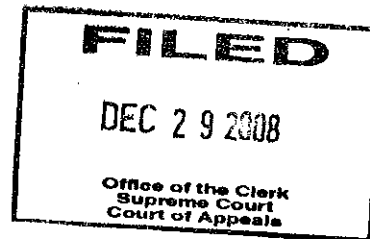


IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2008-WC-01091-COA

[illegible]

APPELLEES



BRIEF OF APPELLEES

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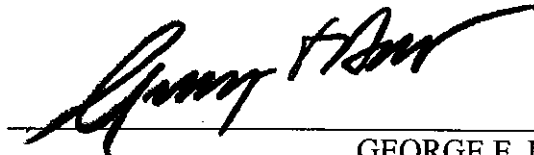
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CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualifications or recusal:

1. Willie L. Brown, Appellant
2. Robinson Property Group, Limited Partnership,
d/b/a Horseshoe Casino and Hotel - Employer/Appellee
3. Zurich American Insurance Company - Workers'
Compensation Carrier for Employer/Appellee
4. Lawrence J. Hakim, Attorney for Appellant
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SO CERTIFIED, this the 29th date of December, 2008.



GEORGE E. DENT
Mississippi Bar No. [REDACTED]

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
CASES	iii
STATUTES	iv
STATEMENT OF ISSUES	1
ALTERNATIVE ISSUES	1
SUMMARY OF THE ARGUMENT	2
PROCEDURAL NOTE	4
SECTION I – MOTION TO DISMISS APPEAL	5
I. In Accord With MRAP and the Uniform Circuit and County Court Rules This Appeal Should Be Dismissed	5
ARGUMENT ON MOTION TO DISMISS APPEAL	7
Section II – Facts	15
Standard of Review	15
II. There Was Sufficient Evidence to Support the Finding That Brown’s Carpal Tunnel Syndrome Was Not Causally Related to His Employment With Horseshoe; Therefore, It Was Not an Abuse of Discretion for the Circuit Court to Affirm This Finding of the Commission	17
III. There Was Sufficient Evidence to Support the Commission’s Finding That Claimant Was Not Entitled to Workers’ Comp Benefits as a Result of the Claimant’s Claim for Cubital Syndrome in Right Elbow	19
CONCLUSION	25
CERTIFICATE OF SERVICE	29
CERTIFICATE OF MAILING	30

TABLE OF AUTHORITIES

Cases

<i>Bracey v. Packard Elec. Div., Gen. Motors Co.</i> , 476 So.2d 28, 29 (Miss.1985)	16
<i>Cuevas v. Copa Casino</i> , 2001-WC-01195-COA	25
<i>DiGrazia v. Park Place Entertainment</i> , 2004-WC-01035-COA	25
<i>Mattie Ford v KLLM, Inc.</i> , 2003-WC-01688-COA	13,14
<i>Fought v. Stuart C. Irby Co.</i> , 523 So.2d 314, 317 (Miss. 1988)	17,24
<i>Hedge v. Leggett & Platt, Inc.</i> , 641 So.2d 9, 12 (Miss. 1994)	16
<i>James Johnson v. Marsha Brooks (Gullette)</i> , 2004-CP-00782-COA	9,10 13
<i>T. H. Mastin and Company v. Mangum</i> , 215 Miss. 454, 61 So.2d 298 (1954)	16
<i>Mississippi Products, Inc. v. Skipworth</i> , 238 Miss. 312, 118 So.2d 345 (1960)	24
<i>Mitchell Buick, Pontiac & Equip. Co. V. Cash</i> , 592 So.2d 978, 980 (Miss. 1991)	16
<i>Myles v. Rockwell International</i> , 445 So. 2d 528, 536 (Miss. 1983)	17
<i>Potts v. Lowery</i> , 134 So.2d 474, 242 Miss. 300 (1961)	16
<i>Smith v. Gand Casino - Biloxi</i> , 2002-WC-01017-COA	25
<i>Tequelia T. Thomas v. Five County Child Development Program, Inc.</i> , 2006-WC-00121-COA	10,11 12,13
<i>Walker v. Parnell</i> , 566 So.2d 1213, 1216 (Miss. 1990)	10
<i>Wallace Van Meter v. Bobby Alford</i> , 1998-CA-01591-SCT	9,10, 12,13
<i>Watson v. Lillard</i> , 493 So.2d 1277, 1278 (Miss. 1986)	10

Statutes

Mississippi Rules of Appellate Procedure 3(a)	7,8
Mississippi Rules of Appellate Procedure 3(e)	7
Mississippi Rules of Appellate Procedure 10(a)	8
Mississippi Rules of Appellate Procedure 10(b)	6,8
Mississippi Rules of Appellate Procedure 11(b)	6,8
Mississippi Rules of Appellate Procedure Rule 31(a) and (b)	12
Uniform Rules of Circuit and County Court Practice, Rule 5.04	6,8

STATEMENT OF ISSUES

I. Whether this case should be dismissed because of Appellant's failure to timely follow Mississippi Rules of Appellate Procedure 3(e), 10(a), 10(b) & 11(b) & Uniform Rules of Circuit and County Court Practice, Rule 5.04.

ALTERNATIVE ISSUES

II. A. Whether the Circuit Court's affirmance of the denial of compensability as to the bilateral carpal tunnel syndrome claim [H-8644] was supported by substantial evidence.

II. B. Whether the Circuit Court's affirmance of the denial of compensability as to claimant's right cubital tunnel syndrome and right ulnar neuropathy claim [H-6758] was supported by substantial evidence.

