

**IN THE SUPREME COURT OF MISSISSIPPI**

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**CAUSE NO. 2008-WC-01097**

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**EARL DEAN TAYLOR**

**CLAIMANT/APPELLANT**

**VERSUS**

**FIRST CHEMICAL AND  
NATIONAL UNION FIRE INSURANCE COMPANY**

**EMPLOYER AND CARRIER/  
APPELLEES**

**On Appeal from the Circuit Court of Jackson County, Mississippi; The Honorable Dale Harkey, Circuit Judge, in *Earl Dean Taylor, Claimant vs. First Chemical and National Union Fire Insurance Company, Employer/Carrier*, Docket No. 2007-00078 and MWCC Case No.: 0504516-J-2419-D**

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**BRIEF OF THE APPELLEES, FIRST CHEMICAL AND NATIONAL UNION FIRE  
INSURANCE COMPANY**

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**JOHN S. GONZALEZ - [REDACTED]  
CELESTE REEP OGLESBY - [REDACTED]  
DANIEL COKER HORTON & BELL, P.A.  
POST OFFICE BOX 416  
GULFPORT, MISSISSIPPI 39507  
(228) 864-8117  
FAX: (228) 864-6331**

**ATTORNEYS FOR FIRST CHEMICAL AND  
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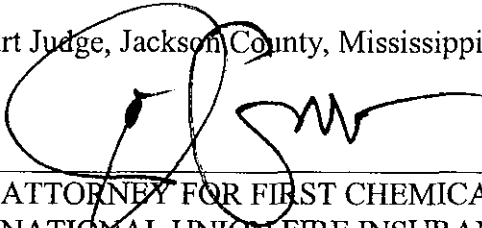
**CERTIFICATE OF INTERESTED PERSONS**

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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 disqualification or recusal.

1. Catherine Jacobs, Esq. - Attorney for the Claimant
2. John S. Gonzalez, Esq.  
Celeste Reep Oglesby, Esq.  
Daniel Coker Horton & Bell, P.A. - Attorneys for the Employer and Carrier
3. Earl Dean Taylor - Claimant

4. First Chemical  
National Union Fire Insurance Company - Employer and Carrier
5. Administrative Judge Cindy Wilson
6. Mississippi Workers' Compensation Commission,  
Liles Williams, Chairman
7. Honorable Dale Harkey - Circuit Court Judge, Jackson County, Mississippi

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a wavy flourish.

ATTORNEY FOR FIRST CHEMICAL AND  
NATIONAL UNION FIRE INSURANCE  
COMPANY

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## **STATEMENT OF THE ISSUES**

I. Whether the lower court erred in affirming the decision of the Commission which found that Claimant had failed to prove by a preponderance of the evidence that he suffered a work-related injury on December 19, 2004.

## **STATEMENT OF THE CASE**

This matter is a workers' compensation case that was initially heard before Administrative Judge Cindy Wilson on August 23, 2006, in Jackson County, Pascagoula, Mississippi. Following the hearing and upon consideration of the evidence, Judge Wilson issued an Order on October 31, 2006, which found that Claimant/Appellant had failed to prove by a preponderance of the evidence that he suffered a work related injury on December 19, 2004. (Vol. II at 22-34, R.E. at 1-13).

From this ruling, the Claimant/Appellant appealed to the Full Commission. The Full Commission entered an Order on March 7, 2007, affirming the "Order of Administrative Judge" entered on October 31, 2006. (Vol. II at 51, R.E. at 14).

From the Commission, the Claimant/Appellant appealed to the Circuit Court of Jackson County, Mississippi. Oral arguments were heard before Circuit Court Judge Dale Harkey on March 14, 2008. Following the hearing, Judge Harkey entered an Order Affirming Decision on May 27, 2008, finding the decision of the Commission was supported by the substantial and credible evidence. (Vol. I at 71-73, R.E. at 15-19).

From this decision, the Claimant/Appellant appealed to this Court.

## **STATEMENT OF THE FACTS:**

Claimant testified he suffered a heart attack in 1995 or 1996. (Vol. 4 at 7; R.E. at 28). Thereafter, he underwent five (5) stint implants and returned to work with the Employer. *Id.* Claimant has a history of a work-related low back injury, which he reported to this Employer in the late 1990's for which he received medical treatment from Dr. John McCloskey. (Vol. 4 at 8; R.E. at 29). Claimant testified that his lower back injury has prevented him from working and limits his physical activities. (Vol. 4 at 11; R.E. at 31). Claimant was initially employed with the Employer on June 19, 1985 as a lab technician. (Vol. 4 at 6; R.E. at 27). Claimant's retirement from the Employer was effective August 1, 2006. (Vol. 4 at 6; R.E. at 27).

