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 APPELLANT

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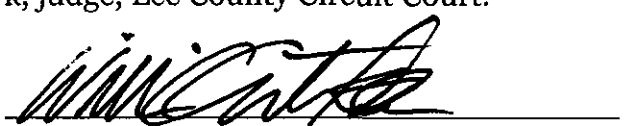
CERTIFICATE OF INTERESTED PERSONS

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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Susan Stevenson, appellee herein;
2. Gregory W. Harbison, attorney 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.



WILLIAM G. ARMISTEAD, SR.
ATTORNEYS FOR APPELLANT

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I. Whether the Circuit Court erred in reversing the Mississippi Worker's Compensation Commission and reopening the underlying action after the settlement of this cause.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On July 13, 2005, the Mississippi Worker's Compensation Commission ("Commission") approved a settlement of this action. On or about June 29, 2006, Appellee Susan Stevenson ("Stevenson" or "Claimant") filed a motion to reopen her claim, alleging a mistake in fact and/or change in conditions. A hearing was held, and subsequently the Administrative Law Judge ("ALJ") entered a "Motion Order" on or about September 18, 2006, denying the motion.

Claimant appealed the ALJ decision to the Full Commission on October 10, 2006, and filed a motion to depose Dr. Hunt Bobo on December 11, 2006. On February 8, 2007, the Full Commission affirmed the ALJ's decision and denied Claimant's motion to depose Dr. Bobo.

Claimant appealed the Full Commission decision to the Circuit Court of Lee County, Mississippi on or about March 2, 2007. On December 3, 2007, the circuit court reversed the findings of the Full Commission. From this order, Appellant North Mississippi Medical Center ("NMMC" or "Employer") filed a Notice of Appeal to this Court on December 28, 2007.

II. Statement of Facts

This case emanates from a back injury on or about July 13, 2003. Claimant filed her Petition to Controvert on December 1, 2003. [Record ("R.") 00006-00007]. The parties then conducted thorough discovery, which included obtaining all of the pertinent medical records and taking various depositions, culminating in a 9(i) settlement shortly before the hearing on the merits.

On July 13, 2005, the Commission approved the settlement [Appellant's Record Excerpts ("R.E.") Tab C 00061-00068], and Claimant signed a "Release of All Claims" on July 25, 2005. [R.E. Tab D 00086-00089].

On June 29, 2006, Claimant filed a motion to reopen her claim, alleging a mistake in fact and/or change in conditions. [R. 00070]. Specifically, Claimant contended that she required lumbar surgery by Dr. Bobo following the settlement. [Id.].

SUMMARY OF ARGUMENT

Claimant failed to meet her burden of proof that there was a mistake in a determination of fact in order to reopen her claim. All relevant evidence regarding the Claimant's physical ability and health was presented to the Commission before the settlement, and the Employer exhibited no misconduct in supplying the Commission with all relevant evidence before settlement approval.

Also, the Claimant cannot reopen this claim under a theory of a change in conditions. Again, all relevant information as to the Claimant's physical condition was presented to the Commission before the settlement was approved. The same conditions which Claimant now says changed were diagnosed long before the Order Approving Settlement, and these diagnoses were presented to the Commission before the settlement was approved.

Claimant has further failed to prove that her back condition in 2006 was causally related to the 2003 work injury.

The parties in this matter reached a full and fair accord and satisfaction. Reopening this claim would completely invalidate a contractual agreement that was mutually agreed to by the parties.

Further, the Commission did not abuse its discretion in refusing to allow Claimant to depose Dr. Bobo well after the settlement was finalized. The Commission had the evidence before it to consider (i.e., Dr. Bobo's records) that Claimant based her motion to reopen on.

The Circuit Court of Lee County erred in finding that the Commission abused its discretion in refusing to reopen this case.

ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

Under Mississippi law, "When the decision of the Commission is before the circuit court on intermediate appeal, that circuit court may not tamper with the findings of facts, where the findings are supported by a sufficient weight of the evidence." University of Southern Miss. v. Gillis, 872 So. 2d 60, 64 (Miss. App. 2003), quoting Natchez Equip. Co. v. Gibbs, 623 So. 2d 270, 274 (Miss. 1993). "The general rule is that the Workmen's Compensation Commission is the trier of facts, as well as the judge of the credibility of the witnesses, and a finding of the commission supported by substantial evidence should be affirmed by the circuit court. (Citations omitted). All questions of law and fact are reviewable by the circuit judge but he may not pass on the weight of the evidence where it is sufficient to support the commission's order." Roberts v. Junior Food Mart, 308 So. 2d 232, 234-35 (Miss. 1975); see also Pike County Board of Supervisors v. Varnado, 912 So.

2d 477, 480-81 (Miss. App. 2005) ("The standard of review in workers' compensation cases is limited. The substantial evidence test is used. The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. This Court will overturn the Workers' Compensation Commission decision only for an error of law or an unsupported finding of fact. Reversal is proper only when a Commission's order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law."); Hale v. Ruleville Healthcare Center, 687 So. 2d 1221, 1225 (Miss. 1997) (Commission's decision should not be overturned unless it is "arbitrary and capricious").

In short, the standard of review for this Court is whether the Commission abused its discretion in refusing to reopen this claim and in not allowing Claimant to depose Dr. Bobo. North Mississippi Medical Center v. Henton, 317 So. 2d 373, 376 (Miss. 1975). Claimant wholly failed to set forth sufficient evidence to enable an appellate court to reverse the Commission under this high standard, and the Circuit Court of Lee County erred in doing so.

B. THERE IS NO BASIS FOR REOPENING THIS CLAIM

Miss. Code Ann. Section 71-3-53 permits the Worker's Compensation Commission to reopen a claim only under limited circumstances; namely, on the ground of a "change in conditions" or because of a "mistake in a determination of fact." Specifically, the statute provides, in pertinent 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...

(1) MISTAKE IN DETERMINATION OF FACT

In order to re-open the claim under a mistake in a determination of fact, the Claimant must show "misconduct or failure of the Commission to consider a full and detailed account" regarding the Claimant's physical capacity at his occupation. J.R. Logging vs. Halford, 765 So. 2d 580, 585 (Miss. App. 2000). "It is clear that an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt...The kind of mistake that will warrant re-opening is ordinarily a mistake on the part of the fact finder, not on the part of one of the witnesses. (citation omitted)." Halford, 765 So. 2d at 585.

Claimant did not meet this burden of proof. All relevant evidence regarding the Claimant's physical ability and health was presented to the Commission before the settlement. The Employer exhibited no misconduct in supplying the Commission with all relevant evidence before settlement approval. In fact, Claimant's counsel signed the Order Approving Settlement [R.E. Tab C 00068], indicating his approval of the facts represented therein. The Commission considered all of the evidence regarding the Claimant's condition and approved the settlement.

(2) CHANGE IN CONDITION

Also, the Claimant cannot reopen this claim under a theory of a change in conditions even though the Claimant continues to allege problems with her back. All relevant information on the Claimant's physical condition was presented to the Commission before the settlement was approved. [R.E. Tab B 00051-00060].

Claimant now avers a change in condition because Dr. Bobo (who Claimant saw before the settlement) purportedly performed a surgery on February 16, 2006.[1] However, these same conditions or precursors to these conditions were diagnosed long before the Order Approving Settlement, and these diagnoses were presented to the Commission before the settlement was approved. Claimant's "new evidence" demonstrates only a possible continued deterioration of Claimant's physical condition[2], not a change in conditions warranting the re-opening of her claim. See Davis v. Scotch Plywood Co. of Miss., 505 So. 2d 1192, 1198 (Miss. 1987) (wherein Claimant filed motion to re-open based on results of thermogram which corroborated the findings of the physician. The court stated, "The thermogram did not show any change in condition other than what Dr. Cook testified. Therefore, the thermogram results were not evidence of a change in condition, but were merely new evidence.") (Emphasis Added).[3]

In Halford, supra, the Mississippi Court of Appeals held, "The burden is upon the party alleging a change in a Claimant's medical condition to prove that change by a preponderance of the evidence. (citations omitted)." Halford, 765 So. 2d at 584; see also Henton, 317 So. 2d at 375-76 (Miss. 1975) ("The burden of proof for showing a change in conditions is on the party, whether Claimant or Employer, asserting the change. (citation omitted). If a party cannot establish by a preponderance of the evidence that the Claimant's condition has changed, then the petition to reopen should be denied and the original order maintained...Our interpretation of the Act is that the legislature did not

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[1] The operative report was not submitted or reviewed by the Commission.