SUMMARY OF THE ARGUMENT

After filing his Notice of Appeal, Appellant, Brown: [1] waited for thirteen (13) months before filing his Designation of Record; and [2] waited eighteen (18) months before paying filing fees, costs and filing his Certificate of Compliance. During the pendency of this appeal there were three occasions where Brown should have been jolted into curing the deficiencies of his appeal. The first was an inquiry from the Workers Compensation Commission about three (3) months after Notice of Appeal was filed. A second occasion was Horseshoe's letter to the Tunica County circuit clerk confirming that nothing had been done of record since the filing of the Notice of the Appeal over twelve (12) months earlier. After the inquiry from the Commission, Brown merely replied by sending a copy of the Notice of Appeal to the Commission. A third prompt to cure occurred on February 21, 2008 when Horseshoe filed its Motion to Dismiss.

After the first prompt, Brown elected to do nothing of record until over thirteen (13) months when he filed his Designation of Record. Twenty-five days after the second prompt, Brown filed his Designation of Record. After the third prompt, Brown replied that any deficiencies in his appeal had been cured before Horseshoe filed its Motion to Dismiss Appeal. However, it was not until four and one-half months later that Brown paid the filing fee and costs and filed his Certificate of Compliance.

After filing his Notice of Appeal, Appellant allowed this matter to sit for over thirteen (13) months before filing his Designation of Record. After filing his Notice of Appeal, Brown did not pay any fees or costs or file a Certificate of Compliance until eighteen (18) months later on July 10, 2008. (V1 P59-63).

It is simply unfair to allow such a blatant disregard for the Mississippi Rules of Appellate Procedure and the Uniform Rules of Circuit and County Court Practice. It is also unfair to let the appeal process linger for over one year and six (6) months before completing the steps to perfect the appeal. Such delay thwarts the administration of justice and denies to all litigants the right to an expeditious termination of their dispute.

Even though Horseshoe filed a Motion to Dismiss Appeal in Tunica County Circuit Court, there was no ruling on the motion and less than six (6) months later the Circuit Court of Tunica County sent the record herein to the Mississippi Supreme Court. Therefore, this issue is properly before this court. For the above stated reasons, this appeal should be dismissed.

II

Alternatively, Horseshoe requests that this Court affirm the Circuit Court's and the Commission's denial of benefits to claimant. Claimant's self-serving testimony was uncorroborated, inconsistent and not credible. The medical evidence regarding causation of the claimant's right elbow disability [H-6758] was based entirely on the claimant's unreliable history, and the hearing record contains insufficient evidence to support a conclusion that the claimant's right ulnar neuropathy was caused or aggravated or arising in any way from his work. Brown failed to report the injury to his elbow at the time it allegedly occurred even though he advised that he was in sharp pain for about ten or fifteen minutes and that it continued to get worse. In spite of working every day for over six (6) months after the injury with an elbow that continued to get worse, Brown did not report his injury to Employer until February, 2002, some eight (8) months post injury. Brown missed two opportunities, when discussing his right arm injury with his superiors at Horseshoe, to report the injury as a work injury, but he failed to do so. Brown

never told Dr. Drewry that he was injured at work, therefore he missed four opportunities to advise his treating physician, Dr. Drewry, that he had injured his right arm at work. Brown went to work for seven (7) months after the alleged injury and failed to report the injury to anyone at work during this time. Brown's 12-28-01 statement to Dr. Drewry that the problems with his right arm began about a year earlier are inconsistent with an injury occurring on July 21, 2001, less than five months before. Therefore, there was substantial evidence for the Commission to affirm the denial of benefits to Brown for carpal tunnel syndrome and to deny benefits to claimant for right cubital tunnel syndrome and right ulnar neuropathy.

Horseshoe respectfully requests that this Court enter its Order dismissing Appellant's appeal or alternatively, that this Court affirm the rulings of the Circuit Court which affirmed the Commission's denial of benefits to Brown.

PROCEDURAL NOTE

On February 21, 2008, Appellees, Robinson Property Group, limited Partnership, d/b/a Horseshoe Casino and Hotel and Zurich American Insurance Company [hereinafter "Horseshoe"] filed in the Circuit Court of Tunica County their Motion to Dismiss Appeal and Alternatively for Other Relief. Appellant Brown filed his reply on March 6, 2008. There was no ruling on the Motion to Dismiss Appeal by the Circuit Court. The case was sent to the Mississippi Supreme Court on or before June 25, 2008. In this appeal, in SECTION I, Horseshoe will reassert its Motion to Dismiss Appeal and the reasons therefore; and in SECTION II will set forth other facts and reasons why this Court should affirm the ruling of the Circuit Court in all other particulars. The issues will be discussed in that order.

SECTION I

MOTION TO DISMISS APPEAL

Pursuant to Mississippi Rules of Appellate Procedure 3(e), 10(a), 10(b), 11(b) and 5.04 of the Uniform Circuit and County Court Rules, Horseshoe moves this Court for dismissal of Brown's appeal and submits the following in support of its Motion to Dismiss Appeal.

I. IN ACCORD WITH MRAP AND THE UNIFORM CIRCUIT AND COUNTY COURT RULES THIS APPEAL SHOULD BE DISMISSED

First and foremost, because the issue was raised in the Circuit Court, but not ruled upon, Appellee, Horseshoe, submits to this Court that dismissal of Appellant's appeal is proper because of this Court's interest in enforcing the rules and ensuring timely compliance with the Mississippi Rule of Appellate Procedure, the same being necessary to the orderly expedition of justice and in the Court maintaining control of its own docket.

FACTS

At hearing on May 5, 2005, the Administrative Law Judge found that the bilateral carpal tunnel syndrome suffered by Willie Brown, Appellant, was not work-related; however, the ALJ did find that Brown suffered a compensable injury due to cubital tunnel syndrome and was entitled to TTD from December 28, 2001 until June 28, 2002, plus associated medical costs. That decision was appealed to the Mississippi Workers' Compensation Commission. Employer and carrier, Horseshoe, cross-appealed. On February 22, 2006, the Full Commission affirmed the Administrative Law Judge's Order denying Brown benefits for carpal tunnel syndrome and reversed the Order to the extent that it granted Brown other benefits. Brown timely appealed the

decision of the Commission. On January 3, 2007, the Circuit Court of Tunica County, Mississippi found for Horseshoe and affirmed the decision of the Mississippi Workers' Compensation Commission denying benefits to Brown. On January 11, 2007, Brown timely filed a Notice of Appeal from the Circuit Court but did not submit: (1) a designation of record or, (2) any payment of costs.