### **Alleged Injury at Issue**

On or about December 19, 2004, Claimant alleged that he sustained an injury to his neck while pushing a self-contained breathing apparatus (hereinafter SCBA) back into the cabinet during a safety drill on the Employer's premises. (Vol. 4 at 15-16; R.E. at 36-37). Claimant testified that he felt a pain in the back of his neck and down between his shoulders when he pushed the SCBA back into the cabinet. (Vol. 4 at 15-16; R.E. at 36-37). Claimant stated the pain was like "I pulled a muscle down between my shoulders on the left side right next to the spine." (Vol. 4 at 16; R.E. at 37). Claimant testified that after the alleged incident occurred, **he failed to report it to his supervisor, Henry Wilkins, and instead, he decided to take his week vacation to Walnut Hill, Florida,** and treat his alleged injury as a pulled muscle. (Vol. 4 at 18; R.E. at 39). Prior to leaving for his vacation, Claimant stopped by the office of supervisor Henry Wilkins in order to tell him that a seal needed to be replaced on his SCBA unit's cabinet, but he did not report his alleged injury at that time. (Vol. 4 at 67; R.E. at 53). Henry Wilkins testified that after the safety drill, he had a



conversation with the Claimant, but the Claimant showed no signs of discomfort and never reported an injury to him. (Vol. 4 at 67-69; R.E. at 53-55). Thereafter, Claimant went on vacation. Claimant stated he took Aleve and used a heating pad for his alleged injury and returned to work three days later for a safety meeting. (Vol. 4 at 19; R.E. at 40). However, Claimant did not report the injury to Henry Wilkins, who was also present, or any other employee present at the safety meeting on December 22, 2004. *Id.* Henry Wilkins testified that he spoke at the safety meeting that occurred on December 22 and confirmed the Claimant was present at the meeting. (Vol. 4 at 68-69; R.E. at 67-68). Mr. Wilkins also testified Claimant did not report the injury at the safety meeting and did not appear to be in any discomfort while at the meeting. (Vol. 4 at 69; R.E. at 55).

Claimant stated he returned to work on December 26 and was climbing a steel ladder when he discovered he could not pull his body weight up with his arms. (Vol. 4 at 20-21; R.E. at 41-42). Claimant testified he felt **“the same pain down between my shoulders, just excruciating pain.”** (Vol. 4 at 21; R.E. at 42). Claimant stated that at this point he realized that his alleged injury was more severe than a pulled muscle and reported to his fill-in supervisor Jimmy Don Langston that he had originally injured himself on December 19, 2004. (Vol. 4 at 21; R.E. at 42). Mr. Langston filled out the First Report of Injury or Occupation Disease which reflected that on December 19, 2004, Claimant experienced **“shock in back of neck between shoulders”** while “lifting SCBA from back to the rack it is stored in.” (Ex. C1-8; R.E. at 58). Mr. Wilkins testified that the Employer’s company policy was for an employee to report an injury within 24 hours. (Vol. 4 at 70; R.E. at 56). During cross-examination, Claimant acknowledged that as a former supervisor with the Employer he realized the extreme importance of reporting work-related injuries and understood the importance of it in December 2004. (Vol. 4 at 37; R.E. at 43). Claimant also acknowledged that he had reported a previous back injury to the Employer immediately when he thought it was a pulled muscle in the

late 1990's, yet stated his reason for not doing the same in this instance was because employees like Henry Wilkins had been stressing no "lost time accidents." (Vol. 4 at 38-39; R.E. at 44-45). However, Mr. Wilkins testified that he never told employees not to report an injury, stressing it would have cost him his job had he done so. (Vol. 4 at 70; R.E. at 56). Due to Claimant's delay in reporting his injury, the Employer instructed the Claimant to seek medical attention under his own insurance. (Vol. 4 at 23; R.E. at 42). On December 27, 2004, an Authorization for Medical Service was filled out by the Employer and Claimant was sent to Dr. Paul Fineburg for treatment for **"pain in upper back between shoulder blades."** (Ex. CI-9; R.E. at 59).