[2] Well before the Order Approving Settlement, Dr. Bobo opined on February 24, 2004 that Claimant had arthritis which will probably evolve into stenosis "with age" and may require surgery in the future. [R.E. Tab G 00119-00120].

[3] As the ALJ noted, "Claimant has not proven her condition in 2006 was a change from her work related condition at the time she settled in 2005. Further, claimant was aware of her back injury at the time of her settlement, and she had received medical treatment for her back injury." [R. E. Tab E 00091].

intend that a Claimant could employ this statute as a strategy or device to gain a second day in court.")

In the case sub judice, Claimant utterly failed to satisfy her burden of proof on this issue.

(3) CAUSAL CONNECTION

Claimant argues that the condition for which Dr. Bobo treated her in 2006 is one and the same as before the settlement. However, it is well settled under Mississippi law that the burden of proof on causal connection rests squarely on the shoulders of the Claimant. Vardaman S. Dunn, Mississippi Workmen's Compensation, §268 (3d ed. 1982). This burden is not satisfied by simply making bald assertions that the back condition for which Claimant was treated three years after the work accident is related.

To the contrary, Dr. Bobo's records are completely void of any opinion that his treatment in 2006 was related to the work injury.[4] As noted supra, Dr. Bobo himself expressly stated on February 24, 2004 (prior to the settlement) that Claimant had arthritis which will probably evolve into stenosis "with age" and may require surgery in the future. [R.E. Tab G 00119-00120].

Further, prior to the settlement, Dr. Bobo reviewed a lumbar MRI which showed a "congenitally narrow spinal canal from L3-5 with an L4-5 lateral disk protrusion." (Emphasis Added) [Id.].

Also, prior to the settlement, Dr. Mark Harriman, an orthopedic surgeon, opined in his deposition that the work injury was a "temporary aggravation," and that future

[4] As the ALJ noted, "There was no indication in Dr. Bobo's notes as to the causal connection between claimant's back condition which warranted surgery and her 2003 work accident." [R. E. Tab E 00090]. The Circuit Court's finding that Claimant was seen by Dr. Bobo on September 27, 2005 for "her work related back injury" [R.E. Tab H 00162] has absolutely no basis in the record.

restrictions were necessary due to Claimant's pre-existing surgeries.[5] [R.E. Tab C 00063-00064].[6]

The Circuit Court of lee County relied on Marshall Durbin Co. v. Warren, 633 So.2d 1006 (Miss. 1994) for its finding that the Employer has the burden of proof as to causal connection "between the work related injury and [Claimant's] 2006 injury," and that the Employer had presented no evidence of any subsequent intervening injury from the date of settlement until the January 2006 visit with Dr. Bobo. [R.E. Tab H 00163].

However, Warren did not involve a motion to reopen, which places the burden of proof on the movant. Further, the annotation to Section 166 of Dunn (cited in Warren) cites M. T. Reed Constr. Co. v. Garrett, 164 So. 2d 476 (Miss. 1964). In Garrett, the court stated,

> When a preexisting disease or infirmity of an employee is aggravated by a work- connected injury, or if the injury combines with the disease or infirmity to produce disability, the resulting disability is compensable..."A corollary to the rule just stated is that when the effects of the injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable." (Emphasis Added).

Id. at 477.

Finally, in Henton, supra, the Mississippi Supreme Court stated, "a change in conditions is usually considered to mean a change of physical conditions due to an original injury which affects an employee's earning capacity or ability to work. (citation omitted)." (Emphasis Added) Henton, 317 So. 2d. at 375. The court concluded, "Without substantial proof to establish that the Claimant was rejected for employment or refused employment

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[5] Claimant had prior lumbar surgeries in 1989 and 1998. [R.E. Tab C 00062].

