IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL NO. 2008-WC-01097

EARL DEAN TAYLOR **CLAIMANT/APPELLANT**

VS.

FIRST CHEMICAL and NATIONAL UNION FIRE INSURANCE COMPANY **EMPLOYER-CARRIER/APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Earl Dean Taylor, Claimant/Appellant
2. National Union Fire Insurance Company, Carrier
3. First Chemical, Employer
4. Honorable John S. Gonzalez, Daniel, Coker, Horton & Bell, P.A., Gulfport, MS 39502, Counsel for Employer-Carrier/Appellees
5. Catherine Jacobs, Ocean Springs, MS, Counsel for Claimant/Appellant

RESPECTFULLY SUBMITTED on this the ____ day of December, 2008.

EARL DEAN TAYLOR, Claimant/Appellant

By: _____

CATHERINE H. JACOBS,
Attorney for Earl Dean Taylor, Claimant/Appellant

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2. Whether the Commission utilized the correct standard of deference when it rejected the treating physician's opinion as to causation and relied upon the EME's testimony.
3. Whether there is credible evidence that the Claimant's cervical herniation was pre-existing, or that it occurred during the Claimant's week vacation following his injury.

I.

STATEMENT OF THE CASE

A. Nature of the Case

The Appellant, Earl Dean Taylor, appeals the decision by the Honorable Dale Harkey, Circuit Judge of the Circuit Court of Jackson County, Mississippi, affirming the Workers' Compensation Commission's decision to deny benefits. The Commission affirmed the decision of the Administrative Law Judge, Cindy Wilson, finding that Earl Dean Taylor's injury, which consisted of a large herniated disc at C5-6 is not a compensable injury. Apparently, her decision was based upon her conclusion that the claimant failed to prove his claim by a preponderance of the evidence because his version of the incident giving rise to his injury was not credible. (R.E.12,C.R. 33)[1]. She also found that his condition was pre-existing. (R.E.10-12, C.R.27, 31-33). She largely ignored the treating physician's opinions as to causation, noting that he did not have earlier medical records at the time of his deposition. (R.E.12, C.R. 33). She relied instead upon the testimony of the Employer's Medical Examiner, Dr. Wolfson, who believed that the accident could not have occurred at work because the herniation was so large that Taylor could not have continued to work after his injury. The Claimant would show that there is substantial proof in the record that he suffered a compensable injury, and that he has been totally disabled as a result.

B. Course of Proceedings

On December 19, 2004, the Claimant, Earl Dean Taylor, who had worked for First Chemical for more than 20 years, injured himself while lifting a heavy air pack off of his back

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[1]References to the record of the Workers Compensation Commission are designated as (C.R.__) and references to the record from the Circuit Court are the usual (R.__). References to the transcript of the ALJ transcript are (ALJ Tr.__), and the Circuit Court transcript is the usual (Tr.__). References to the the exhibits introduced at the ALJ hearing are referenced by (W.C. Exh.__). Claimant's deposition cites are designated (Depo.__). This is necessary because the Clerk's office did not retain a copy of the record it received from the Workers Compensation Commission for use by the attorneys in preparing their briefs.

while performing a safety drill on the job. (ALJ Tr. 15,16). This injury resulted in a large herniated disc in his neck and it re-injured his back.

Because the incident occurred just one hour before the Claimant's Christmas vacation, he did not report it, believing it to be a strained muscle. (ALJ Tr. 18-19). However, when he returned to work on December 27, 2004, he found that he could not pull his weight up a ladder with his arms.(ALJ Tr. 20-21). He reported the injury to his employer at that time. *(Id.)*

In order to avoid a "lost time" accident, following his injury, First Chemical allowed the Claimant to come to work and sit at a desk with virtually no responsibilities at full pay. (Depo. 55-56). He was treated by doctors chosen by his employer before he was finally referred to Dr. John McCloskey, a neurosurgeon. Dr. McCloskey diagnosed the Claimant with a herniated disk in his cervical spine and recommended a fusion. (W.C. Exh. 3).

Ultimately, the Employer and Carrier denied responsibility for the Claimant's injuries maintaining they were not work related. Although the Employer had referred the Claimant to company doctors for treatment, ultimately he was required to find other means to pay these physicians. When the Employer and Carrier denied the claim, the Claimant retained Ray Mitchell to represent him and a Petition to Controvert was prepared on April 15, 2005 and filed April 19, 2005 alleging that the Claimant had injured his neck and back while lifting an air pack on December 19, 2004. (C.R. 1) In response to the Petition, the Employer and Carrier admitted that the accident arose out of the Claimant's employment. However, they denied that the accident caused any disability. (C.R. 3) Pretrial Statements were completed by the parties during October, 2005, and again in December, 2005, and eventually the case was heard on August 23, 2006.