On December 27, 2004, Claimant was evaluated by Dr. Fineburg who noted in his treatment history that Claimant was injured when he was removing his Scott Air pack when he turned to place it in its resting position and felt a sharp pain in the upper midback, midline. (Ex. 5; R.E. at 66). Dr. Fineburg placed Claimant off work pending an x-ray of the thoracic spine. On December 28, 2004, Claimant's x-ray of the thoracic spine showed moderate thoracic degenerative disc disease, but no acute abnormalities were apparent. (Ex. 5; R.E. at 67). Dr. Fineburg referred Claimant to physical therapy and was Claimant discharged from therapy approximately two weeks later. (Ex. 5; R.E. at 71). The Discharge treatment record from Seaside Physical Therapy dated January 14, 2005, indicates that Claimant reported injuring his back after wearing an air harness at work. *Id.*

On January 14, 2005, Claimant was treated again by Dr. Fineburg, who noted that Claimant maintained midback pain primarily between the shoulder blades and the upper thoracic region, worse on the left than the right, noting the pain shot up to his neck. (Ex. 5; R.E. at 70). The history also noted continued pain from an old lumbar injury which had remained unchanged. Thereafter, Dr. Fineburg referred Claimant to Dr. Chris Wiggins, an orthopaedist. *Id.* The Claimant remained off of work. It should be noted that prior to the alleged December 2004 on the job injury, Claimant

sought treatment from Dr. Westbrook, Dr. Fineburg's partner, on August 17, 2004 for severe left shoulder pain that he had been experiencing for several months. (Ex. 5; R.E. at 62). The records indicate greater pain in the left shoulder than the right side. (Ex. 5; R.E. at 62). An x-ray was obtained and revealed a normal left shoulder. *Id.*

Claimant was referred to Dr. Wiggins by Dr. Fineburg and was initially evaluated on January 17, 2005, for his upper back pain. The medical history on this date notes Claimant was injured on December 19, 2004, while putting on a Scott air pack at First Chemical. (Ex. 6; R.E. at 78). Dr. Wiggins recommended an MRI of the thoracic spine, which showed a wedging of the T7 vertebral body and some disc bulging at T7-8 and T10-11, but no disc herniations. (Ex. 6; R.E. at 82). Arthritic changes were also noted. *Id.* On February 4, 2005, Claimant presented with thoracic spine pain, lower neck pain, and numbness and tingling into the fifth finger of the left hand. (Ex. 6; R.E. at 81). EMG/NCV tests were recommended and obtained, which revealed a right C8 radiculopathy that was considered acute and bilateral mild to moderate carpal tunnel syndrome, right worse than left. (Ex. 6; R.E. at 85-87). A cervical MRI was recommended by Dr. Wiggins, but he elected to refer him to Dr. McCloskey and defer to his decision on this issue. (Ex. 6; R.E. at 84, 88).

Dr. McCloskey testified during his deposition on April 17, 2006, that he had treated Claimant for a lower back injury in 1989 for disc herniations at L4 and L5 on the left which occurred while Claimant was in the scope of his employment at First Chemical. (Ex. 2; R.E. at 93-96). Dr. McCloskey testified that surgery was not recommended and was released to MMI on April 7, 1989, with a permanent partial impairment of 5%. (*Id.* at 7; R.E. at 95).

Regarding the present injury, Claimant was initially treated by Dr. McCloskey on March 25, 2005. (Ex. Gen. #3; R.E. at 114). Dr. McCloskey testified that Claimant reported that he was injured on December 12 or 19, 2004 while struggling with an air pack at work and had continuing problem

with neck and arm pain, pain between his shoulder blades. (Ex. 2 at 7-8; R.E. at 95-96). Thereafter, the medical records indicate that Dr. McCloskey order a myelogram on March 30, 2005, which revealed a 1) left-sided disc herniation at L5; 2) central disc herniation at L4; and 3) a diffuse disc herniation at C5-6 which results in a relative block as seen best at myelography. (Ex. 3; R.E. at 116). To questioning concerning the C5-6 level, Dr. McCloskey described the Claimant's condition as a "really big ruptured disc at C5-6." (Ex. 2 at 9; R.E. at 97-99). Dr. McCloskey noted abnormalities above and below the C5-6 level as well. *Id.* Further, Dr. McCloskey testified that the L4 and L5 disc herniations were unchanged from his prior back injury. *Id.* Dr. McCloskey opined the C5-6 was "nearly a complete myelographic block, which we don't frequently see, as things were so tight the dye didn't get by." *Id.* Dr. McCloskey testified that he recommended surgery for this condition. *Id.*

