IN THE SUPREME COURT OF MISSISSIPPI

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| RUTH WOOTEN | CLAIMANT/APPELLANT |
| V. | CAUSE NO: 2008-WC-00858 |
| FRANKLIN CORPORATION and<br>LIBERTY MUTUAL INSURANCE CO. | EMPLOYER/ APPELLEE<br>CARRIER/ APPELLEE |

# BRIEF OF APPELLANT


**Prepared By:**

**Don O. Gleason, Jr.**
**MSB#:** [redacted]
**Gleason & McHenry**
**P.O. Box 7316**
**Tupelo, MS 38802**
**Phone: 662-690-9824**
**Fax: 662-690-9825**

**Attorney for Claimant/Appellant**

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## CERTIFICATE OF INTERESTED PERSONS

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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 recusal.

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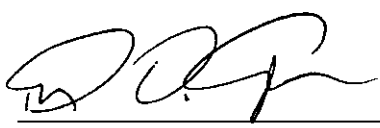
|---|---|
| RUTH WOOTEN | CLAIMANT/APPELLANT |
| FRANKLIN CORPORATION | EMPLOYER/APPELLEE |
| LIBERTY MUTUAL INSURANCE CO. | CARRIER/ APPELLEE |
| DON O. GLEASON, JR. | ATTORNEY FOR APPELLANT |
| GEORGE READ | ATTORNEY FOR APPELLEES |
| GINGER ROBY | ATTORNEY FOR APPELLEES |



DON O. GLEASON, JR.

Prepared By:

Don O. Gleason, Jr.
MSB#: [redacted]
Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Phone: 662-690-9824
Fax: 662-690-9825

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## STATEMENT OF THE ISSUES

Whether the Full Commission's finding that the Claimant is not entitled to permanent disability benefits is unsupported by substantial evidence, clearly erroneous or arbitrary and capricious.

## STATEMENT OF THE CASE

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

This is a workers' compensation case appealed by the Claimant from the Order and Opinion of the Chickasaw County Circuit Court, First Judicial District affirming the Order of the Full Commission of the Mississippi Workers' Compensation Commission.

On September 7, 2004, the Claimant, Ruth Wooten filed a Petition to Controvert her workers' compensation claim following her on the job injury on or about February 16, 2004. The Claimant's injury was as a result of the repetitive nature of her job with Franklin Corporation. The employer and their insurance carrier, Liberty Mutual Insurance Company filed an Answer on September 30, 2004, admitting the injury to the Claimant's right wrist.

The claim came to be heard on December 12, 2005, and an Order entered by Administrative Judge Cindy P. Wilson on February 28, 2006, wherein it was Ordered that the Claimant had suffered no industrial loss of use to her admittedly injured right upper extremity despite a permanent two pound lifting restriction.

The Full Commission, of the Mississippi Workers' Compensation Commission, in an Order dated August 4, 2006, affirmed the Administrative Judge in a one page Order with no discussion of the facts and without oral argument.

The Chickasaw County Circuit Court, First Judicial District, Hon. Andrew K. Howorth, entered an Order affirming the Full Commission of the Mississippi Workers Compensation Commission on April 15, 2008.

### B. Statement of facts relevant to the issues presented for review.

The Claimant was born on July 6, 1952, and was 51 years old at the time of this injury and is now 56 years old.

The Claimant has a limited formal educational background in that she completed the 11th grade in high school, but did eventually obtain a G.E.D. certificate. The Claimant's work history revolves almost exclusively around the manufacturing industry. The Claimant originally worked as a sewer at Monty Glove and held a similar position with Garan's Manufacturing. Later she worked with PEP Industries as a quality inspector and at Ark-Ell Springs sewing waterbed mattresses. The Claimant also worked as a salesclerk with Howard's Department Store and Bell Layman's Department Store in the past.

The Claimant worked for the employer in this matter from 1999 continuing for almost five years before suffering this final injury.

It is undisputed that the Claimant suffered a compensable injury to her right upper extremity on February 16, 2004, while in the employ of Franklin Corporation in Chickasaw County, Mississippi.

