2008-WC-00858

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO.:2008-WC-00858

RUTH WOOTEN — APPELLANT

VS.

FRANKLIN CORPORATION
AND
LIBERTY MUTUAL INSURANCE COMPANY — APPELLEES

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 disqualifications or recusals.

1. Ruth Wooten
   Claimant/Appellant

2. Don O. Gleason, Jr., Esquire
   Counsel for Claimant/Appellant

3. Franklin Corporation
   Employer/Appellee

4. Liberty Mutual Insurance Company
   Carrier/Appellee

5. George E. Read, Esquire
   Ginger M. Robey, Esquire
   Daniel Coker Horton & Bell, P.A.
   Counsel for Employer and Carrier/Appellees

Respectfully Submitted,

FRANKLIN CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY, APPELLEES/EMPLOYER AND CARRIER

BY: George Read
GEORGE E. READ
DANIEL COKER HORTON & BELL, P.A.

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STATEMENT OF THE ISSUES

Whether the Full Commission, as affirmed by the Circuit Court, correctly determined that Claimant is not entitled to permanent disability benefits.

I. STATEMENT OF THE CASE

A. Nature of the case and the course of the proceedings and its disposition in the Court below.

This matter is before the Court pursuant to the jurisdiction conferred upon the Circuit Court and the Mississippi Supreme Court by MCA § 71-3-51 (1972) to hear appeals of decisions of the Full Commission.

On September 7, 2004, Ruth Wooten [hereinafter "Claimant"] filed a Petition to Controvert, alleging that she developed right carpal tunnel syndrome and sustained injuries to her body as a whole on or about February 16, 2004, as a result of the repetitive nature of her job with Franklin Corporation [hereinafter "Employer"]. *Commission's Original File* [hereinafter "*F*"] *at p. 1.* Employer and its insurance carrier, Liberty Mutual Insurance Company [hereinafter "Carrier"] filed an Answer on September 30, 2004, admitting the injury to Claimant's right wrist, but disputing the extent of any disability. *F at p. 2.*

A hearing on the merits was held on December 12, 2005, with Administrative Judge Cindy Wilson presiding. On February 28, 2006, the Administrative Judge issued an Order finding that Claimant reached maximum medical improvement no later than September 23, 2004, after which Claimant was no longer entitled to temporary disability benefits. *F at pp. 72-79.* Employer and Carrier were awarded a credit for any temporary benefits paid subsequent to September 23, 2004. The Administrative Judge further held that Claimant suffered no loss of industrial use as to her right upper extremity and was therefore not entitled to any permanent disability benefits. *Id.*

On March 6, 2006, Claimant filed a Petition for Review before the Full Commission, appealing the Order of the Administrative Judge. *F at pp. 80-82.* The Full Commission [hereinafter "Commission"] affirmed the Opinion of the Administrative Judge by Order dated August 4, 2006. *F at p. 83.* The Claimant subsequently filed her Petition for Review before Circuit Court of

Chickasaw County, First Judicial District, on September 5, 2006, asking that the Commission's decision be overturned. *F at pp. 84-85.* Circuit Court Judge Andrew K. Howorth, entered an Order dated April 15, 2008, affirming the decision of the Commission. See *Appellant's Record Excerpt at pp. 2-3.* Claimant subsequently filed her appeal to this Honorable Court.

B. Facts relevant to the issues presented for review.

Claimant was born on July 6, 1952, and completed the 11th grade at Clay High School. *Transcript* [hereinafter "*T*"] at *p. 7.* She dropped out of school in the 12th grade and later obtained her GED. *Id.* Claimant's work history includes working as a sewer at Monty Glove for approximately four years and at Garan's Manufacturing for a few months. *T at pp. 8-9.* She also worked at PEP Industries as a quality inspector for seven years, as a salesclerk at Howard's Department Store and at Bell Layman's Department Store and at Ark-Ell Springs for five years, sewing waterbed mattresses. *T at pp. 9-11.*