The medical records indicate that on April 25, 2005, Claimant underwent a three level discectomy and fusion for the large disc herniation at C5-6 and spondylosis and spinal stenosis and C4-5 and C6-7. (Ex. 3; R.E. at 118-120). Claimant remained off work during this time. After the surgery, Claimant underwent physical therapy with Ruth Bosarge, PT, with Physical Therapy Solutions. (*Id.*; R.E. at 111). Treatment history from June 20, 2005, notes Claimant was continuing to struggle with neck pain. (*Id.*; R.E. at 125). On July 13, 2005, Claimant presented to Dr. McCloskey for followup from his neck surgery. The medical record on this date noted surgery had helped the Claimant tremendously with the bilateral neck, shoulder, and arm pain, numbness, and tingling that was radiating to both hands and also in both sides of his chest. (*Id.*; R.E. at 127-128). On September 12, 2005, Claimant appeared for followup with Dr. McCloskey, noting some neck stiffness, with an opinion that Claimant was far better than he had been. (*Id.*; R.E. at 130-131). On this date Dr. McCloskey placed the Claimant at MMI due to his neck injury, with a permanent partial

impairment of 15% due to his neck. *Id.* Dr. McCloskey combined the previously assigned 5% permanent partial impairment from his lumbar injury to the 15% impairment to his neck resulting in a 20% permanent partial impairment. *Id.* As a result of the neck injury, Dr. McCloskey permanently limited the Claimant to sedentary work, noting that Claimant could not do overhead work, no vertical climbing, very limited bending and stooping, and no crawling. *Id.* A lifting restriction of 20 pounds was also provided. *Id.* Claimant was provided a return to work slip for January 2006 by Dr. McCloskey dated January 10, 2006, at light duty with no lifting over 20 pounds. (Ex. 2 at 12, Ex. 1; R.E. at 132-133). During his deposition, Dr. McCloskey testified that the disc herniations within the neck were related to the December 2004 injury reported by the Claimant to have occurred at First Chemical. (Ex. 2 at 14; R.E. at 102).

The medical records indicate that after Claimant was released to return to work in January 2006 by Dr. McCloskey, Claimant appeared for treatment by Dr. McCloskey on June 10, 2006 for complaints of neck pain and stiffness and his neck locking up. (Ex. C1-12; R.E. at 134-135). The medical records indicate that it had been over seven (7) months since Claimant had been treated by Dr. McCloskey. A review of the medical record for this date indicates that Dr. McCloskey noted a recent X-ray looks satisfactory post-surgery. The medical record also notes Claimant's past medical history of hypertension, non-insulin dependent diabetes mellitus, and significant coronary artery disease. *Id.* The following impression was provided on this date by Dr. McCloskey: 1) Posttraumatic and postoperative cervical syndrome; 2) One year postop three level anterior cervical discectomy and fusion; 3) Symptomatic L5 disc herniation. 4) Hypertension; 5) Non-insulin dependent diabetes mellitus; 6) Coronary artery disease; and 7) on aspirin prophylaxis. *Id.* Dr. McCloskey noted that his opinion of MMI and a 20% PPI remained the same. However, he provided the following comment , "From the standpoint of Social Security, I think that he's totally and

permanently disabled. He has very limited neck motion, persistent problems with neck pain, and multiple medical problems.” *Id.*

On May 22, 2006, an EME of the Claimant was performed by Dr. Eric Wolfson. During the exam, Claimant provided a history that he was injured when pushing a Scott Air pack into the rack. (Ex. 1 at 17; R.E. at 141). Dr. Wolfson’s opinion was that Claimant had a mild cervical radiculopathy status post anterior cervical discectomy at C4-5, C5-6, and C6-7 with anterior cervical plates. (Ex. 4; R.E. at 146-148). After a physical examination and review of pertinent medical records, Dr. Wolfson opined based on a reasonable degree of medical certainty, Claimant’s cervical radiculopathy with resultant surgery was not a result of the work-related injury reported in December 2004. *Id.* Dr. Wolfson testified in his deposition on August 2, 2006, that the size of the disc bulge experienced by the Claimant at C5-6 was not work-related, as immediate symptomology would have occurred. (Ex. 1 at 10; R.E. at 139). Further, although Dr. Wolfson agreed with the initial work restriction of Dr. McCloskey of light duty in January 2006, Dr. Wolfson disagreed that the June 10, 2006 treatment record of Dr. McCloskey diagnosing the Claimant permanent and total disability was related to the work related incident of December 2004. (Ex. 1 at 8-9; R.E. at 137-138). Dr. Wolfson opined that Claimant’s change in status to permanently and totally disabled was not due to any alleged work-related neck injury, but would be related to his chronic low back pain, chronic neck pain related to degenerative changes in his neck and also the multiple significant medical problems that plague the Claimant. (Ex. 1 at 9; R.E. at 138).