[6] The Employer raised pre-existing conditions and/or intervening causes as an affirmative defense in its Answer to the Petition to Controvert. [R. 00010-00011].

because of her disability, we are unable to say the Commission abused its discretion when it denied the petition to reopen due to a change in conditions, pursuant to Miss. Code Ann. §71-3-53 (1972)." Id. at 376. In the case sub judice, Claimant offered no evidence that she was refused employment.

In short, Claimant failed to prove that the back condition in 2006 was causally related to the 2003 work injury.

(4) ACCORD AND SATISFACTION

The Mississippi Supreme Court requires four elements for a valid accord and satisfaction. Royer Homes of Mississippi, Inc. vs. Chandeleur Homes, Inc., 857 So. 2d 748, 753 (Miss. 2003). First, value must be offered for "full satisfaction of demand." Id. at 754. Second, the offer must contain "acts and a declaration which amounts to a condition that if everything offered is accepted, it is accepted in satisfaction." Id. Third, the offered party understands that if he accepts, he accepts according to the conditions. Id. Fourth, the offered party must accept the offer. Id. Accord and satisfaction requires a "meeting of the minds of the parties. (citation omitted)." Id.

On or about July 25, 2005, the Claimant, in exchange for the sum of $15,000, signed a Release forever discharging any future claims she could possibly have against the Employer. [R. E. Tab D 00086-00089]. The Release states in pertinent part:

> I [Claimant] do hereby release, acquit and forever discharge North Mississippi Medical Center, Employer... from any and all claims, demands, actions, rights, benefits, and suits, including any claim for medical expenses which I may now or hereafter have under the Mississippi Workers' Compensation Act or otherwise on account of injuries sustained [in the subject work accident]...[paragraph 1] (emphasis added).
>
> I [Claimant] hereby agree that as further consideration and inducement for this compromise settlement that this

> settlement shall apply to unknown and unanticipated injuries and damages resulting from said accidents, as well as those now disclosed...[paragraph 2] (emphasis added).
>
> I [Claimant] covenant not to assert any further claims against the parties herein released, directly, or indirectly, and not to attempt to reopen this claim in any manner and do hereby waive and relinquish any right I might have to reopen. [paragraph 4] (emphasis added).

Further, the Order Approving Settlement provides, in pertinent part:

> The Claimant expressly recogniz[ed] that the Employer shall have no further, future or additional liability for the payment of any medical bills associated with the accidents made the basis of this claim... [R. E. Tab C 00065] (emphasis added).
>
> The Claimant represents that she has some degree of disability as a result of the accidents, but her claims of disability are denied and disputed by the Employer and that, in any event, the extent of her disability, if any, as a result of any accidents is not capable of exact determination of the extent thereof... [Id. at 00066].
>
> [C]laimant has agreed to accept ... $15,000 as a lump sum compromise of any and all claims and demands for disability, medical and compensation benefits... [Id.].
>
> The Claimant represents ... it being understood and provided that the payment of said sum will be received in full compromise and settlement of any and all demands whatsoever on account of said injuries heretofore received in the employment of said Employer and in full settlement, compromise and satisfaction of any and all claims, past, present and future, for compensation benefits, including any and all medical expenses and other items of expense... [Id. at 00067] (emphasis added).
>
> [The Commission ordered] that said payment when so made and received by the Claimant, shall be in full compromise settlement and satisfaction of any and all claims and demands, present or future, against said Employer on account of any accidents and injuries suffered or sustained by the Claimant in the course of her employment by said Employer, and said payment shall be in full compromise settlement and satisfaction of any and all

> claims to benefits of any kind and character under the Mississippi Workers' Compensation Act and arising out of or in any way connected with the employment of the Claimant prior to this date by the Employer. [Id. at 00067-00068]. (emphasis added).