In the case at bar, after filing a Notice of Appeal on January 11, 2007, Brown did absolutely nothing of record until more than thirteen (13) months later when he filed a Designation of Record on February 12, 2008. V1-R 21-23. Brown failed to: (1) file within seven (7) days the Designation of Record required by MRAP 10(b)(1); (2) failed to estimate the cost of preparation of the record on appeal and deposit that sum with the clerk as required by MRAP 11(b) and Rule 5.04 of the Uniform Circuit and County Court Rules until eighteen (18) months after filing the Notice of Appeal.

Appellant had three prompts or inquiries concerning the status of this Appeal which should have alerted him to these deficiencies, which required his timely response and correction of same. The first prompt was the inquiry from the Mississippi Workers' Compensation Commission asking whether or not the appeal had been perfected. This inquiry on March 6, 2007 was less than two months after the Notice of Appeal had been filed. Brown chose to do nothing of record and did not attempt to comply with the requirements of the Rule that he: (1) designate the record, or (2) pay the costs for filing. Prompt number two occurred in January of 2008, when counsel for Horseshoe sent correspondence on January 18, 2008 to the Circuit Clerk of Tunica County confirming that nothing had been done of record other

than filing of the Notice of Appeal and copied counsel for Brown with same. V1-R18. This should have been a second wake-up call for Brown. However, it was not until some 25 days later that Brown filed its Designation of Record on February 13, 2008. V1-R21-23. V1-R59-63. A third prompt to Brown occurred when Horseshoe filed its Motion to Dismiss Appeal with the Circuit Clerk on February 21, 2008. V1-R24-54. Brown replied on March 6, 2008 advising the court, *inter alia*, that “. . . any alleged deficiency was cured before Appellees filed their Motion to Dismiss.” V1-R56. However, at that time Brown had not paid the filing fee and costs, nor had he filed his Certificate of Compliance. Brown did not cure these deficiencies until July 10, 2008. V1-R59-63. Further Brown failed to file any Briefs with the Circuit Court.

ARGUMENT ON MOTION TO DISMISS APPEAL

The Mississippi Rules of Appellate Procedure, specifically M.R.A.P. 3(a) provides in pertinent part:

In all cases . . . there shall be one procedure for perfecting such appeal An appeal permitted by law as of right from a trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. [30 days] Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the perfection of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal.

M.R.A.P. 3(e) provides that:

Upon filing of any separate or joint notice of appeal from the trial court, the appellant shall pay to the clerk of the trial court the docket fee to be received by the clerk of the trial court on behalf of the Supreme Court.

M.R.A.P. 10(a) provides that:

The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of the proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.

M.R.A.P. 10(b) provides in pertinent part:

- (1) *Designation of Record.* Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the Appellee a written designation describing those parts of the record necessary for appeal.

M.R.A.P. 11(b) provides further in pertinent part:

- (1) *Record Preparation Estimate and Deposit.* Within seven (7) days after filing the notice of appeal, the appellant shall estimate the cost of preparation of the record on appeal, including, but not limited to, the cost of the preparation of the transcript, and shall deposit that sum with the clerk of the court whose judgment or order has been appealed. The appellant shall simultaneously file with the clerk of the trial court a certificate setting forth the fact of compliance with this subparagraph and shall serve a copy of the certificate upon all other parties, upon the court reporter, and upon the Supreme Court Clerk. . .

Additionally, Rule 5.04 of the Uniform Rules of Circuit and County Court Practice provides in pertinent part:

. . . In all appeals, whether on the record or by trial de novo, the **notice of appeal and payment of costs must be simultaneously filed and paid** with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal.
...

There are various cases dealing with dismissal of appeals under the current Rules. In Wallace Van Meter v. Bobby Alford, 1998-CA-01591-SCT, the Supreme Court of Mississippi considered a case wherein Appellant's appeal was dismissed by the Circuit Court for failure to comply with the Uniform Circuit and County Court Rules, as well as the Rules of Appellate Procedure. In Van Meter, Van Meter filed a Notice of Appeal from a June 23, 1998 verdict in favor of Alford. Upon the filing of the Notice of Appeal, Van Meter paid the Clerk's filing fee of \$100.00. Approximately 43 days later, Alford filed a Motion to Dismiss the Appeal on September 2, because Van Meter had failed to comply with the appellate procedure in several ways. On September 4, Van Meter filed a Designation of Record and request for an estimate of cost and a response to the Motion to Dismiss. On September 23, the Circuit Court dismissed Van Meter's appeal. The Supreme Court of Mississippi reversed the dismissal of the appeal and remanded the case to the Circuit Court of Leflore County with instructions that it issue a Rule 2(a)(2) notice to Van Meter, giving him specific notice of the deficiencies of his appeal and allowing fourteen (14) days from the date of the notice to cure said deficiencies, and with instructions to the Circuit Court to consider lesser sanctions.

In 2005, the Court of Appeals of Mississippi considered James Johnson v. Marsha Brooks (Gullette), 2004-CP-00782-COA, the judgment in question was entered after a bench trial on June 20, 2003. The bench trial was appealed to the Circuit Court and Gullette filed a Motion to Dismiss the appeal. The motion was denied by Order entered November 6, 2003. No further action was taken until March 5, 2004 when Gullette again filed a Motion to

Dismiss the case for non-prosecution. On March 15, 2004, Circuit Judge Jerry O. Terry granted Gullette's motion and dismissed the appeal. The Court of Appeals noted:

The power to dismiss for failure to prosecute is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and allow the Court's control of its own docket.

(citing, Walker v. Parnell, 566 So.2d 1213, 1216 (Miss. 1990); Watson v. Lillard, 493 So.2d 1277, 1278 (Miss. 1986)).