## SUMMARY OF THE ARGUMENT

The medical evidence and lay testimony demonstrates that the lower court correctly affirmed the findings of the Commission that Claimant had failed his burden of proving a compensable work-related injury, finding in favor of the Appellees, the Employer and Carrier.

With regard to the medical evidence within the record, the only medical evidence within the record that links Claimant's cervical disc herniation to his work is the medical opinion of Dr. McCloskey, who admitted during his deposition that he had failed to review relevant medical records, namely those of Dr. Fineburg, which document that Claimant experienced shoulder pain prior to December 2004. Further, Dr. McCloskey noted that these shoulder complaints prior to December 2004 were consistent with a diagnosis of a cervical disc herniation. Therefore, given that Dr. McCloskey failed to review all relevant medical records with regard to Claimant's treatment history and was unaware of prior shoulder complaints, the Appellees assert that any opinion concerning causation and the diagnosis of permanent and total disability with regard to Claimant's neck was tainted.

To the contrary, Dr. Eric Wolfson, evaluated the Claimant for purposes of an Employer Medical Examination and **reviewed the entire relevant medical history of the Claimant.** During the course of his examination, Dr. Wolfson opined that given the size of the disc herniation, the herniated disc and resulting surgery were not related to Claimant's work as an immediate onset of symptoms would have occurred and that an injury to the neck of this magnitude would have caused the Claimant severe pain, even while lying down and would have been unable to work the rest of the day. However, the record reflects that Claimant's activities were not modified in any manner. Given the medical evidence within the record, the Commission's decision to find the testimony of Dr. Wolfson more reliable is supported by the substantial and credible evidence.

Moreover, the decision of the circuit court to affirm the ruling of the Commission is supported by the substantial and credible evidence as during the course of these proceedings, the Claimant's testimony was replete with inconsistencies. Claimant was unable to provide consistent testimony with regard to when the alleged incident occurred. Secondly, the Claimant, on cross-examination, admitted that as a former supervisor, he understood the importance of reporting injuries, but failed to do so even after deliberately seeking out his supervisor on the alleged date of injury following the safety drill. This inconsistency, coupled with the fact that Claimant had previously suffered a lower back injury with the Employer and immediately reported it, despite his thinking it was a minor injury, further emphasizes that the Commission's findings are supported by the evidence within the record. However, perhaps the most telling of all these inconsistencies with regard to Claimant's alleged injury is found in the medical records within the records which indicate varying stories of how Claimant's alleged injury occurred. Based on history provided by the Claimant, the medical records reflect a multitude of ways in which the alleged injured occurred -- removing the air pack, wearing the harness, putting on the air pack, backing into the rack to remove the pack, and finally pushing the pack into the rack. Claimant provides no reason for these inconsistencies.

Based on the foregoing, the Appellees aver that the decision of the circuit court should be affirmed as the Commission's holding that Claimant failed to meet his burden in proving a work injury is based on the substantial and credible evidence.



## ARGUMENT

- I. The circuit court was correct in affirming the decision of the Commission that Claimant failed to prove by a preponderance of the evidence that Claimant suffered a work-related injury on December 19, 2004, as said decision was based on the substantial and credible evidence.**

**A. Claimant failed to meet his burden in proving that he suffered a work-related injury as the medical evidence, specifically the medical testimony of Dr. John McCloskey, indicates that Dr. McCloskey was provided an incomplete medical history by the Claimant.**

As was noted by the lower court, the Commission is afforded great deference, and facts determined by them may not be disturbed on appeal if those facts are supported by substantial evidence. *Hale v. Ruleville Health Care Center*, 687 So. 2d 1221, 1224 (Miss. 1997). To establish entitlement to benefits under the Act, the Claimant bears the burden of proving by a preponderance of the evidence each element of the claim of disability. *Harrell v. Time Warner/Capitol Cablevision and Travelers Cas. And Surety Company*, 856 So. 2d 503, 506 (Miss. App. 2003). In this instance, Dr. McCloskey testified that Claimant's cervical disc herniation at C5-6, which resulted in surgery, was related to the work related incident which allegedly occurred on December 19, 2004. (Ex. 2 at 13; R.E. at 101). Dr. McCloskey also testified that he based his opinion the injury was work-related on the history received from Claimant concerning his neck injury and symptoms and the radiologic findings. (Ex. 2 at 12; R.E. at 100).