It is undisputed that the Claimant was working as a "Rivet Machine Operator" at the time of the injury, and that the Claimant had an average weekly wage of $455.98. It is further undisputed that Claimant was never returned to her former position post-injury, and that she was ultimately sent home by the employer when they became aware of her permanent restrictions.

Relevant medical testimony in this matter consists of three separate orthopedic surgeons; Dr. Alexander Bibighaus (the employer and carrier's choice, and the physician who performed surgery,) Dr. Kurt Thorderson (the Claimant's choice of physician and

the only physician who had treated the Claimant prior to this injury,) and Dr. Mark Harriman (saw the Claimant one time only for an Independent Medical Evaluation.)

Dr. Bibighaus, the employer and carrier's choice of physician, diagnosed chronic stenosis and tenosynovitis (tendonitis.) Ultimately, after conservative treatment failed, he performed a right dorsal extensor compartment release and returned her to regular duty.

After experiencing continuing symptoms after returning to work (a less physically demanding position then her usual position at that,) Claimant requested that she be allowed to treat with her personal physician, Dr. Kurt Thorderson.

Dr. Thorderson and the Claimant had an extensive history of treatment. In 2000, also an admitted injury by this employer and carrier, Dr. Bibighaus performed surgery for left middle finger, performing a "trigger finger." In 2003, the Claimant treated with Dr. Thorderson after breaking her right thumb, also while in the employ of this employer, and later in the year for "trigger finger" yet again, this time of her left thumb. All of these incidents occurred while the Claimant was in the employ of Franklin Corporation, the Claimant never pursued a claim for any of these injuries.

Dr. Thorderson ultimately released the Claimant with a two pound permanent lifting restriction.

Dr. Harriman, who saw the Claimant one time only for the purpose of litigation, stated the usual course of action was to return the Claimant to full duty without restriction.

The Claimant attempted to return to work with the employer following the injury, however at a different position, as she was unable to perform her former job. The

employer did not have nor did they offer any position within her medical restrictions when they were eventually issued.

## II. SUMMARY OF THE ARGUMENT

The Circuit Court erred in affirming the Order of the Full Commission of Mississippi Workers' Compensation Commission as the Order denying permanent benefits was arbitrary and capricious and unsupported by the overwhelming weight of the evidence.

The 56 year old Claimant, who has essentially always worked in physically demanding jobs has a two (2) pound lifting restriction for the rest of her life. The Administrative Judge's/ Commission's ruling states that despite this fact, and the fact that this is an admitted injury, the Claimant has not suffered a disability that impacts her ability to earn the same wage as she made pre-injury. The Claimant submits this conclusion is contrary to the evidence presented at Hearing, and the benevolent purpose behind the Act itself.

The Administrative Judge in her Order stated that she found the opinions of Dr. Bibighaus and Harriman "more persuasive" than Dr. Thorderson.

The Claimant would respectfully submit that this is arbitrary and capricious. Dr. Bibighaus returned the Claimant to work following surgery and the Claimant, soon thereafter began experiencing similar symptoms. At this time, the Claimant returned to Dr. Kurt Thorderson for treatment and remained in his care until released with the two-pound permanent restriction. Following the return of the same symptoms, the Claimant never returned to Dr. Bibighaus.

Dr. Harriman examined the Claimant only one time for the purposes of an Independent Medical Evaluation. To find this report "persuasive" or more persuasive than a physician that had a four year history with the Claimant is unsupported by the evidence and certainly arbitrary and capricious.

## III. ARGUMENT

### A. The finding that the reports of Dr. Bibighaus and Dr. Harriman as "more persuasive" than that of Dr. Thorderson is contrary to the overwhelming weight of the evidence and is arbitrary and capricious.

The Administrative Judge inexplicably stated that she found the opinions of Dr. Bibighaus and Harriman "more persuasive" than Dr. Thorderson. (Order of the Administrative Judge, p.7) This ruling is arbitrary and capricious and contrary to the weight of the evidence.