The Court of Appeals in Johnson went on to state that the issue to consider was whether it was abuse of discretion for the Circuit Court to dismiss Johnson's appeal for failure to prosecute. The appeal in question was the appeal from County Court to Circuit Court. The Court of Appeals decided that based upon the *Mississippi Rules of Appellate Procedure*, the Circuit Clerk was required to notify Johnson of the "nature of the deficiency" and allow him fourteen (14) days to cure the defect or the case may be dismissed for failure to prosecute. The Court cited Van Meter v. Alford, 1988-CA-01591-SCT. Because the Clerk did not give Johnson the required notice of deficiency, Johnson was deprived of due process rights when the Court dismissed Johnson's appeal and the case was remanded for further proceedings consistent with the Opinion. In Johnson, there was only a nine month delay between the order of the lower court and the dismissal of the appeal.

In a case similar to the case at bar, Tequelia T. Thomas v. Five County Child Development Program, Inc., 2006-WC-00121-COA, the Court of Appeals considered the Circuit Court of Warren County's dismissal of Thomas's appeal for failure to file a Brief. The appeal was taken from a decision of the Mississippi Workers' Compensation Commission,

which affirmed the decision of an Administrative Judge denying Thomas's claim for Workers' Compensation benefits. Aggrieved by the Circuit Court's dismissal, Thomas appealed to the Court challenging the Circuit Court's dismissal of her appeal, as well as the merits of the Commission's decision. The Court of Appeals found that the Circuit Court erred in dismissing Thomas's appeal. Therefore, they reversed and remanded the matter without reaching the merits of the Commission's decision. Interestingly, in Thomas, Thomas appealed a January 14, 2005 decision by the Administrative Law Judge. She perfected her appeal to the Commission, which after hearing, confirmed the findings of the Administrative Law Judge. Thomas then perfected an appeal of the Commission's decision to the Circuit Court of Warren County by filing a Notice of Appeal on July 7, 2005. The Commission forwarded its transmittal letter to the Circuit Court on July 25, 2005. Two days later, counsel for Thomas received a phone message from the Clerk's office that a filing fee and a case cover sheet were needed before the case could be docketed. Thomas's attorney called back to voice his belief that no filing fee is required in an appeal from an administrative agency. Unable to convince the Clerk, counsel for Thomas sent an e-mail to the Clerk's office on August 3, 2005 citing case authority to support his contention. Nothing happened of record until September 16, 2005 when counsel for Thomas sent a copy of the cover sheet and a letter to the Clerk asking him to docket the case. Counsel for Thomas waiting to receive notice of docketing and a briefing schedule from the Clerk, filed no brief with the appeal. On November 8, 2005, Five County filed a Motion to Dismiss for Thomas's failure to file a brief. The Circuit Court of Warren County granted Five County's motion by Order dated December 22, 2005. Aggrieved

by the Circuit Court's decision, Thomas appealed. Although M.R.A.P. Rule 31(a) and (b) provide in pertinent part:

- (a) **Notice of Briefing Schedule.** Immediately upon filing of the record in the office of the clerk of the Supreme Court, the clerk shall notify counsel of the filing of the record. *However, failure of the clerk to give, or of a party to receive, notice of the filing of the record shall not excuse any delay in filing briefs.*
- (b) **Time for Filing and Service of Briefs.** *The appellant shall serve and file the appellant's brief within 40 days after the date on which the record is filed.*

The Court held that:

Notwithstanding, Thomas's failure to file a brief, we find that, pursuant to *Mississippi Rule of Appellate Procedure 2(a)(2)*, Thomas was entitled to written notice from the clerk of the deficiencies in the appeal and a fourteen day period in which to cure any deficiencies.

The Court went on to impose sanctions and required Thomas to pay one-half the cost of appeal. In Thomas, the elapsed time from the filing of the Notice of Appeal until filing of the Motion to Dismiss was a little over four months.

In Van Meter, the Court also found that while dismissal was "too harsh a sanction," the consideration of a lesser sanction was appropriate. Evidence revealed that Van Meter took necessary steps to correct the deficiencies in his appeal two (2) days after the filing of Alford's Notice of Dismissal. Thus, the Court stated:

There is no evidence in the record that the deficiencies in Van Meter's appeal were the result of clear delay or contumacious conduct. The Court is therefore of the opinion that lesser sanctions may be appropriate in this case.

In a related case, Mattie Ford v KLLM, Inc., 2003-WC-01688-COA, on April 3, 2001, Mattie Ford's claim for permanent workers' compensation disability was denied by the administrative law judge. Ford filed her petition for review by the Full Commission twenty-one (21) days later on April 24, 2001. KLLM subsequently filed its motion to dismiss Ford's petition of appeal for lack of timeliness. On May 7, 2001, the Commission held that Ford's petition for review was untimely and, thus, dismissed the appeal.

Ford then appealed the Commission's decision to the Hinds County Circuit Court. On June 24, 2003, the trial judge affirmed the Commission's decision and dismissed Ford's appeal. Ford appealed to this Court asserting that her failure to file her petition for review in a timely manner was the result of excusable neglect and that the Commission erred in denying her motion for enlargement of time to file an appeal along with her motion for the admission of additional evidence. This Court held that the Commission was not in error in determining that Ford's petition for review was untimely. *Id.*

For purposes of the case at bar it is to be noted that in all of these cases, the delay involved was shorter than the delay in the instant case. In Van Meter v. Alford, 1998-CA-01591-SCT, the Motion to Dismiss was filed 43 days after the Notice of Appeal was filed. Also, Van Meter actually paid the clerk's filing fee of \$100.00. In Johnson v. Brooks (Gullette), 2004-CP-00782-COA, the judgment appealed from was entered on June 20, 2003. The case was appealed and a Motion to Dismiss the appeal was filed less than six (6) months later. In Thomas v. Five County, 2006-WC-00121-COA, Appellant timely filed a Notice of Appeal on July 7, 2005. Within 30 days, counsel corresponded with the Circuit Clerk citing authority supporting his contention that no filing fee was required in an appeal from an administrative agency. On November 8,

approximately four (4) months later, Appellee filed its Motion to Dismiss for Appellant's failure to file a brief. On December 22, 2005, the circuit court entered its Order dismissing the appeal. In Ford v. KLLM, Inc., 2003-WC-01688-COA, appellant missed her deadline to file a brief by one day and dismissal of her appeal was affirmed.