On cross-examination, Dr. McCloskey acknowledged that a complaint of severe shoulder pain was a normal symptom frequently associated with a cervical herniated disc. (Ex. 2 at 14; R.E. at 102). Further, Dr. McCloskey agreed upon questioning that pain radiating between the shoulder blades was a common symptom of a cervical herniated disc. *Id.* The medical records of Dr. Fineburg indicate that Claimant was treated by Dr. Westbrook on August 17, 2004, for severe left shoulder pain that he had experienced for several months. (Ex. 5; R.E. at 62). During cross-

examination, Dr. McCloskey stated Claimant failed to tell him of any significant problems to his shoulders prior to December 2004. (Ex. 2 at 15-16; R.E. at 103-104). Further, Dr. McCloskey testified he had never reviewed the medical records of Dr. Fineburg, which contained the medical opinions of Dr. Westbrook, which note Claimant's shoulder problems prior to December 2004. (Ex. 2 at 16; R.E. at 104). Also, Dr. McCloskey stated that he was unaware that Claimant was asked to undergo an MRI to his left shoulder prior to December 2004, yet the MRI did not occur. *Id.*

Dr. McCloskey confirmed that shoulder pain was a common symptom of a neck herniation at C5-6. (Ex. 2 at 17; R.E. at 105). Additionally, Dr. McCloskey acknowledged that his opinion that the December 2004 injury was work-related was based on the history provided by the Claimant. *Id.* To questioning, Dr. McCloskey replied that his opinion might change had a different history been provided. *Id.*

The employer medical examiner Dr. Eric Wolfson opined that due to the size of the disc herniation at C5-6, the herniated disc and resulting surgery were not work-related as immediate symptomology would have occurred. (Ex. 1 at 10; R.E. at 139). Further, Dr. Wolfson testified that as to the issue of causation, an independent medical examiner was sometimes in a better position than the treating physician to determine causation because an IME is given all of the medical records and able to be more objective due to information from multiple sources. (Ex. 1 at 20; R.E. at 144). Dr. Wolfson opined due to the tremendous size of the cervical herniation, had the Claimant experienced the herniation at work, **the Claimant would have been unable to work the rest of the day, then go home only to realize 8 days later he had this large disc herniation.** (Ex. 1 at 18; R.E. at 142). The record reflects that not only did Claimant continue to work the rest of his shift, but he stopped by to see his supervisor Mr. Wilkins to relay to him that a seal needed to be replaced on his cabinet. Thereafter, Claimant went on vacation to Walnut Hill, Florida, returned to a safety

meeting in the middle of the week at work without reporting the injury in the middle of the week, and then on December 26, 2004, reported his injury after allegedly realizing it was more than a pulled muscle. Dr. Wolfson stated an injury to the neck of this magnitude would have caused the Claimant severe pain at all times, even while lying down. (Ex. 1 at 18; R.E. at 142).

Claimant testified he performed clean up work due to Hurricane Ivan at his wife's home in Walnut Hill, Florida, which involved him picking up limbs about six feet long and weighing approximately twenty pounds. (Vol. 4 at 45-46, 50; R.E. at 49-50). Additionally, Mr. Wilkins, Claimant's supervisor, testified that Claimant had told him prior to December 2004 that he went to Atmore, Alabama, to clean up around his in-law's home. (Vol. 4 at 70-71; R.E. at 56-57). Further, Mr. Wilkins testified that prior to December 2004 on more than one occasion Claimant had told him he was doing strenuous clean up work and how tired he was from cleaning and picking up tree limbs. (*Id.* at 70-71; R.E. at 56-57).

Given the evidence within the record, the Commission correctly concluded Claimant failed to meet his burden in proving a work-related injury. Claimant's only medical evidence that links Claimant's cervical disc herniation to a work incident is the medical opinion of Dr. McCloskey. Dr. McCloskey admitted that he did not review all relevant medical records of Dr. Fineburg which note shoulder pain prior to December 2004. More importantly, Dr. McCloskey acknowledged the symptoms experienced by Claimant to his shoulder prior to December 2004 were common symptoms of a cervical disc herniation. Dr. McCloskey noted that his opinion could change depending upon the history provided by the Claimant. Given Dr. McCloskey, by his own admission was provided an incomplete medical history and failed to review all relevant medical records, the medical opinion linking the injury to a work related incident is tainted along with the flip-flop diagnosis of permanent and total disability due to the neck injury as to the Claimant by Dr. McCloskey. Dr. Wolfson