Dr. Thorderson is the only physician out of the three whose medical records are part of the Record that had ever seen or treated the Claimant prior to this latest injury. The Claimant had been in the care of Dr. Thorderson for numerous years and through numerous injuries that she sustained while in the employ of Franklin Corporation. They had an established relationship unlike any other physician involved with this injury.

Dr. Bibighaus never addressed final impairment or restrictions one way or the other. Following surgery, Bibighaus returned the Claimant to regular duty and she soon had a re-occurrence of swelling and pain. At this point, she exercised her right to see a physician of her choice (Dr. Thorderson) and never again returned to Dr. Bibighaus. Therefore, there is nothing in the record for this Commission to properly rely upon for a final opinion from this physician as to rating or restriction.

As there is nothing in the Record in regards to Dr. Bibighaus' issuance of rating or restriction, there is nothing for the Administrative Judge to have based her opinion that Dr. Bibighaus' records were "more persuasive" (Id.) than Dr. Thorderson's, therefore, this finding can only be arbitrary and clearly erroneous.

Dr. Thorderson issued permanent restrictions of no lifting, pushing, or pulling over two pounds. (Deposition of Dr. Thorderson p. 9). When asked how restrictions for the Claimant could be so severe and there be a 0% disability rating, the doctor explained, *"...I don't think it's in the AMA Guides that it's strongly weighted toward the problems that people have with tendonitis..."* (Id.) He further testified in this regard, *"...impairment ratings are highly weighted on flexibility. And she doesn't have any flexibility of her wrist... she has persistent pain problems. And any time she would do any aggressive type of work, she's going to keep having pain..."* (Id p.10) [1]

Dr. Thorderson after discussing all previous care he had provided to the Claimant for both this and previous conditions was asked by counsel opposite which condition he was basing his restrictions upon and stated, *"I don't think you could separate them. I was trying to treat the patient as a whole, I guess. I mean typically after that surgery – and she didn't have any symptoms after that surgery from when I examined her. So, the restrictions were not with respect to that. But restricted as to chronic tendonitis of her arm..."* (Deposition of Dr. Thorderson p.15).

Clearly, given the long-standing doctor-patient relationship Dr. Thorderson was in the best position to treat the patient as a whole, and therefore, should be given the most

[1] Employer and Carrier Exhibit 6 in the record describes the Claimant's job at the time of injury as requiring either *256, 250, or 648 repetitions per hour*. The Claimant would respectfully submit this work is clearly "aggressive."

weight, should be considered the most persuasive, and certainly not disregarded, as the Administrative Judge and the Full Commission seem to have done.

The report of Dr. Harriman is hardly worth discussion. Again, Dr. Harriman examined the Claimant only one time for the purposes of an Independent Medical Evaluation. There was no prior relationship with Dr. Harriman, whatsoever, and certainly no relationship after the one time examination. While there is no statutory requirement that the opinion of a treating physician be weighted heavier than that of a treating physician, it cannot be argued, in any intelligent manner, that a physician seeing a patient one time is in a better position to gauge disability than one with an established relationship. For the Administrative Judge to find this report persuasive in any fashion or "more persuasive" than a physician that had a four year history with the Claimant is unsupported by the evidence and certainly arbitrary and capricious.

**B. The prior rulings erred in denying permanent benefits to the Claimant.**

It is the contention of the Claimant that the Full Commission's finding that the Claimant did not have a loss of wage earning capacity or industrial loss of use as a result of her admitted injury is contrary to the overwhelming weight of the evidence.

Permanent disability would properly be evaluated either on a scheduled member basis or on a body as a whole/ loss of wage earning capacity basis. Despite this injury only affecting one extremity, this Court would be within its discretion in awarding benefits on a loss of wage earning capacity basis.

> As is well known to this Full Commission, it has long been the law in Mississippi that an injury resulting in a partial disability to a scheduled member may, through other considerations, establish that, for purposes of his wage earning capacity, the impairment has rendered him or her totally occupationally disabled, so as to entitle claimant to workers'

> compensation for complete disability. Alumax Extrusions, Inc. v. Wright, 737 So.2d 416 (Miss. Ct. App. 1998).