Claimant began working for Employer herein as a line worker in 1999. *T at p. 12.* She testified that this was a repetitive job, requiring her to remove metal parts from a bin, place the parts into a machine and then hit a pedal which caused a rivet to come down into the middle of the parts, holding them together. *T at p. 13.* She would then push the parts down the line to the next worker. *Id.* She indicated that this job required her to lift five to ten pounds. *Id.* After about a year and a half at that job, Claimant was moved to the position of a rivet machine operator. *T at pp. 13-14.* She was responsible for removing seat plates from a bin and placing them into a machine. *T at p. 14.* She would then insert a pin into the machine and strike a pedal and place the plate back into the bin. *Id.* Each seat typically weighed 2.5 or 2.8 pounds. *T at pp. 14-15.* Claimant testified that workers often lifted multiple parts at one time in order to keep up with production. *T at p. 18.* Claimant also testified that occasionally a defective seat would be returned down the line, weighing a maximum

of five pounds, which she would have to reassemble. *T at p. 15.* Claimant further testified that she was required to move the bins containing the metal parts but admitted that the bins were on rollers. *T at pp. 16-17.* Claimant was working as a rivet operator at the time of her February 16, 2004 work injury. *T at p. 14.*

Claimant initially sought treatment for complaints of right wrist pain from Dr. Bobby Smith at MedServ Clinic on February 19, 2004. *General Exhibit* [hereinafter "*Gen Ex*"] 2 (pages of *Gen Ex 2* unnumbered). Dr. Smith placed her on restricted work duty and referred her to Dr. Alex Bibighaus for further evaluation. *Id.*

Claimant presented to Dr. Alex Bibighaus, orthopedic surgeon, on February 20, 2004, and was diagnosed with first dorsal extensor compartment tenosynovitis involving the right hand. *Gen Ex 3* (pages of Gen Ex 3 unnumbered). After no improvement from conservative treatment, including therapy, bracing and medications, Dr. Bibighaus recommended surgical intervention. *Id.* First dorsal extensor compartment release was performed on April 2, 2004. *Id.* On April 13, 2004, Dr. Bibighaus stated that Claimant was capable of working, at least at a limited duty position. *Id.* Dr. Bibighaus opined that Claimant reached maximum medical improvement on May 21, 2004, and found no reason why Claimant could not return to work. *Id.* Claimant was scheduled to return for a follow up evaluation with Dr. Bibighaus on July 9, 2004, but failed to keep the appointment. *Id.* In response to an inquiry drafted by Claimant's counsel regarding maximum medical improvement, restrictions, impairment, etc., Dr. Bibighaus responded that he could not address these issues due to Claimant's failure to follow up as instructed. *Id.* Therefore, Claimant was returned to work without him placing any restrictions as of May 21, 2004.

Upon returning to work after her February 2004 injury, Claimant was placed in the poly plant, gluing pieces of poly together with a glue gun. *T at p. 18.* She stated that she would

sometimes use her left hand to operate the glue gun. *T at p. 21.* However, on cross-examination, Claimant admitted that only one hand was required to operate the glue gun. *T at p. 40.* She testified that she performed that job for approximately nine weeks, making less money than at her pre-injury job. *T at p. 9.* Claimant stated that the job caused her hands to swell, and at that point, she sought treatment from Dr. Thorderson. *T at p. 27.*

Claimant presented to Dr. Kurt Thorderson on July 15, 2004, with continued complaints of right wrist pain. Gen Ex 4. Claimant had previously treated with Dr. Thorderson in 2000, with surgical release of left middle trigger finger performed, and in 2003 for a broken right thumb and left trigger thumb. *Id. at pp. 5-6.* When Claimant returned to Dr. Thorderson in July, 2004, he opined that she suffered from flexor carpi radialis tunnel syndrome. *Id. at p. 7.* He proceeded with a cortisone injection. *Id.* Dr. Thorderson released Claimant at maximum medical improvement on September 23, 2004, with no impairment rating. *Id. at p. 8.* However, he gave Claimant a two pound permanent weight restriction of the right hand. *Id. at p. 9.*