provided undisputed medical testimony that had Claimant's cervical disc herniation occurred at work, Claimant would not have been able to finish his shift. Further, Dr. Wolfson, opined that although the Claimant may in fact be disabled, that disability is unrelated to the alleged work-related incident, given the numerous pre-existing maladies suffered by the Claimant and itemized in Claimant's voluminous medical history. The Appellant asserts that Dr. Wolfson relied on erroneous information, but fails to identify the exact nature of the erroneous information. Moreover, the Appellant/Claimant argues that Miss. Code Ann. §71-3-15(1)(1972) does not allow an Employer Medical Examination for purposes of contesting the existence of a work-related injury or causation. However, the Appellees assert this argument, if followed, would suggest that every workers' compensation case would be compensable as compensability or causation could never be a contested issue on behalf of an employer and carrier. This argument by the Appellant is inherently flawed.

As noted herein, Claimant has the burden of proving he suffered a compensable injury. Claimant argues that Claimant has met his burden by having Dr. McCloskey link his injury to the alleged work-related incident. However, the medical evidence and deposition of Dr. McCloskey indicate that Dr. McCloskey did not have a full and complete medical history or medical records concerning Claimant's shoulder complaints.

As such, the Commission properly made a credibility call finding the opinion of Dr. Wolfson more credible than the opinion of Dr. McCloskey, and said finding was supported by the substantial and credible evidence.

**B. The finding that the testimony of Henry Wilkins was more persuasive than the testimony of the Claimant is supported by the substantial and credible evidence.**

Claimant was unable to provide consistent testimony as to when the alleged work incident occurred— whether it was during the morning or night shift. To questioning, Claimant initially

testified that he started working on the date of the injury at 5 a.m. with his shift ending at 5 p.m. (Vol. 4 at 17; R.E. at 38). Later, during the course of the hearing, Claimant testified that he thought the incident occurred during the graveyard shift. (Vol. 4 at 20; R.E. at 41). However, the accident report notes that the time of the work day when the alleged injury occurred began at 5:00 a.m., with a time of injury of 4:00 p.m. (Ex. C1-8; R.E. at 58).

Mr. Wilkins, Claimant's supervisor, testified that on the date of injury Claimant worked the day shift. (Vol. 4 at 66; R.E. at 52). After all testimony had concluded, Claimant's counsel stated on the record that Claimant was not certain whether he worked the day or night shift on the day of the alleged injury. (Vol.4 at 76; R.E. at 57). Given this inconsistency of Claimant's position as to this issue, the Commission correctly found Claimant equivocal as to when the alleged injury occurred.

Further, Claimant as a former supervisor for the Employer, acknowledged the importance of timely reporting on the job injuries, but failed to do so in this instance despite Claimant deliberately seeking out and speaking with his supervisor Mr. Wilkins after the safety drill on the date of the alleged injury. Further, after getting a second opportunity three days later to report the injury, Claimant failed to do so while attending the safety meeting. Finally, given the fact that Claimant previously suffered a lower back injury while working for the Employer and reported it immediately despite his thinking it was a pulled muscle further emphasizes that Claimant has failed to meet his burden in proving his neck injury is work-related. In light of this evidence in the record, the Commission correctly found Mr. Wilkins more persuasive than the Claimant. As such, the decision of the Commission should be affirmed, as the decision was clearly based on the substantial and credible evidence.

**C. The finding that Claimant failed to meet his burden in proving a work-related injury is supported by the substantial and credible evidence as Claimant provided inconsistent medical history to medical providers regarding the alleged work-related injury. In fact, the Claimant's version of his medical history improved with the passage of time.**

Claimant's medical history indicates that upon reporting the injury to his Employer, Claimant felt "shock in back of neck between shoulders" while removing SCBA and returning it to the rack. (Ex. C1-8; R.E. at 58). Upon referral to Dr. Fineburg, Claimant provided a history that he was removing a Scott air pack and turned to place it in a resting position and felt pain in upper midback, midline. (Ex. 5; R.E. at 66). Thereafter, the medical records of Seaside PT Center reveal another inconsistency in Claimant's history noting Claimant was seen for mid-back pain after wearing an air harness weighing 40-50 pounds. (*Id.*; R.E. at 71). Further inconsistencies in Claimant's medical history are noted upon referral to Dr. Wiggins. The medical history within Dr. Wiggins' medical records indicate that Claimant was injured when putting an air pack onto his back. (Ex. 6; R.E. at 78). Interestingly, the EMG report performed by Dr. Lennon Bowen notes that Claimant's injury occurred when lifting a Scott air pack off of his back to place on a rack at which time he felt a sharp pain to his neck and left shoulder blade. (Ex. 6; R.E. at 85). However, the inconsistencies do not end at this point of the Claimant's medical treatment. Dr. McCloskey's treatment record dated March 25, 2005, notes that Claimant was injured while backing up to the rack to remove the Scott air pack, experiencing pain in back of neck to his shoulder blades. (Ex. 3; R.E. at 110). Yet another inconsistency was noted in Claimant's version of how the alleged injury occurred upon the employer medical examination by Dr. Eric Wolfson. Dr. Wolfson testified Claimant provided him a history that he was pushing the air pack into the rack while at work when the injury occurred. (Ex. 1 at 17; R.E. at 141). A review of the medical evidence clearly demonstrates that Claimant provided inconsistent histories to medical personnel. However, Claimant can provide no explanation as to