The parties in this matter reached a full and fair accord and satisfaction. First, the Employer offered $15,000 to the Claimant to settle her claim, an offer accepted by the Claimant. Second, all parties were informed that acceptance of the settlement and release would discharge any future claims against the Employer. Third, the Claimant was aware that acceptance of the settlement award would subject her to compliance with the settlement and release conditions. Fourth and finally, the Claimant accepted the settlement award and freely signed the Release. There was a clear "meeting of the minds" regarding the settlement and release of this claim. Reopening this claim would completely invalidate a contractual agreement that was mutually agreed to by the parties.

(5) EFFECT OF 9(i) SETTLEMENT

It should also be noted that this settlement was based on Section 9(i) of the Act, as amended. The Mississippi Supreme Court has been very reluctant to reopen claims following 9(i) settlements. For example, in Armstrong Tire & Rubber Co. v. Franks, 137 So. 2d 141 (Miss. 1962), the Court allowed a claim to be re-opened after a 13(j) settlement. However, the Court distinguished this type of settlement from a 9(i) settlement as follows:

> Whenever the Commission determines that it is for the best interest of a Claimant, the liability of the Employer may be discharged by the payment of a commuted lump sum. The Commission shall be the sole judge as to whether a lump sum payment shall be to the best interest of the worker or his dependents. This is simply a mathematical computation of the present value of future payments. Although sometimes called a lump sum "settlement", Sec. 13(j) does not provide for a determination of the amount due by an agreement of the parties. It is not a compromise settlement. Claimant's application for a "lump sum settlement" expressly stated that it

> was under Sec. 13(j). [The Employer and carrier] were not parties to this application. The commission's order approving the lump sum payment was also based upon Sec. 13(j). It assumes the existence of a particular obligation...
>
> On the other hand, a compromise settlement of a claim is dealt with in a separate section, for a different purpose, and with specific limitations. Sec. 9(i)...provides that rules of the Commission shall govern compromise payments "where the prescribed schedules are not applicable." The Commission may approve a compromise settlement or payment in its discretion "where it is not possible to determine the exact extent of disability, as for example in certain injuries to the back or head...The present case simply involves a reopening of a commuted lump sum payment under Sec. 13(j), not a compromise settlement under Sec. 9(i)...This was in no respect a compromise settlement under Sec. 9(i). (Emphasis Added).

Id. at 145-146.

Also, in Dixon v. Green, 127 So. 2d 662 (Miss. 1961), a case involving a 9(i) settlement, the Mississippi Supreme Court quoted Section 9(i) and held,

> The prescribed schedules were not applicable here. The Commission found it was not possible to determine the exact extent of disability to Claimant's back and head. The record reflects that [Claimant] was well aware of the existence of a doubtful claim as to whether he still had a compensable disability, connected with the accident; or whether the employment injury had ended and there remained only a condition pre-dating the accident. One of the members of the Commission talked with Claimant about the effect of a settlement. He knowingly signed the application for a compromise settlement, and the agreement, with full cognizance of its import. The Commission reviewed in detail the petition for settlement, and approved it. [Claimant] failed to show any fraud by [Employer/carrier] or unfair advantage by them. He knew what he was doing. Hence the Commission was manifestly correct in refusing to set aside its order of approval and the compromise.

Id. at 664.

In the case sub judice, the Claimant represented to the Commission at the time of settlement that she "has some degree of disability as a result of the accidents, but that her

claims of disability are denied and disputed by the Employer and that, in any event, the extent of her disability, if any, as a result of any accidents is not capable of exact determination of the extent thereof." [R.E. Tab C 00066]. Claimant further advised the Commission that she had retained Mr. Harbison as her personal attorney "and has fully advised and consulted with said attorney as to all matters pertinent to the claims herein..." [Id. at 00067]. Mr. Harbison then signed the Order Approving Settlement as "agreed and approved." [Id. at 00068]. Dixon controls this issue, and Claimant is not entitled to reopen her claim.