In the instant case, (1) there was over a 13-month delay between the filing of the Notice of Appeal and the filing of the Designation of Record; and, (2) there was an 18-month delay between the filing of the Notice of Appeal and payment of costs! Appellee, Horseshoe, filed its Motion to Dismiss Appeal on February 21, 2008 and Brown timely filed a written response. Horseshoe's Motion clearly advised Brown of the deficiencies in his appeal. However, Brown's cure of these deficiencies did not occur until over 4 ½ months later on July 10, 2008.

The Circuit Court made no ruling on Horseshoe's Motion to Dismiss Appeal. On or before June 25, 2008, the Clerk of the Mississippi Supreme Court received the Circuit Court record in this matter. Because there was no ruling by the Circuit Court on Horseshoe's Motion to Dismiss Appeal, it is proper for this Court to consider the motion. Since there is precedence concerning the interest of the courts in requiring parties' timely adherence to the rules and prevention of pure delay, and since this Court has an interest in timely prosecution of appeals and the orderly administration of justice, it follows that dismissal of this appeal is appropriate.

SECTION II

FACTS

In this section we turn to the alternative issues of the merits of the appeal. This appeal originated as two Workers' Compensation cases. The claimant filed his B5-11 in MWCC Cause Number 04000134-H-8644A [hereinafter H-8644] on December 19, 2003 alleging bilateral carpal syndrome as a result of "repetitive lifting, straining and carrying money/coin bags." Four months later, on April 21, 2003, claimant filed a B5-11 in MWCC cause number 02 04043-H-6758 [hereinafter H-6758] alleging a right cubital tunnel and right ulnar neuropathy injury on June 1, 2001. Brown described the latter injury as "Plaintiff was waiting to fill a slot machine and a co-worker opened the steel door of the machine hitting Plaintiff's arm with the steel door and injuring Plaintiff's right elbow." V2 P1.

The Order of the administrative judge was issued on June 21, 2005. The administrative judge found that Brown did not meet his burden of proof as to the issue of bilateral carpal tunnel syndrome [H-8644] and that there was insufficient evidence to establish a causal connection between Brown's carpal tunnel syndrome and his work activities. V2 P63. The Commission affirmed the finding that Brown's bilateral carpal tunnel syndrome was not related to his employment. V2 P72. However, in [H-6758] the Commission reversed "the Administrative Judge's findings on the claimant's diagnosis of right cubital tunnel syndrome and right ulnar neuropathy," determining that the testimony of the claimant together with the medical testimony and documentary medical evidence do not support her findings that the right elbow claim is

compensable. V2 P72,73. The Circuit Court of Tunica County affirmed the Commission's denial of both claims. V1 P15,16.

STANDARD OF REVIEW

The claimant [Brown] has the burden of proof regarding causation. In order to meet his burden of proof, Brown must show an accidental injury arising out of and in the course of employment and causal connection between the injury and the claimed disability. See, Potts v. Lowery, 134 So.2d 474, 242 Miss. 300 (1961). It is well established, and has been for decades, that the claimant has the general burden of proof to establish every essential element of his claim, and it is not sufficient to rely on conjecture or speculation. T. H. Mastin and Company v. Mangum, 215 Miss. 454, 61 So.2d 298 (1954).

The standard of proof regarding causation is the preponderance of the evidence. In a workers' compensation case, the claimant bears the burden of proving by a "fair preponderance of the evidence" each element of the claim. These elements are: (1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the disability. Bracey v. Packard Elec. Div., Gen. Motors Co., 476 So.2d 28, 29 (Miss.1985).

"This Court will reverse an order of the Workers' Compensation Commission only where such order is **clearly erroneous and contrary to the overwhelming weight of the evidence.**" [emphasis added]. Mitchell Buick, Pontiac & Equip. Co. v. Cash, 592 So.2d 978, 980 (Miss. 1991). If the Commission's findings are supported by substantial evidence, appellate courts are bound by the Commission's findings, even if the evidence would persuade this Court to find otherwise, if it were the fact finder. Hedge v. Leggett & Platt, Inc., 641 So.2d 9, 12 (Miss. 1994). In other words, this Court will reverse the Worker's Compensation Commission only if it finds

that order clearly erroneous and contrary to the overwhelming weight of the evidence. *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1988). *Myles v. Rockwell International*, 445 So. 2d 528, 536 (Miss. 1983).

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT BROWN'S CARPAL TUNNEL SYNDROME WAS NOT CAUSALLY RELATED TO HIS EMPLOYMENT WITH HORSESHOE; THEREFORE IT WAS NOT AN ABUSE OF DISCRETION FOR THE CIRCUIT COURT TO AFFIRM THIS FINDING OF THE COMMISSION

The administrative judge set forth in her order the following:

“As to the issue of bilateral carpal tunnel syndrome; however, Claimant has not met his burden of proof that he sustained a work injury in the form of bilateral carpal tunnel syndrome occurring on or about December 28, 2001, as a result of repetitive work by claimant for the Employer. There was insufficient evidence to establish a causal connection between Claimant's bilateral carpal syndrome and his work activities.” V2 R63.

This finding was affirmed by the Commission and the Circuit Court. Brown in his brief lightly addresses the issue of carpal tunnel syndrome. Brown's lean argument on this point is that the administrative judge and Commission were wrong because common knowledge, common experience and common sense would establish a connection between the extremely repetitive nature of his work and his resulting carpal tunnel syndrome. Brown offered no medical testimony to substantiate this claim. However, Brown misses the point. What Brown must do to overturn a decision of the finder of fact is to show that the Workers Compensation Commission decision on

this point is clearly erroneous and contrary to the overwhelming weight of the evidence. Brown has failed to do this.

