations were made, albeit inadvertantly, by both parties to the Commission. The Commission based its order of settlement on these mistakes. Therefore, the Lee county Circuit Courts Order reopening this claim should be affirmed.

## C. CHANGE IN CONDITION

Following the standing myelogram and CT scan, Dr. Bobo changed his opinion as to the Claimant's surgical need and permanent disability/ability to work. Prior to this diagnostic test Dr. Bobo was of the opinion that the Claimant could perform all job duties other than manual labor. However, upon his review of the standing myelogram and CT scan, Dr. Bobo opined that the Claimant was and is 100% disabled and unable to perform any work duties even sedentary. [R.E. pg. 00123]. A change in condition does not necessarily have to mean a change in the Claimant's physical condition, although the

evidence is clear that is exactly what happened in Stevenson's case, but can also be a change in the claimant's ability to work. *Henton v. North Mississippi Medical Center,* 317 So. 2d 373, 375 (Miss. 1975). It cannot be disputed that just such a change occurred in Stevenson's case. Dr. Bobo clearly stated in his reports presented to the Commission at the time of settlement, that Stevenson could work just not perform manual labor. [R.E. pg 00063] However, after the standing myelogram and CT scan his opinion changed, and he opined in his records that Ms. Stevenson is 100% disabled. [R.E. pg. 00123] Clearly this evidence from Dr. Bobo is substantial proof of inability to work and a resulting loss of wage earning capacity which would be compensable under the Act. *Pikes County Bd. Of Supv.v. Varnado,* 912 So. 2d 477, 481 (Miss. 2005); *South Central Bell Telephone Co. v. Aden,* 474 So. 2d 584 (Miss.1985). Further, Dr. Bobo is the only physician that has had the opportunity to review the standing myelogram and CT scan. He is the only physician possessing the requisite knowledge to make an informed diagnosis of Ms. Stevenson's present medical circumstance.

Therefore, based upon the statutory provision of §71-3-53 and the long line of cases interpreting this section, the reopening of a Workers' Compensation claim is not only allowed but mandated when justice so requires. *Armstrong Tire and Rubber Co. v. Franks,* 242 Miss. 792, 137 So. 2d 141 (1962); *Metal Trims Industries, Inc. and the Home Insurance Company v. Stovall,* 562 So. 2d 293 (1990); *Henton v. North Mississippi Medical Center,* 317 So. 2d 373, 375 (Miss. 1975). The facts of this case clearly indicate a material mistake in the determination of fact and a material change in conditions. Therefore the Order of the Lee County Circuit Court reopening this claim should be affirmed.

## D. THE CAUSAL CONNECTION

The Appellant argues that the records lack a causal link of the work injury and the findings and surgery performed by Dr. Bobo. The Appellee respectfully disagrees. The record is clear Ms. Stevenson suffered an admitted work related injury on July 13, 2003. [R.E. pg. 00061]. Dr. Barry Jones began treating Ms. Stevenson for same almost immediately and opined that at least some if not all of her back problems were related to this work injury. [R.E. pg. 00052-00053]. It is clear that the only low back problem for which Dr. Bobo treated Ms. Stevenson, was a work related back injury per his February 24, 2004 note. The Appellant **admitted** in the settlement petition that the treatment rendered by Dr. Bobo in 2004 was causally connected to the work injury [R.E. pg. 00055]. The Appellant authorized and paid for the treatment provided by Dr. Bobo in 2004. It is this same admitted work related back injury that he was "following up" in August of 2005 and September of 2005. It is this same admitted work related injury for which he treated the Claimant in January of 2006 and recommended surgery. [R.E. pgs. 00119-00123]

The Appellant paid all of the medical bills associated with Dr. Bobo's treatment prior to the settlement, thereby admitting their relation to the work injury. The Appellant has presented **no evidence** of any subsequent or intervening injury from the date of settlement until the January 2006 visit when the true nature of the Claimant's injury was revealed. Mississippi case law is abundantly clear that the burden of proving an intervening injury is on the shoulders of the Employer/Carrier. *Marshall Durbin Co. v. Warren*, 633 So. 2d 1006 (Miss. 1994). Therefore, the Claimant submits that the evidence is clear that she has meet her burden of causally linking her back problems to her July 2003 injury. In fact, the Appellant has admitted same throughout. Dr. Bobo's

records are consistent, throughout the litigation and after the litigation, that he was treating the Claimant for a work injury. The Appellant is attempting to place the burden upon Ms. Stevenson to prove that an intervening injury or pre-existing condition did not exist. That is simply not the law in Mississippi. The law states that the burden of proof for any pre-existing or intervening injury defense is borne by the Appellant. *Marshall Durbin Co. v. Warren*, 633 So.2d 1006 (Miss. 1994). They presented no such evidence and the Commission cited no such evidence. [R.E. pg. 65-67]