C. THERE IS NO BASIS FOR ALLOWING CLAIMANT TO DEPOSE DR. BOBO

After the ALJ denied Claimant's motion to reopen this claim in September 2006, Claimant not only appealed to the Full Commission, but also filed a motion to allow her to depose Dr. Bobo. [R. 00094-00097]. In other words, since the ALJ found that the medical records of Dr. Bobo were inadequate to show a mistake in fact or a change in conditions, Claimant hoped to "create" such evidence by deposing Dr. Bobo.[7]

The Circuit Court of Lee County found that the Commission's refusal to grant the Claimant's motion to introduce evidence was reversible error, citing Smith v. Container General Corp., 559 So. 2d 1019 (Miss. 1987), and finding that the Claimant never had an opportunity to present this issue to the Commission "since Dr. Bobo changed his opinion." [R.E. Tab H 00164].[8]

In Smith, the employee's attorney failed to put on evidence to substantiate his client's claim for lost wages at the hearing on the merits. The Court remanded the case to

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[7] This request by Claimant is basically a concession that there was no "mistake of fact" since the Commission clearly did not have the deposition of Dr. Bobo at the time of settlement approval.

[8] Once again, it is unclear how the circuit court finds that Dr. Bobo "changed" his opinion. Apparently, the circuit court is referring to the post-settlement surgery. However, as stated earlier, Dr. Bobo opined in February 2004 (well before the settlement) that surgery was a possibility. [R.E. Tab G 00119-00120].

the Commission with instructions to reopen the case to allow submission of this additional proof.

However, in the case sub judice, there was no attorney error. All of the evidence on hand was presented to the Commission before settlement, including Dr. Bobo's records. Smith is further distinguishable because it did not involve a request to set aside a compromise settlement.

The Circuit Court also stated that a deposition of Dr. Bobo "would clear up any evidential matters as to 1) whether Dr. Bobo ever discussed surgical option with Susan Stevenson prior to settlement of her compensation claims, 2) whether the abnormalities Dr. Bobo found present in Stevenson's low back, which Bobo discovered only after the standing myelogram and CT scan, were congenital, degenerative, or a result of the 2003 work related injury, and 3) whether Susan Stevenson's back problem and condition is indicative of her total and permanent disability from the compensation prospective." [R.E. Tab H 00163].

These questions were already answered based on the record alone prior to the settlement. First, on February 24, 2004 (well before the settlement), Dr. Bobo stated that he "does not anticipate any surgery until [Claimant] develops spinal stenosis with age" and that "as arthritis progresses, she will probably develop spinal stenosis and need a laminectomy." (Emphasis Added).[9] [R.E. Tab G 00120].

Secondly, regarding the congenital/degenerative issue, Dr. Bobo clearly stated prior to the settlement that Claimant would develop stenosis "with age" and that as her "arthritis" progresses, she will probably develop spinal stenosis. [Id.]. In fact, it was "high

[9] This medical record clearly contradicts the Circuit Court's finding that "at the time of settlement, all of the doctors thought no surgery was necessary . . . " [R.E. Tab H 00163].

grade stenosis" that was found on the CT scan by Dr. Bobo following the settlement on January 13, 2006. [Id. at 00123].[10]

Dr. Bobo further opined prior to the settlement that the MRI scan showed "congenitally" narrow spinal canal from L3-L5 with an L4-5 lateral disc protrusion and scar tissue. [R.E. Tab G 00119-00120].

In addition, Dr. Mark Harriman, an orthopedic surgeon, testified prior to the settlement that the work injury was only a "temporary" aggravation, and that future restrictions were necessary due to Claimant's pre-existing surgeries. [R.E. Tab C 00063-00064].

Finally, in February 2004, Dr. Bobo stated, [N]o surgery anticipated for [Claimant's] current problem and from any of the work related lifting injuries or physical therapy injuries." (Emphasis Added). [R.E. Tab G 00120]. Instead, Dr. Bobo only anticipated surgery being necessitated by the development of stenosis due to age and the progression of her pre-existing and unrelated arthritis. [Id.]. Thus, it is apparent on the face of the records provided to the Commission prior to settlement that the February 2006 surgery was necessitated by factors completely unrelated to the work injuries.