A review of the medical records reveals that not a single record connects Brown's work with the bilateral carpal syndrome. Brown's medical history is short. He began treatment on 12-28-01 complaining of headaches off and on for about 6 months, a lot of stress at work, depression, feeling down, loss of self worth, feeling tired and sleepy, and also some numbness in his right hand with some weakness and muscle wasting in his right hand for about a year. He also complained that his right arm gets tired quickly and that he had numbness in his right hand that got worse with headaches. See Horseshoe Record Excerpt [hereinafter "HRE 1"] pp1-5 [The Family Physicians Group notes 12-28-01]. Significantly, not only was there no report that any of these injuries were "work" injuries; and there was no complaint of bilateral pain in the hands and arms. Brown was seen three more times by Dr Drewry, on 1-11-02, 2-1-02, and 2-15-02, see HRE 1, pp1-5. Not once did Brown complain of bilateral carpal tunnel syndrome symptoms or relate these complaints to his work. Brown saw Dr. Kellett four times. Nowhere in the record does claimant complain of bilateral hand and arm pain. Claimant also failed to report any bilateral hand and arm pain to his employer. At hearing on 5-5-05, claimant failed to complain of bilateral carpal tunnel symptoms. Brown failed to meet his burden of proof that his carpal tunnel syndrome was caused by his work at Horseshoe. There is no medical testimony to substantiate Brown's claim.

It is stipulated that Brown did not report a work injury until he started treatment with Dr. Kellett on February 21, 2001. V2 P57. It seems unlikely that one could suffer carpal tunnel syndrome doing "extremely repetitive" work for more than a year without complaining to

someone at work or at least to treating physicians of pain or bilateral pain in the upper extremities caused by working for the Employer, Horseshoe. The absence of these complaints in the record along with no medical testimony to substantiate the claim of bilateral carpal tunnel syndrome is substantial evidence supporting the affirmance of the denial of this claim.

Thus, because there is no documentary evidence from any of Brown's medical providers that the carpal tunnel syndrome is related to his work at Horseshoe, because Brown failed to report any carpal tunnel syndrome symptoms at work, because he failed to offer any testimony in his own behalf as to the claim of bilateral carpal tunnel syndrome, because all this is borne out by a review of the record, and because Brown did not meet his burden of proof on this claim and cannot now show that the finding against him was clearly erroneous and contrary to the overwhelming weight of the evidence, this Court should affirm denial of this claim by the Commission and the Circuit Court.

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT CLAIMANT WAS NOT ENTITLED TO WORKER'S COMP BENEFITS AS A RESULT OF THE CLAIMANT'S CLAIM FOR CUBITAL SYNDROME IN RIGHT ELBOW

Regarding Brown's alleged work injury occurring on or about June 1, 2001 [elbow injury or cubital tunnel syndrome] [H-6758], this injury was not reported to the Employer for more than eight (8) months after the alleged event. The Employer denied coverage and a Petition to Controvert was filed on April 21, 2003. At hearing on May 5, 2005, the Administrative Law Judge found that Appellant suffered a compensable injury due to cubital tunnel syndrome and was entitled to TTD from December 28, 2001 until June 28, 2002, plus associated medical costs.

Claimant worked about a year at Horseshoe Casino as a slots cashier from December 5, 2000 through December 28, 2001. In that job, he was required to lift bags of coins weighing 50 or more pounds as well as other duties of a cashier. In September, 2001 he reported that he stated to Regina Barnes of Human Resources, that injuries to his right arm and hand were interfering with the duties of his employment. However, Brown did not report these injuries as work injuries. [T 31, 42, 56]. In fact, all that Brown reported was that he was hurting and having headaches. He did not say where he was hurting. [T 29, 30]. This was repeated in December, 2001 when Brown spoke with his supervisor, Patrice Rush, reporting right arm pain and headaches and that he was seeking medical treatment for same but not reporting the right arm pain as a work injury. [T 30]. In fact, Brown did not state that he thought the problem was work-related or that he had suffered an injury at work. [T 56].

The first medical treatment of any kind sought by the claimant was on December 28, 2001, six months after the alleged injury to the right elbow. Before reporting this alleged injury in February, 2002, claimant had gone to Dr. Drewry complaining of depression and headaches. He also reported on 12-2001, decreased strength in his right hand lasting for the last "one year." [HRE 1 pp. 1-5]. Brown did not report to his doctor or employer that he had been injured at work. His visit with Dr. Drewry on January 11, 2002, was for headaches, depression, abdominal pain, and increased glucose. It was for complaints other than his elbow that Dr. Drewry took him off work from January 11, 2002 to February 3, 2003. [HRE 2: pp.1-13]. On February 15, 2002, Dr. Drewry noted that the EMG he ordered revealed multiple neuropathy and severe right cubital tunnel syndrome and mild left cubital tunnel syndrome. Even armed with this information,

Brown did not advise his doctor that he injured himself at work, nor did he report any work injury to Horseshoe. It was not until after Brown was fired, or on or about February 21, 2002 that claimant decided he had been injured at work. Brown's first report of injury came only after medical tests established an injury to his right elbow. Only then were Brown's reports to his doctors expanded to include a work injury which would encompass workers' compensation benefits.

Although Brown was not hesitant to complain to his employer, Horseshoe, about other issues, Brown missed several opportunities to report this alleged work injury. Brown describes the occurrence of the injury as being hit hard and says he experienced sharp pain for 10 or 15 minutes and the symptoms didn't go away [T 29]. This alone should have prompted a report of injury and most likely a visit to the on-site EMT station at Horseshoe. However, Brown did not complain at the time of the injury or report it to anyone at work. Even though after a month and a half when Brown reports, "the pain started getting severe," Brown still did not report a work injury to anyone at Horseshoe. Brown had a history of complaining to his supervisors at Horseshoe. In fact, after the alleged injury to his elbow, Brown complained to his supervisors: (1) that he was being teased at work because he had not been promoted; and (2) also that he was being teased about keeping horses. [T 57, 58]. Brown cannot explain why he did not report this alleged work injury before February, 2002.