In his deposition testimony given on June 6, 2005, Dr. Thorderson explained that in his opinion, without such a significant weight restriction, Claimant was "going to just keep coming back" and "going to keep having the claims." *Id. at p. 10.* On cross examination, Dr. Thorderson admitted that he had no specific reason for assigning the two pound weight restriction. *Id. at p. 11.* He stated that he "picked a light amount knowing that she had seen me several times for other sort of tendinitis-related problems. . . . . so I just kept it light." *Id.* He further admitted that the weight restriction could have been five or three pounds, and that he did not have a problem with Claimant lifting three pounds. *Id.* Dr. Thorderson also explained that he could not distinguish whether the restrictions he assigned were related to Claimant's work injury versus her chronic tendinitis of her arm. *Id. at p. 15.* He stated that he was "trying to treat the patient as a whole." *Id.*

When Claimant was released by Dr. Thorderson to return to work in September 2004, she advised Scott Shempert at Franklin that Dr. Thorderson gave her a two pound weight restriction. *T at p. 29.* Claimant testified that Mr. Shempert told her that there was no work available for her within the two pound restriction and that all he could do was "send her home." *T at p. 24.* Claimant opined that she is currently unable to perform any job that she has ever done for Employer herein. *T at p. 30.*

Pursuant to an Order from the Administrative Judge, Claimant presented to Dr. Mark Harriman on April 5, 2005, for an Independent Medical Evaluation. Gen Ex 1. Dr. Harriman opined that Claimant had a "very nice result from her de Quervain's release" and presented with a normal examination, with no swelling detected. *Id. at p. 2.* Further, Claimant had no ongoing signs of tendinitis or limitations of the right upper extremity. *Id. at pp. 2-3.* Dr. Harriman noted that "it would be extremely unusual to have a patient with a lifetime two pound maximum lifting restriction after de Quervain's surgery." *Id. at p. 3.* He further explained that the normal course of treatment would be to release Claimant to full duty without restrictions, which he concluded to be applicable to Claimant herein. *Id.*

On cross-examination, Claimant reviewed the job description of a rivet machine operator and stated that the description was accurate, with the exception that she was required to move the bins containing the metal parts. *T at p. 34.* She admitted that she had never been given work restrictions for her left hand and admitted that Dr. Thorderson is the only physician that has assigned work restrictions for her right hand. *T at pp. 35, 40.* Claimant testified that she had previously suffered from bilateral carpal tunnel syndrome and underwent bilateral CTS release, in addition to the prior treatment she received from Dr. Thorderson for trigger fingers and her broken thumb. *T at pp. 40-41.* Further, Claimant testified that Employer provided work for her while Dr. Bibighaus had her

on restricted work duty, and that Employer continuously provided work for her up until the time Dr. Thorderson gave her the two pound weight restriction of the right upper extremity. *T at pp. 42-43.* Claimant admitted that she has not contacted the Employer since that time seeking employment. *T at p. 42.*

Employer and Carrier called Lanny Glover at the hearing on the merits to testify on behalf of the Employer. Mr. Glover is employed as the general manager of the mechanism division for Employer herein. *T at p. 51.* He testified that he supervised Claimant when she was employed as a rivet machine operator. *Id.* Mr. Glover prepared the job description for a rivet machine operator. He testified that the parts involved in that job weighed either 2.5 or 2.8 pounds. *T at p. 52.* Mr. Glover testified that, contrary to Claimant's testimony, rivet operators are not required to lift multiple finished products at one time in order to meet production requirements. *T at p. 59.* He stated that some workers simply choose to do so. *Id.* Mr. Glover confirmed that rivet operators would sometimes have to move the bins of metal parts, but further confirmed that the bins were on rollers and could be moved with one hand, although he had never seen anyone do so. *T at p. 54.* Further, Mr. Glover testified that there were people available to help move the bins if needed. *T at p. 55.* Mr. Glover confirmed that it is sometimes necessary for a worker to reassemble a defective product. *Id.*

Mr. Glover testified that Claimant reported her work injury to him and an accident report was completed. *T at p. 56.* Claimant was then referred to the safety director, per company policy. *Id.* Upon returning after being released by Dr. Bibighaus, Mr. Glover stated that Claimant was placed in the poly department, which he does not supervise. *T at p. 58.* He stated that Claimant's position as a rivet operator had been filled due to the length of time she had been off work. *Id.* He went on to state that had a position in the rivet department subsequently come open, then Claimant could

have been transferred back under his supervision. *T at pp. 58-59.* Further, Mr. Glover testified that had Claimant returned to work in July, 2004, with no restrictions or even with a three pound weight restriction, there would have been a job available for her. *T at p. 61.*