It is established that Ms. Stevenson sustained an injury on July 13, 2003. That is admitted directly. Dr. Bobo treated her for this injury in January and February 2004. The causal connection of that treatment is admitted by the Appellant's actions of paying for said treatment, listing, and relying upon this treatment in the settlement of this claim. Dr. Bobo's treatment after the settlement is and was "**followup for low back pain**." This is a direct quote from the first line of Dr. Bobo's August 9, 2005 office visit, the first visit with him after the settlement. [R.E. pg. 00121] Further, Dr. Bobo's February 24, 2004 visit clearly states that Ms. Stevenson should "come on back anytime she needs to be checked out again." Finally, Dr. Bobo refers to the February 2004 visit, the visit that he was following up (and the visit that was admitted as being causally connected to the work injury) in stating that the last MRI was in February 2004.

The Appellant attempts to argue that the standing myelogram and CT scan (although the Appellant, conspiciously, does not name or mention this test anywhere in its brief) only shows evidence of continued worsening of Ms Stevenson's condition. This argument, however, contradicts itself! The condition that is worsening is a result of the admitted work related injury. [R.E. pg 00056] Even if assuming arguendo, that the

standing myelogram CT scan only shows a worsening of Ms. Stevenson's condition, this is still a change, that if material would be sufficient to reopen her claim. Also, the change in Ms. Stevenson's condition is not the only change in this case. As stated above, Dr. Bobo's changes in his opinions as to surgery and ability to do any work are certainly material changes. The Claimant has shown that the treatment rendered by Dr. Bobo in 2005 and 2006 is causally related to the admitted work injury and in fact was and is follow up for said work injury. The Appellant has not presented any evidence of an intervening injury.

The only evidence of possible involvement of preexisting injuries is from Dr. Harriman's records. Dr. Harriman, however, did not have the benefit of the **standing myelogram and CT scan**. The Mississippi Supreme Court held "expert opinion based on inadequate or incomplete examination does not carry as much weight and has little or no probative value compared to the opinion of an expert who made a through and adequate examination." *Marshall Durbin Co. v. Warren*, 633 So. 2d 1006, 1010 (1994). Therefore, Dr. Harriman's records would be of no probative value since he never reviewed the standing myelogram and CT scan.

## E. ACCORD AND SATISFACTION

The Appellant attempts to usurp the statutory powers of the Court under Mississippi Code §71-3-53 by arguing accord and satisfaction and the effects of a 9(i) settlement. This argument has been dealt with by this Court many times. In *Metal Trims Industries, Inc. and the Home Insurance Company v. Stovall*, The Court dealt with the same argument. *Stovall* had settled her claim on a 9(i) basis and signed a release. However, after her settlement she discovered that her condition had changed, and

petitioned to reopen her claim. The Defendant argued that the 9(i) settlement and release would preclude the reopening of the claim. The Court in answering this question held:

> Indeed, the singular work on Worker's Compensation in Mississippi, Dunn's *Mississippi Worker's Compensation Practice,* recognizes the ability of the Commission to reopen claims, despite a release signed by the claimant to the contrary:
>
> > "In compensation matters, the strict rules of the common law governing the finality of release contracts in the absence of fraud, do not apply, and the best interest of the injured worker is a paramount consideration. Therefore, a compromise release given by an employee when approved under a mistake of fact may still be vacated by the Commission. The compromise release may be vacated on the basis of a mistake as to the extent of disability, viewed in retrospect, or whenever it is shown that the settlement was unfair in fact and contrary to the best interest of the claimant."