After a hearing, the Administrative Law Judge, Cindy Wilson, issued an opinion denying benefits on October 31, 2006 on the stated ground that the testimony of the Claimant was not credible. (R.E., 3-15; C.R. 22-34). Her decision was appealed to the Workers' Compensation Commission, which, after allowing the Claimant to supplement the record with the deposition of

the Claimant, summarily affirmed the ALJ on March 7, 2007. (R.E. 16; C.R. 51) The Claimant appealed the decision to the Circuit Court of Jackson County on March 23, 2007. (C.R.52). The appeal was assigned to Judge Dale Harkey, who affirmed the Commission after a hearing. (R.71, Tr. 3-30). A notice of Appeal was filed with the Supreme Court on June 24, 2008 (R.74)

II.

THE FACTS

A. The Claimant's Prima Facie Case

At the time of his injury on December 19, 2004, Mr. Taylor was fifty-nine years old and had been employed by First Chemical for approximately twenty years as an Outside Operator. (ALJ Tr. 7). As indicated in the position description included in Exhibit 3, the job had an average work week of forty (40) or more hours in twelve (12) hour shifts. (R.E. 22; W.C. Exh. 3). It was classified as heavy work, and required exerting up to 100lbs. of force occasionally, 50lbs. of force frequently and 20 lbs. of force routinely to move objects. R.E. 20-26; W.C. Exh. 3)). Mr. Taylor described the physical demands of his job as including a lot of climbing, lifting buckets, some of which were "quite heavy" and routinely lifting buckets that weighed 20 or 30 pounds. (ALJ Tr., 11-12).

During the course of his employment with First Chemical, the Claimant herniated a disc in his lumbar spine in the late nineties. He returned to work without drawing any workers' compensation and without having the surgery offered by Dr. McCloskey because he was afraid that it would compromise his ability to do his job. (ALJ Tr. 12-13; WC Exhibit 2). His supervisor, Henry Wilkins observed that Mr. Taylor was faithful about coming to work and never had to be counseled about abuse of his sick leave. (ALJ Tr., 63-64). As an outside operator, Mr. Taylor would work twelve (12) hour shifts, which would alternate weekly between shifts that began at 5:00a.m. and shifts that began at 5:00p.m. (ALJ Tr. 18).

During the course of the hearing before Judge Wilson, Mr. Taylor testified that he was

injured on December 19, 2004, at 4:00 a.m, just one hour before his shift was to end.[2] (ALJ Tr. 18, 22-24). In his deposition, he also testified that he was working the graveyard shift and was injured at 4:00 a.m. (Depo., 48-49). Because Mr. Taylor also testified that the accident occurred at the end of the day shift, before correcting himself, the Employer claims that he is not credible. Given the fact that his shift changed every week between day shift and graveyard, as well as the number of days worked, his confusion in this regard is understandable.[3] According to Mr. Taylor, on December 19th his supervisor ordered a drill where the employees were to strap on their Scott air packs, a piece of safety equipment weighing 30 to 40 lbs. and consisting of a tank on a harness with a mask attached for employees to use in the event of a chemical spill. (ALJ Tr.17-19, 65-66). To facilitate quick accessibility, the tanks were stored in cabinets that have clamps to hold the tank in place. To put on the tank, an employee would back up to the cabinet, slip his arms through the straps, tighten them, and step away, thereby pulling the tank out of the clamps. Mr. Taylor followed this procedure and walked around with the tank as he was instructed to do. When he was returning the tank to its box, while lifting the straps over his head in order to shove the tank back into the cabinet, he felt a sharp pain in his neck radiating into his shoulder blades. (ALJ Tr.17-20). He went to the office to report it, but changed his mind because he thought perhaps it was a pulled muscle and it was his last day to work before a week's vacation. (ALJ Tr. 19). He testified that the reason that he did not report it at the time was because if he could avoid it, he did not want to report an accident so close to the end of the year because it would affect bonuses company wide. (ALJ Tr. pp. 19-21). He also testified that he did not know the severity of his injury at that time. (Id.)

After his injury, Mr. Taylor left work and went to his wife's home in Alabama where he rested and convalesced, taking Aleve and Tylenol for his pain. (ALJ Tr. 19-20). During his

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[2]Mr. Taylor testified initially that he was working the day shift, and later corrected himself indicating that he worked the graveyard shift.