On cross-examination, Mr. Glover testified that the job description for the rivet operator was a general description and was not very detailed. *T at p. 62.* He further confirmed that there are rivet operators that only move one product at a time as opposed to others who choose to stack multiple products. *T at p. 65.* Mr. Glover testified that he had been Claimant's supervisor for about five years and that she performed her job well during that time. *T at pp. 67-68.*

II. SUMMARY OF THE ARGUMENT

The Full Commission's findings are supported by substantial evidence and the applicable law, and should therefore be upheld. It is undisputed that Claimant suffered a compensable work injury to her right upper extremity on February 16, 2004. Employer and Carrier herein provided Claimant with indemnity and medical benefits until she was released to return to work by Dr. Bibighaus, her treating physician. Dr. Bibighaus assigned no permanent impairment or work restrictions, and Employer returned the Claimant to work. Claimant subsequently sought treatment from Dr. Thorderson, with whom she had previously treated for a number of unrelated injuries to her right upper extremity. Dr. Thorderson treated Claimant conservatively, assigned no permanent impairment but released Claimant to return to work with a permanent two pound lifting restriction. Claimant was seen by Dr. Harriman for a Commission ordered medical evaluation. Dr. Harriman found that Claimant could return to work with no rating or restrictions.

The Administrative Judge considered the evidence presented at the hearing on the merits, which included testimony from the Claimant, Danny Glover (the Employer representative), Dr. Bibighaus (the treating physician), Dr. Harriman (the Commission chosen IME doctor), and Dr.

Thorderson (whom Claimant consulted for a second opinion), and denied Claimant's claim for permanent disability benefits. The Administrative Judge's Order was subsequently affirmed upon review by the Commission. The Circuit Court subsequently agreed that the Commission's findings were supported by the substantial evidence and upheld its decision.

Employer and Carrier contend that the Commission's denial of permanent disability benefits is supported by the substantial weight of the evidence and by the applicable law and should be upheld by this Court.

III. ARGUMENT

The Commission's finding that Claimant is not entitled to permanent disability benefits is supported by substantial evidence and the applicable law and should be upheld by this Court.

The standard of review to be utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well established. The Mississippi Supreme Court has stated that "the findings and order of the Workers' Compensation Commission are binding on the Court so long as they are supported by substantial evidence." *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314,317 (Miss. 1988)). This Court will not review the facts on appeal to determine how it would resolve the factual issues if it was the ultimate trier of fact, but instead, will only determine whether the Commission's factual determinations are supported by substantial credible evidence. *South Central Bell Tel. Co. v. Aden*, 474 So.2d 584, 589 (Miss. 1985). This Court should only overturn the Commission if its ruling was arbitrary and capricious. *Hale v. Ruleville Health Care Center*, 687 So.2d 1221, 1225 (Miss. 1997).

The Commission, considering all evidence presented at the hearing on the merits, upheld the Order of the Administrative Judge and concluded that Claimant sustained no loss of industrial use

as to her right upper extremity, and therefore, denied her claim for permanent disability benefits. The Circuit Court found that the Order was supported by the substantial evidence and affirmed. Employer and Carrier respectfully request that this Court uphold the decision of the Commission as it is supported by the applicable law and the substantial weight of the evidence.

Claimant suffered a compensable injury to her right upper extremity on February 16, 2004, while working as a rivet machine operator for Employer herein. Claimant was diagnosed with first dorsal extensor compartment tenosynovitis of the right hand by Dr. Alex Bibighaus, with surgery performed on April 2, 2004. Upon being released at maximum medical improvement on May 21, 2004, Claimant returned to work but was placed in the poly department, gluing poly together with a glue gun. Claimant previously held the position of a rivet machine operator, which had been filled in her absence. Claimant continued working in the poly department for approximately nine weeks. She then sought treatment from Dr. Kurt Thorderson for continuing complaints of right wrist pain. Dr. Thorderson ultimately released Claimant to work in September 2004, with a two pound weight restriction of the right upper extremity. Dr. Thorderson testified in his deposition that this weight restriction could be raised to three pounds. Further, he admitted that his restrictions were based on his prior treatment of Claimant for other unrelated hand injuries in addition to her February 2004 work injury.