how these inconsistencies ended up in the medical record. Further, to questioning, Claimant could provide no reason as to why his story concerning how his injury occurred only became consistent after he filed a lawsuit. (Vol. 4 at 42; R.E. at 48).

The medical evidence within the record relays multiple ways in which Claimant's alleged injury occurred. Specifically, the records reflect Claimant's injury occurred while removing the air pack, wearing the air harness, putting on the air pack, backing into the rack to remove the pack, and pushing the air pack into the rack. Claimant can provide no explanation for these multiple inconsistencies noted throughout his treatment history. Claimant characterizes these inconsistencies as "relatively minor." **Clearly, Claimant's version of the story improved with time.** As such, the Commission correctly concluded the Claimant failed to meet his burden by a preponderance of the evidence that a work-related injury occurred, and was affirmed by the Circuit Court.

## **CONCLUSION**

The lay and medical evidence clearly indicate that Claimant failed to meet his burden in proving by a preponderance of the evidence that a work-related injury occurred. Given Claimant's inconsistent testimony concerning when and how the injury occurred, the Commission properly found the testimony of Mr. Wilkins more persuasive. In reality, Claimant's account of injury was a work in progress only to fall apart at the hearing before the Administrative Judge.

Further, the undisputed medical evidence of Dr. Wolfson indicates that had a cervical herniation of this magnitude occurred at work, Claimant would have experience immediate symptomology. Although Claimant's treating physician Dr. McCloskey linked the cervical disc herniation to a work-related incident, Dr. McCloskey, by his own admission, was provided an incomplete medical history from the Claimant concerning his shoulder pain. Also, Dr. McCloskey never reviewed Dr. Fineburg's medical records, and as such, was unaware of Claimant's shoulder pains in August and October 2004. In light of these developments, the medical opinion of Dr. McCloskey that Claimant endured a work-related injury to his neck in December 2004 and his flip flop decision of permanent and total disability, were tainted and were aptly refuted by Dr. Eric Wolfson. Thus, the record indicates that the medical opinion of Dr. Eric Wolfson was more credible than the tainted and incomplete opinion of Dr. McCloskey. As such, the decision of the lower court should be affirmed, as the findings by the Commission are supported by the substantial and credible evidence.

**WHEREFORE PREMISES CONSIDERED**, the Employer and Carrier respectfully request that this Court affirm the decision of the circuit court as the decision of the Full Commission, that Claimant has failed his burden of proving by a preponderance of the evidence that a work-related injury occurred is supported by the substantial and credible evidence. The Employer and



**CERTIFICATE OF SERVICE**

I, the undersigned, of counsel for Employer and Carrier, do hereby certify that I have this day served via United States mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of the Appellees* to:


Catherine H. Jacobs, Esq.  
425 Porter Avenue  
Ocean Springs, MS 39564

Honorable Dale Harkey  
Jackson County Circuit Court Judge  
3104 South Magnolia Street  
Pascagoula, MS 39567

Liles Williams, Chairman  
Mississippi Workers' Compensation Commission  
P. O. Box 5300  
Jackson, MS 39296-5300

Administrative Judge Cindy P. Wilson  
Mississippi Workers' Compensation Commission  
P.O. Box 5300  
Jackson, MS 39296-5300

THIS the 23<sup>rd</sup> day of February, 2009.

  
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OF COUNSEL

JOHN S. GONZALEZ - [REDACTED]  
CELESTE REEP OGLESBY - [REDACTED]  
DANIEL COKER HORTON AND BELL, P.A.  
1712 15TH STREET, SUITE 400  
POST OFFICE BOX 416  
GULFPORT, MISSISSIPPI 39502-0416  
TELEPHONE - (228) 864-8117  
FACSIMILE - (228) 864-6331  
4172-113275 rlh