As noted above, Brown complained twice to superiors at Horseshoe, in September and December, 2001, that he had problems with his right arm and failed to mention that he was hurt at work. Brown went to Dr. Drewry on 12-28-01 and complained of several symptoms including numbness in his right hand for about a year and that his right arm got tired. He returned to Dr.

Drewry on 1-11-02 but did not complain of any problems with his arm, hand or elbow. [HRE 2: pp 1-13]. He followed up with Dr. Drewry on 2-1-02 for depression, blood pressure check, some dizziness, headaches, and muscle soreness in the mornings. [Appellant Brown usually went to work in the evenings.] On 2-15-02 Brown returned to see Dr. Drewry for follow up on hypertension and situational stress. At that time the EMG revealed multiple neuropathy with severe right cubital syndrome, bi-lateral carpal tunnel syndrome and mild left cubital syndrome. In all of these four visits to his treating physician, Brown never once mentioned to his medical providers or to Horseshoe that he had suffered an injury at work or any injury at all to his right arm or elbow.

Initially, Brown could not identify the co-worker that supposedly opened the slot door and caused this injury. [T 77]. Brown's testimony concerning the identity of the co-worker who caused this crippling injury to him was inconsistent. [T 76]. At deposition, Brown could not even say if the co-worker was male or female. [T 76]. At hearing, Brown claimed to have remembered that the co-worker was Trudy. [T 76-78]. In spite of remembering the identity of this important witness, he failed to obtain her testimony to corroborate his claim that an injury to his elbow (and upper right extremity) actually occurred at work. Brown's testimony is inconsistent and uncorroborated.

Evidence indicates that Brown not only missed several opportunities to report this alleged work injury, but also that he is the lone proponent of his allegation of a work injury.

The Commission noted in its Opinion, *inter alia*, the following:

. . . Of particular significance to the Commission is the fact that in September of 2001, some three months after the alleged right elbow injury, the claimant sought assistance from the casino's human

resources department, reporting to one of the human resource officers, Regina Barnes, that injuries to his right arm and hand were interfering with the duties of his employment, but failed to relate these injuries as “work” injuries. This particular reporting was repeated in December 2001 when the claimant spoke directly with his supervisor, Patrice Rush, reporting right arm pain and headaches advising Ms Rush that he was seeking medical treatment for same, but not reporting the right arm pain as a “work” injury. [V2 P73].

The Full Commission also found, *inter alia*, “In examining the testimony of the claimant as a whole, we find it untrustworthy”. [V2 R73]. The testimony at hearing contained admissions from Brown that he had been convicted of two crimes involving dishonesty, one of the crimes was embezzlement from a former employer. [T 82]. The Commission also noted in its Opinion, that

“... the tenor of the claimant’s entire testimony is simply not trustworthy. A reading of his testimony at the hearing leaves the Commission with the impression that the Claimant is evasive in manner and leads us to conclude that this claimant conveniently recalled an injury when it suited his needs.” [V2 P74]

A number of factors support a conclusion that the claimant’s report of the cause of the injury and his testimony at the hearing were not credible and should not be relied upon by the fact-finder. In addition to missing several opportunities to report a work injury, Brown gave inconsistent reports of the onset date of the illness. On December 28, 2001 Brown stated to Dr. Drewry that the symptoms to his right arm had occurred for about one year. [HRE 1 p4]. This conflicts with his testimony and his B 5-11 stating that the injury occurred on 6-1-01. Brown also failed to make any connection of his injury to work until eight (8) months past alleged injury. Only after medical tests established an injury to his right elbow did claimant report a work injury, in spite of numerous doctor visits and opportunities to do so earlier. Brown who admitted at

hearing that he had an injury to his right shoulder in 1997 or 1998 and did not report this to Dr. Kellett. [T 47]. A review of his medical records reveals that the right shoulder injury was never mentioned to any of his other treating physicians.

The Commission found that there was a significant delay from the date of alleged injury, approximately eight months or longer, in reporting to the employer that he had a work injury. The Full Commission found that it was unreasonable for the claimant to fail to report the accident to the employer until February 2002, when Dr. Kellett asked him if he had suffered a blow to his elbow. This series of events is indicative of fabricating a work injury to fit the medical evidence.

The Commission found the tenor of the testimony of claimant was simply not trustworthy and that Brown was evasive. A review of parts of his cross-examination shows that Brown was evasive and untrustworthy in his testimony. See excerpts of Brown's testimony. [T 48, 58, 75, 82].

The Commission had a right and a duty to critically evaluate and weigh medical evidence, as well as lay evidence, and to base its findings upon the evidence as a whole. It is acceptable for the Commission to give little or no weight to medical opinions regarding causation when those opinions have inadequate basis in objective evidence and are not persuasive. When the opinion of a doctor was inconclusive the Commission properly gave his opinion little weight. Mississippi Products, Inc. v. Skipworth, 238 Miss. 312, 118 So.2d 345 (1960).

Here the Commission in its Full Commission Opinion noted, inter alia, "6. In examining the testimony of the claimant as a whole we find it untrustworthy." V1-R73. As noted above, the findings and order of the Workers' Compensation Commission are binding on this Court so long as they are supported by substantial evidence. Fought v. Stuart C. Irby Co., 523 So. 2d 314, 317

(Miss. 1988). Medical opinions based on a “mere scintilla” of evidence are properly not given significant weight. Conflicting testimony of physicians may be relied on or disregarded depending on what evidence they are based on. DiGrazia v. Park Place Entertainment, 2004-WC-01035-COA. When a physician reached a conclusion regarding causation based on the history reported by claimant and not on objective findings, noting that the medical evidence did not entirely make sense, the Commission properly determined that the doctor was not credible and that the claimant did not meet his burden of proof. Smith v. Grand Casino - Biloxi, 2002-WC-01017-COA.