Dunn, *Mississippi Worker's Compensation Practice,* Sec. 339 (3rd ed. 1982). *Metal Trims Industries, Inc. and the Home Insurance Company v. Stovall*, 562 So.2d 1293, 1296 (1990). Based on the above the Court allowed the reopening of the claim stating, " This Court has heretofore allowed the reopening of Worker's Compensation claims if justice so required." *Armstrong Tire & Rubber Co. v. Franks,* 242 Miss. 792, 137 So. 2d 141 (1962); *Graeber Bros., Inc. v. Taylor*, 237 Miss. 691, 115 So. 2d 735 (1959); *Shainberg's Black & White Store v. Prothro,* 233 Miss. 444, 118 So. 2d 862 (1960); *Yazoo Mfg. Co. v. Schaffer,* 254 Miss. 35, 179 So. 2d 784 (1965). The Appellant's argument of accord and satisfaction and effect of 9(i) settlement is without merit and the Order of the Lee County Circuit Court reopening this claim should be affirmed.

## F. THE DEPOSITION OF DR. HUNT BOBO

In an attempt to clear up any perceived ambiguity as to the causal connection of Dr. Bobo's recommended surgery and opinion as to permanent total disability,

concomitant with her Petition, Stevenson brought a Motion to Introduce New Evidence pursuant to Rule 9 of the Procedural Rules promulgated by the Workers Compensation, therein beseeching the Commission to afford her an opportunity to depose Dr. Bobo - solely at Stevenson's expense - so that Dr. Bobo's opinions could be clearly expressed, to remove any doubt as to whether the surgery was ever discussed with Claimant or even contemplated prior to settlement and the exact effects that the findings of the standing myelogram and CT scan had on his opinions regarding surgery and Ms. Stevenson's ability to work. The Commission denied Claimant's Motion on February 8, 2007, again with only a conclusory order stating that the motion was denied.[R.E. pg 00103]

The Lee County Circuit Court, realizing the import of Dr. Bobo's testimony, reversed the Commission's Order finding that its refusal to allow the deposition was abuse of discretion and reversible error. [R.E. pg 00164] The Lee County Circuit Court recognized that Dr. Bobo's testimony would conclusively answer all questions that continue to haunt this case. A truly impartial fact-finder would see quite readily that Dr. Bobo's insight in this matter is essential to its fair and ultimate resolution on at least these contentious points: 1.) Whether Dr. Bobo ever discussed a surgical option with Susan Stevenson prior to settlement of her compensation claim; 2.) Whether the abnormalities Dr. Bobo found present in Stevenson's low back, and which Bobo discovered only after the standing myelogram and CT scan were congenital, degenerative, or a result of Stevenson's July 2003 work-related injury; and 3.) whether Susan Stevenson's back problem and condition is indicative of her total and permanent disability from a compensation perspective. See e.g., *Pike County Board of Supervisors v. Varnado*, 912 So. 2d 477 (Miss. App. 2005) (holding that substantial evidence supported the Workers

Compensation Commission's finding that the claimant was totally and permanently disabled; claimant's physician testified that claimant could not hold any type of job and was totally physically disabled due to recurrent back pain and spinal stenosis ). The lower court, in so ruling, relied upon the Mississippi Supreme Court's decision in *Smith v. Container General Corporation*, 559 So. 2d. 1019, (Miss. 1987). In *Smith,* the Claimant, by and through her attorney, failed to introduce certain evidence concerning the Claimant's loss of wage earning capacity at the Administrative hearing of the case. A Motion to Introduce Additional Evidence was filed by Claimant and said motion was denied and the claim for benefits was denied. The Commission affirmed the Administrative Judge's Order which denied Claimant's claim for benefits and motion to introduce new evidence. The Mississippi Supreme Court, however, reversed this decision. In reaching this conclusion, the Court relied upon *Wells-Lamont Corporation v. Watkins*, 247 Miss. 379, 388 151 So. 2d 600, 604 (1963) and the Court's recognition that "the right to reopen proceeding for the purpose of introducing testimony inadvertently omitted has been liberally allowed, even in criminal trials or formal hearing (citations omitted). The *Smith* Court goes on to state that the Claimant's attorney simply failed to put on the necessary evidence to substantiate a claim for lost wages, but due to the critical nature of the evidence in question, the Court's traditional approach in allowing cases to be reopened, and the Commissioner's duty to fully develop the issues between the parties in a Workers Compensation dispute, "Justice requires that this matter be reconsidered," *Smith* 559 So. 2d 1019, 1024 (Miss. 1987).