The issue presented to the Administrative Judge for decision, and reviewed by the Commission and Circuit Court, was the extent of permanent disability benefits, if any, to which Claimant was entitled relating to her February 16, 2004 work injury to her right upper extremity. The Commission found that Claimant failed to present credible and substantial evidence of any functional or medical impairment of her right arm resulting from her February 2004 work injury, and thus, denied her claim for permanent disability benefits. Claimant asks this Court to re-weigh the

evidence, find Dr. Thorderson's opinions more convincing and award her permanent disability benefits. As it is not the duty of this Court to re-weigh the evidence as Claimant requests, Employer and Carrier would show that the Commission's decision was supported by substantial evidence and ask this Court to uphold the Commission's decision.

Claimant's injury was to her right upper extremity, a scheduled member as defined in MCA §71-3-17(c). No physician involved in her treatment opined that Claimant suffered any permanent medical impairment. Dr. Bibighaus, the treating physician, did not address the issue of permanent impairment because of Claimant's failure to return as instructed. Both Dr. Mark Harriman, the IME physician chosen by the Administrative Judge, and Dr. Kurt Thorderson, whom Claimant consulted for a second opinion, opined that Claimant had no permanent impairment relating to her February 16, 2004 work injury. Based on the substantial weight of the evidence presented, the Commission concluded that Claimant had no permanent medical impairment as a result of her February 2004 work injury, and therefore, denied her claim for permanent disability benefits.

Claimant argues that she could not return to her pre-injury employment, and therefore, the Full Commission erred in not analyzing her claim according to the *Jensen* line of cases. The *Jensen* Court held that where a permanent partial disability renders a worker unable to continue in the position held at the time of the injury, such inability creates a rebuttable presumption of total occupational loss of the member, subject to proof of the Claimant's ability to earn the same wages which Claimant was receiving at the time of the injury. *Meridian v. Jensen*, 828 So.2d 740 at 748 (Miss. 2002). The Claimant may establish such inability by showing that she has made a reasonable, but unsuccessful effort to find work in her usual employment, or by presenting evidence of her inability to perform the substantial acts of her usual employment. *Id.*

The Commission found that this is not such a case. Claimant failed to show that she was unable to perform the substantial acts of her usual employment and presented no evidence that she had made reasonable but unsuccessful efforts to find work. Although Claimant testified that she is unable to perform any of the jobs that she has previously held with Employer herein or with any Employer for whom she has ever worked, her personal opinion was not supported by the overwhelming medical evidence presented.

Only one of three doctors that evaluated and/or treated Claimant opined that she had any work restrictions following her surgery of April 2, 2004. Dr. Bibighaus, the treating physician, who performed Claimant's surgery, noted that as of May 21, 2004, there was no reason why Claimant could not return to work. Dr. Mark Harriman, the physician chosen by the Commission to perform an independent medical evaluation, opined that Claimant could return to full duty without restrictions. Claimant argues that the Commission erred in finding the opinions of Drs. Bibighaus and Harriman more persuasive than the opinion rendered by Dr. Thorderson, who was chosen by Claimant to render a second opinion. Claimant asks this Court to re-weigh the evidence and find Dr. Thorderson's opinions controlling. Employer and Carrier would show that this factual finding of the Commission is supported by substantial evidence and was neither arbitrary nor capricious. It has been found that the Workers' Compensation Commission is entitled to favor the testimony of a treating physician. *South Central Bell Telephone Co. v. Aden*, 474 So.2d 584, 593 (Miss. 1985). Further, Dr. Thorderson's opinions were contrary to those of both the treating and IME doctors. Dr. Thorderson testified that he had treated Claimant prior to the subject work injury for three other unrelated injuries and that the permanent work restrictions he assigned were based on all of Claimant's current and prior problems collectively. He even admitted that the restriction placed on Claimant's right upper extremity was an effort to keep Claimant from having to "keep coming back"

with "other claims." He went on to testify that two pounds was merely an arbitrary number he selected, and that he had no problem with Claimant lifting three pounds with her right upper extremity. Both the treating physician and the IME physician released Claimant to return to work without any restrictions. Although there were conflicting medical expert opinions, it is the job of the Commission to weigh those opinions and decide which is the most persuasive. This Court should only reverse where such findings are unsupported by substantial evidence. Such is not the case.