However, the Court can also Rule that the Claimant suffered a total industrial loss to her right upper extremity and is, therefore, entitled to two hundred weeks of her average weekly wage under the schedule as defined under MS Code Sec. 71-3-17(c)(1).

> A permanent partial disability, rendering a workers' compensation claimant unable to continue in the position held at the time of injury, creates a rebuttable presumption of total occupational loss of the member, subject to other proof of the claimant's ability to earn the same wages which the claimant was receiving at the time of injury. Meridian Professional Baseball Club v. Jensen, 828 So.2d 740, 745 (Miss. 2002).

In the case at hand, the Claimant was undeniably sent home when the company became aware of her final restrictions and was never called back to work. It was the testimony of the Claimant that she informed Mr. Scott Shempert of the restriction and he stated, "All I can do is send you home." (Record p.24) This testimony is uncontradicted. The Claimant further testified that this followed her specifically asking if there was anything in the plant she could do, and that no one from the plant has ever contacted her with information that there is a job available within her restrictions. (Id.)

Before receiving the restrictions from Dr. Thorderson, the Claimant had returned to work and placed by the company at another position. When asked by counsel opposite why she was placed there instead of her usual job the Claimant responded that her supervisor, Lanny Glover, stated that he didn't think she could do her former job. (Record p.46) When Mr. Glover took the stand, and asked the same question, he responded, "*...we had already filled that position. And I'm sure it had something to do with her restrictions...*" (Record p.58)

For ten weeks after returning post-injury, the Claimant worked in the poly-glue department. She was placed there by the employer for the reasons stated above. Her stipulated average weekly wage prior to the accident was $455.98, and her average weekly wage post-accident, the only post-injury wages earned by the Claimant, averaged $317.88.

The Claimant testified that she could not have continued in any position she had previously performed with Franklin Corp., particularly that of rivet operator. (Record p.18, 23, 30) The Claimant further testified that she could not return to *any* position she had performed in her working career with her restrictions. (Record p. 30) The employer and carrier offered no evidence to rebut these assertions.

By not returning Ms. Wooten to her former position when she returned to work, and assigning her to another job within the plant when she returned with an average weekly wage of $317.88 they have effectively admitted a loss of wage earning capacity. Further, by unilaterally terminating her employment and not providing any evidence to rebut the presumption created, the Commission would be within its discretion to award permanent and total benefits.

It is clear that the Claimant could not return to the position she performed at the time of her injury based on the Claimant's testimony, her restrictions, and the fact that she was simply told to go home by her superior. Therefore, there is a rebuttable presumption of total occupational loss of the right upper extremity created under a Jensen analysis.

The employer and carrier attempt to rebut this presumption by convincing Dr. Thorderson to raise the restriction from two pounds to three pounds. However, this attempt clearly fails.

The employer and carrier introduced into evidence and relied upon a job description that described the heaviest object the Claimant would lift as being approximately 2.8 lbs. However, the Claimant testified that the weight listed was only correct if there was nothing else attached to it. That if something was wrong with the piece, it would come back to her and then be well in excess of three pounds. (Record p.15) Further the job required moving the bins containing the parts to be assembled to the work area. The Claimant testified that the bins weighed greater than three pounds, that they sometimes required several people to move them. (Record p. 17) The Claimant also testified that to meet the requirements of completing up to 648 repetitions every hour, all employees resorted to stacking the objects in order to complete several at a time.

The witness for the employer and carrier, Lanny Glover, stated that stacking was commonly performed but was at the discretion of the worker. The only worker to testify, the Claimant, stated that the production required in the job could not be met, in her opinion, if she did not stack the objects. (Record p.18) Mr. Glover was asked about the possibility of moving the bins with one hand and he said that he could do it but he also testified that he had never seen anyone else do it. (Record p.54)

Finally, and most importantly, Mr. Glover admitted under cross-examination what the Claimant had previously stated, that the job description was *not complete*. This job description provided to her physicians and entered into evidence before this court left out

essential duties required of the employees and according to Mr. Glover, *"...it's not that detailed, no."* (Record p. 63)

Regardless of the above, it is the contention of the Claimant that the question is moot as her prior position was never offered to the Claimant. Before receiving restrictions from Dr. Thorderson, the Claimant returned to work and was sent to another position because it was clear she was unable to continue in the rivet machine operator position.