In this case, Dr. Bobo's testimony was not inadvertently left out, his opinions changed after the settlement. He clearly stated in his pre-settlement records that surgery

was not indicated. All the parties and the Commission agreed that this was in fact Dr. Bobo's opinion. After the standing myelogram and CT scan, this opinion changed and he recommended and performed surgery on Claimant. Claimant has never had the opportunity to present Dr. Bobo's testimony, other than his medical records, on this issue after he reviewed the standing myelogram and CT scan results. Dr. Bobo is the only physician that could offer relevant testimony on this issue at question in this matter, not only is he the best source of the necessary evidence he is the only source of said evidence.

If the *Smith* court found that justice dictated that critical evidence inadvertently left out should be allowed, then surely this Court should hold that justice requires that Dr. Bobo's testimony, which was not available to the Claimant until after the settlement, should be allowed. In fact, as the *Smith* Court held, citing *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 61 So. 2d 789 (1953), that the Commission, as the ultimate trier of fact, had a **duty** to fully develop all of the issues between the parties in a Workers Compensation dispute. *Smith*, 559 So. 2d 1019, 1024 (Miss. 1987)(*emphasis added*). The Commission did not fulfill this duty in this case. The Lee County Circuit Court concluded that the Commission did not fulfill this duty and reversed that decision. The Order of the Lee County Circuit Court should be affirmed.

## CONCLUSION

The Claimant has conclusively established that a material mistake of fact was made by all involved in the settlement of her claim. Further, Stevenson has conclusively established that a material change in her condition took place in both her physical condition and her ability to earn wages following the settlement of her claim. As the Lee County Circuit Court held justice requires that this claim be reopened.

Further, the Commission has a "...duty to fully develop the issues between the parties in a Workers Compensation dispute..." as delineated in *Smith*. The Lee County Circuit Court determined that this Commission did not satisfy this duty. The Order of the Lee County Circuit Court should be affirmed.

This the 11th day of July, 2008.

SUSAN STEVENSON, APPELLEE

BY: _____
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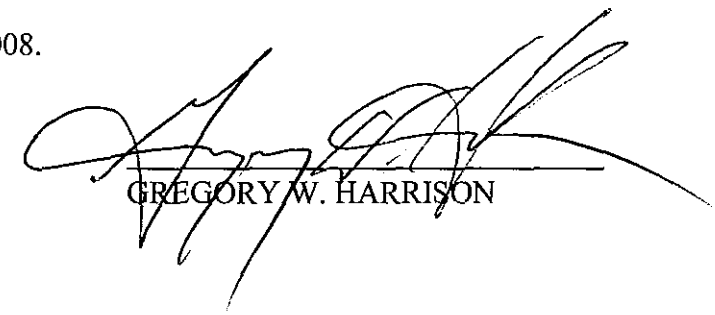
## CERTIFICATE OF SERVICE

I, Gregory W. Harbison, do hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to Honorable Paul S. Funderburk, at his address of Post Office Drawer 1100, Tupelo, MS 38802-1100 and William Armistead, at his address of P. O. Box 7120, Tupelo, MS 38802.

This the 11th day of July, 2008.

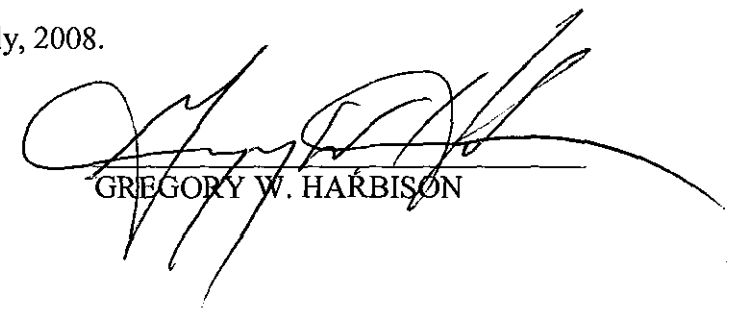


GREGORY W. HARRISON

## CERTIFICATE OF FILING

I, Gregory W. Harbison, the attorney for the Appellee, do hereby certify that I have this date deposited in the United States Mail addressed to the clerk the original and three (3) copies of the Brief of Appellee along with four (4) copies of the Appellee's Record Excerpts pursuant to Rule 25(a) of the Mississippi Rules of Appellee Procedure. Pursuant thereto, the Brief and Record Excerpts are being filed by First Class Mail postage pre-paid.

This the 11th day of July, 2008.



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