Thirdly, regarding the disability issue, Claimant was already restricted prior to the settlement. On February 24, 2004, Dr. Bobo stated, "I do not think [Claimant] will ever be able to return back to housekeeping or manual labor". [R.E. Tab G 00119].[11]

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[10] The Circuit Court stated that Dr. Bobo found "new evidence" of back problems in January 2006. [R.E. Tab H 00162]. Again, however, the January 13, 2006 office note states that the CT scan showed "high grade stenosis" [R.E. Tab G 00123], which Dr. Bobo clearly said was unrelated prior to the settlement. [Id. at 00120].

[11] Again, this medical record clearly refutes the Circuit Court's finding that "[p]rior to the diagnostic test [in 2006], Dr. Bobo was of the opinion that the Claimant could perform all of the job duties." [R.E. Tab H 00163].

In addition, due to Claimant's chronic back pain following the pre-existing surgeries, Dr. Harriman thought some restrictions were reasonable; however, he did not believe these were related to the July 2003 accident. [R.E. Tab C 00064].

In short, the questions the Circuit Court had were already answered by the records available prior to the settlement.

Further, to allow Claimant to depose Dr. Bobo would lead the parties and Commission down an undesirable path. For example, Dr. Bobo's deposition testimony could lead to a request for a second or third medical opinion regarding the necessity of surgery, etc., resulting in a never-ending, perpetuation of this litigation.

Also, the Employer avers that this request by Claimant was unduly burdensome. The Employer has already incurred significant legal costs in defending the motion to reopen (which Claimant promised not to file), the appeals to the Commission level and to the Lee County Circuit Court, and now to this Court. A deposition would only serve to increase those costs.

The Commission already had the evidence before it that Claimant based her motion to reopen on (namely, Dr. Bobo's records).[12] Taking Dr. Bobo's deposition would merely have been a duplicative (and expensive) exercise.

CONCLUSION

"It is discretionary with the commission whether or not it will reopen a case. The statute provides that the commission 'may' reopen a case and not that it shall do so, and the action is not mandatory. ... Thus, after the hearing is closed and a decision is rendered by the administrative judge, the commission is not required to reopen the case on a plea of

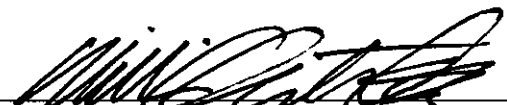
[12] Prior to the Motion Order in September 2006, the ALJ allowed Claimant to submit all of Dr. Bobo's medical records post-dating the settlement. [R.E. Tab G 00114-00125].

newly discovered evidence. ..." Dunn, supra, at §336. As set forth herein, Claimant completely failed to set forth evidence to satisfy her burden of proof in order to re-open this claim and/or allow for the taking of Dr. Bobo's deposition. The Circuit Court clearly over-reached in finding an abuse of discretion by the Commission.

For the reasons stated herein, the Employer respectfully requests that the Order of the Lee County Circuit Court be reversed and that the decision of the Full Commission be reinstated.

Respectfully submitted, this the 9th day of May, 2008.

NORTH MISSISSIPPI MEDICAL CENTER, Appellant

BY: 
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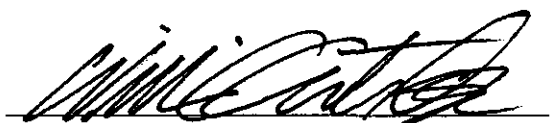
CERTIFICATE OF SERVICE

I, William G. Armistead, Sr., one of the attorneys for the Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellant, on the following, by placing said copy in the United States Mail, postage prepaid, addressed as follows:

Gregory W. Harbison, Esq.
Attorney at Law
204 W. Main Street
Tupelo, MS 38804

Hon. Paul S. Funderburk
Circuit Court Judge
Post Office Drawer 1100
Tupelo, MS 38802-1100

DATED, this the 9th day of May, 2008.



WILLIAM G. ARMISTEAD, SR.

CERTIFICATE OF FILING

I, William G. Armistead, Sr., one of the attorneys for the Appellant, 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 Appellant along with four (4) copies of the Appellant's Record Excerpts pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure. Pursuant thereto, the Brief and Record Excerpts are being filed by First Class Mail with postage pre-paid.

Dated, this the 9th day of May, 2008.

WILLIAM G. ARMISTEAD, SR.