In the case at bar there is no opinion to a reasonable degree of medical probability as to causation of Brown’s cubital tunnel and ulnar neuropathy. Dr. Kellett’s opinion regarding causation of the right cubital syndrome and right ulnar neuropathy is based entirely on the claimant’s delayed and uncorroborated report of bumping his right elbow on a door. Kellett stated explicitly that because the claimant reported injury when hit by a door occurred at the same time the symptoms reportedly occurred, he concluded that the accident caused the medical problems for which he treated the claimant. Kellett made it very clear that the opinion regarding causation was based entirely on the claimant’s history, not on any objective test. This case is much like Cuevas v. Copa Casino, 2001-WC-01195-COA, in terms of the credibility analysis, in that here, as in Copa, the claimant also gave inconsistent statements. The guiding principle here is that medical evidence based on inadequate or incorrect facts, or to less than the requisite degree of medical certainty is not reliable.

Dr. Kellett’s opinion that the claimant’s right ulnar neuropathy was work-related was based on a “mere scintilla” of evidence – the claimant’s delayed report of an injury (8 month

delay) which retrospectively coincided with the approximate time his symptoms began. Kellett never stated or gave any indication that his opinion was to any particular level of medical certainty, leaving open the distinct possibility that his opinion was mere speculation. Kellett's opinion regarding causation is not substantial evidence, and is inadequate to support the administrative judge's decision regarding causation and compensability of the right elbow cubital tunnel syndrome and ulnar neuropathy. Moreover, the Commission found that the claimant was evasive and gave untrustworthy testimony. Thus, there is inadequate evidence regarding causation and the Commission so found and the Circuit Court affirmed.

CONCLUSION

I.

It is apparent that Brown had at least three occasions where he was asked about or notified about the status of the appeal. The first of these times was an inquiry from the Workers' Compensation Commission, about three (3) months after Brown filed his Notice of Appeal. The second occasion was Horseshoe's letter to the Tunica County Circuit Clerk confirming that nothing had been done of record since the Notice of Appeal was filed over twelve (12) months earlier. Brown elected to do nothing of record within the fourteen day time period following each of said notices. The third notice of the deficiencies of his appeal was Horseshoe's Motion to Dismiss Appeal where the deficiencies were clearly set forth. Brown answered by saying that the deficiencies were already cured. Four and a half months later, Brown paid his fees and costs and filed his Certificate of Compliance.

After filing his Notice of Appeal, Appellant allowed this matter to sit for over thirteen (13) months before filing his Designation of Record. After filing his Notice of Appeal, Brown did not pay any fees or costs or file a Certificate of Compliance until eighteen (18) months later on July 10, 2008. V1 P59-63. It is simply unfair to allow such a blatant disregard for the Mississippi Rules of Appellate Procedure and the Uniform Rules of Circuit and County Court Practice. It is also unfair to let the appeal process linger for over one year and six (6) months before completing the steps to perfect the appeal. Such delay thwarts the administration of justice and denies to all litigants the right to an expeditious termination of their dispute. For these reasons, this appeal should be dismissed.

II.

Alternatively, addressing the merits of the appeal, Claimant's self-serving testimony was uncorroborated, inconsistent and not credible. There was no medical evidence to substantiate Brown's claim of work related bi-lateral carpal tunnel syndrome. [H-8644]. The medical evidence regarding causation of the claimant's right elbow disability [H-6758] was based entirely on the claimant's unreliable history, and the hearing record contains insufficient evidence to support a conclusion that the claimant's right ulnar neuropathy was caused or aggravated or arising in any way from his work. Brown failed to report the injury when it occurred even though he advised that he had sharp pain for 10 or 15 minutes and that it continued to get worse. Brown worked full time for over six (6) months after the alleged work injury to his elbow but did not report it to his supervisors. Brown missed two opportunities, when discussing his right arm injury with his superiors at Horseshoe, to report the injury as a work injury, but he failed to do so. Brown missed four opportunities to advise Dr. Drewry that he had injured his right arm at work.

Brown's 12-28-01 statement to Dr. Drewry that the problems with his right arm began about a year earlier are inconsistent with an injury occurring on July 21, 2001, less than five months before. Only in February, 2002, over eight (8) months after he was "injured" and after he no longer worked for Horseshoe, did Brown report this injury. Brown's testimony was evasive and inconsistent. Therefore, there was substantial evidence for the Commission to affirm the denial of benefits to Brown for carpal tunnel syndrome and to deny benefits to claimant for right cubital tunnel syndrome and right ulnar neuropathy.

Therefore, Appellees respectfully request that this Court enter its Order dismissing Appellant's appeal or alternatively, that this Court affirm the rulings of the Commission and the Circuit Court of Tunica County.

Respectfully submitted, this, the 29th day of December, 2008.



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CERTIFICATE OF SERVICE

I, the undersigned, George E. Dent, do hereby certify that I have this day mailed, postage prepaid, by United States mail, a true and correct copy of the above and foregoing **Brief of Appellee** to the following:

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SO CERTIFIED, this, the 29th day of December, 2008.



GEORGE E. DENT

CERTIFICATE OF MAILING

I, Janet L. Self, hereby certify that I have this date, personally by my own hand, placed into the United States Mail, proper postage prepaid, one electronic disk in Word Perfect 10 format (*correctly labeled*) and the original and three copies of the Brief of Appellee to the clerk for filing at her usual address:

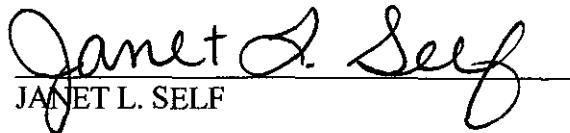
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THIS, the 29th day of December, 2008.


JANET L. SELF