Claimant does not dispute that Employer herein provided her with work following her treatment with Dr. Bibighaus. However, she contends that she was unable to perform her "usual job." The Employer testified that Claimant was moved from the position of a rivet operator to the poly plant, only because her prior position had been filled in her absence. Further, it was the Employer's testimony that had a position come open for a rivet operator, Claimant could have been transferred back to her former position. Also, the Court in *Jensen* stated that, "ususal employment" is not limited to the job held at the time of the injury, but refers to jobs in which Claimant has past experience, jobs requiring similar skills, or jobs for which Claimant is suited based on age, education, experience or other relevant factors. *Id. at 747.* Clearly, the poly department position to which Claimant returned was within her "usual employment" as defined by the *Jensen* Court.

Claimant nonetheless argues that Dr. Thorderson's restrictions prevented her from returning to her usual employment. However, Dr. Thorderson admitted that he had no problem with Claimant lifting three pounds with her right upper extremity. Both Claimant and Lanny Glover testified that the job of a rivet operator required a worker to only lift 2.5 or 2.8 pounds. Even if Dr. Thorderson's restrictions were found by the Commission to be more persuasive, Claimant failed to show that she was unable to perform the substantial acts of her usual employment.

In support of her argument that permanent disability benefits are owed, Claimant points out that Employer herein has not contacted her since her departure notifying her of any job openings. Employer and Carrier would show that Claimant's argument is contrary to the applicable law. The Court in *Hale v. Ruleville* held that a Claimant must demonstrate (1) that he is medically disabled and unable to work and therefore need not seek employment, or (2) that he has presented himself to his employer for work, and the employer failed or refused to reinstate him. 687 So.2d 1221, 1226 (Miss. 1997). The burden does not rest with the employer to seek out the employee and inquire as whether she is interested in returning to work. *Lane Furniture v. Essary*, 919 So.2d 153, 157 (Miss. Ct. App. 2005). Clearly, it is the claimant's responsibility to contact the Employer regarding work availability. Therefore, Claimant's argument lacks merit.

V. CONCLUSION

Employer and Carrier respectfully request that the Order of the Commission, as affirmed by the Circuit Court be upheld. The Commission found that Claimant failed to present substantial evidence to prove that she sustained a functional or occupational disability as a result of her February 16, 2004 work injury. It is undisputed that no physician assigned any permanent impairment rating, and further, that both the treating and IME doctors released Claimant at maximum medical improvement with no permanent work restrictions. It is also undisputed that Employer provided Claimant with employment per the treating physician's recommendations. The Commission, who is the ultimate finder of fact, determined that the opinions of the treating and IME physicians were more convincing than the opinion of Dr. Thorderson.

Considering the medical and lay testimony presented at the hearing on the merits, the Administrative Judge correctly determined that Claimant failed to prove that she suffered any loss of industrial use of her right upper extremity, and denied her claim for permanent disability benefits.

The Administrative Judge's findings were thoroughly reviewed and affirmed by the Commission and the Circuit Court. This Court should uphold the Circuit Court's affirmance of the Commission's Order denying Claimant's claim for permanent disability benefits.

Respectfully submitted,

FRANKLIN CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY, EMPLOYER AND CARRIER

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CERTIFICATE OF SERVICE

I, George E. Read, of counsel for the employer and carrier herein, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

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P. O. Box 7316
Tupelo, MS 38802-7316

Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Square, Suite 201
Oxford, MS 38655

Mississippi Workers' Compensation Commission
1428 Lakeland Drive
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THIS, the 27th day of Oct., 2008.

GEORGE E. READ

File No.: 4366-112010