The employer and carrier took issue with the fact that Ms. Wooten never called the company back to ask about a job. It is not controverted that Ms. Wooten returned to work despite being in constant pain, and worked for ten additional weeks in a position that paid her less money than she had previously earned. It is not contradicted that Ms. Wooten was told to go home by Mr. Shempert when he learned of the restrictions. There was no testimony that the Claimant was told to check back with the company. As the Claimant was told to go home because of the restrictions, restrictions she knew were permanent, and not told to check back, and was never called or contacted by anyone from the employer again; she was clearly justified in believing that she would never be allowed to return to work with Franklin. In fact, Mr. Glover was asked point blank who would be in a better position to know of openings in the rivet machine department, Ms. Wooten or he, Mr. Glover responded, "It would be me." (Record p.72) To now argue that it was Ms. Wooten's responsibility and that the employer had no responsibility is illogical and unfair.

In Jensen, the Court correctly limited compensation to the medical rating of 25% to the upper extremity. The court reasoned the employer and carrier rebutted the

presumption of total industrial loss to the extremity by analyzing Jensen's youth, work history, education, and jobs/ wages earned post-injury.

In the case at hand, the Claimant is in her mid 50's, has only a G.E.D. certificate, has no relevant work history to which she can return within her restrictions, and the only wages she was ever able to earn after the injury were with the same employer and averaged almost $140.00 per week less than her pre-injury earnings. It can not be successfully argued that the employer and carrier rebutted any presumption in the matter at hand.

Clearly, this case should have been analyzed under Jensen and permanent benefits of two hundred weeks for the upper extremity awarded.

## IV. CONCLUSION

It is clear the Claimant has sustained a total industrial loss to her right upper extremity under the Jensen analysis.

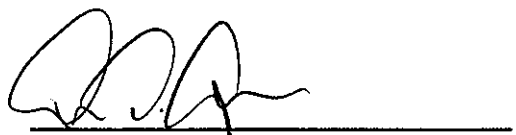
This Claimant has worked hard her entire adult life at manual labor jobs. She labored for Franklin Corporation for five years, sustaining numerous injuries to her hands, never pursued permanent benefits even though it was her right to, and even tried to return after this final injury only to be sent home by the employer.

Clearly the benevolent intention of the Workers Compensation Act is to be liberally construed in order to find compensation. Ms. Wooten has a permanent two pound restriction assigned to her for the rest of her life. Clearly, she was unable to continue in her usual employment. This fact was obvious to her and her employers who never even attempted to place her in her pre-injury job. Dr. Thorderson had a long history with the Claimant and felt the restriction was necessary. He was in the best

position of the physicians to judge this, and successfully defended his position with his deposition testimony.

The Claimant would therefore respectfully suggest that the prior rulings in this matter were not based on substantial evidence and were arbitrary and capricious and, therefore, should be reversed and permanent benefits be awarded.

**Respectfully Submitted, this the 1st day of October 2008.**



**DON O. GLEASON, JR.**

Prepared By:

Don O. Gleason, Jr.
MSB#: [redacted]
Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Phone: 662-690-9824
Fax: 662-690-9825

## CERTIFICATE OF SERVICE

I, Michael B. McHenry, of counsel for claimant, 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 to:

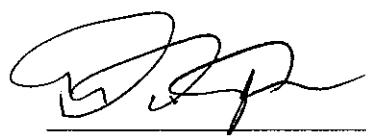
George Read, Esq.
Daniel Coker Horton & Bell
P.O. Box 1396
Oxford, MS 38655-1396

Ginger Roby, Esq.
Daniel Coker Horton & Bell
P.O. Box 1396
Oxford, MS 38655-1396

Mississippi Workers' Compensation Commission
P.O. Box 5300
Jackson, MS 39296

Chickasaw Circuit Court
1 Pinson Square
Houston, MS 38851

THIS the 1st day of October, 2008.



Don O. Gleason, Jr.