[3]According to Taylor, he would work 2 days on and 2 days off and then 3 days on and 2 days off. His shifts would alternate weekly between the night shift and the day shift. (Depo. 49).

vacation, he reported to an hour long mandatory safety meeting at First Chemical, after which his wife drove him back to Alabama. Upon his return to work a week later, he tried to climb a ladder and could not pull his body weight up the ladder. Realizing that his injury was more serious than originally thought, Mr. Taylor reported it to his employer. In the First Report of Injury, the injury was described as "shock in back of neck between shoulders". (R.E. 27, WC Exh. 8). The activity that the employee was engaged in is described as "removing SCBA and returning to rack". And, the event giving rise to his injury, is described as "lifting SCBA from back to the rack it is stored in". Id. The report, which was filled out by a company supervisor, indicates that the injury occurred at 4:00p.m., rather than 4:00a.m. Id. The report does not state whether the shift began at 5:00p.m. or 5:00a.m. A relief supervisor filled out the report, rather than the Claimant's regular supervisor. (Taylor Depo., p. 60-61).

The company sent Mr. Taylor to Dr. Fineburg on December 27, 2004. The history indicates that Mr. Taylor was "initially injured on December 19th when he was removing his Scott air pack". "He turned to place it in its resting position and felt a sharp pain in the upper mid-back midline." X-rays were taken which, though sub-optimal, appeared to indicate a compression fracture at T6. (R.E. 28-30;WC Exh. 3, WC Exh. 5). Dr. Fineburg referred him to Seaside for physical therapy, where Mr. Taylor reported mid back pain that began 12/19/04 after wearing an air harness weighing 40 to 50 lbs. (WC Exh. 5; R.E. 31). When his symptoms did not improve, he was referred to Dr. Wiggins, an orthopaedic surgeon. At the time of this referral, First Chemical told him that it was contesting his injury and refused to pay for any more treatment for this employee of 20 years. He was told to go to his own doctor to be treated before he could return to his job.[4]

Mr. Taylor did go to Dr. Wiggins on January 17, 2005. The history reported by Dr. Wiggins indicates that the Claimant was injured while "putting on a Scott air pack". (WC Exh.

[4]While in physical therapy at Seaside, Mr. Taylor was given a desk job and continued to work. (Tr. p. 25). (Depo., p. 65-66).

6; R.E. 32-34). Mr. Taylor, however, claims that he told Dr. Wiggins the same thing he told everyone else, that the injury occurred when he was taking the air pack off and putting it up. (ALJ Tr., p 42.) When Dr. Fineburg referred Mr. Taylor to Dr. Wiggins, the focus was on Mr. Taylor's thoracic spine because of the x-ray indicating a possible compression fracture and Mr. Taylor's belief that he had a rotator cuff injury. (R.E. 28-30; WC Exh 5) Dr. Wiggins ordered an MRI of the thoracic spine which revealed nothing more than a few degenerative changes which were not thought to be significant. (R.E.33,WC Exh. 6). Later, he ordered an EMG, from Dr. Bowen in his offices, and Dr. Bowen reports that the patient told him he was injured on December 19, when he was "lifting a Scott air pack off of his back to place it on a rack" and felt "a sharp burning pain in the neck and into the left shoulder blade", which then "spasmed like a rock". The EMG was "abnormal" and indicated sensory loss at both 5th digits, and electro physiologic evidence of an acute right C-8 radiculopathy in the cervical spine. (R.E.35-37, WC Exh. 6).

After reviewing the EMG, Dr. Wiggins referred Mr. Taylor to Dr. John McCloskey, a neurosurgeon, who first saw the Claimant on March 15, 2005. Dr. McCloskey had treated the Claimant some years before for his back. On the initial intake sheet, the history reported by Mr. Taylor was that he was injured on December 19 removing a Scott Air Pack when he felt a sharp pain the back of his neck to shoulder blades. (R.E. 12, WC Exh. 3). Dr. McCloskey's later notes sometimes indicate that the injury occurred on December 12 and sometimes December 19, but the reasons for this are unclear. (WC Exh. 3). Again, the intake information provided by the Claimant is consistent with the history he gave to his other providers. (R.E. 39; WC Exh. 3)

Dr. McCloskey ordered an MRI and a myelogram, which revealed a large herniated disc at C5-6 and significant abnormalities at C4-5 and C6-7. Dr. McCloskey recommended surgery, and performed a three level fusion on or about April 25, 2005. (R.E. 40-43; WC Exh. 3). Initially, Dr. McCloskey released Mr. Taylor to return to work in January of 2006, but his employer had nothing for him with his restrictions, and despite his efforts, the Claimant could

not find any other work. (R.E.43, WC Exh.3; ALJ Tr. 28). Later, Dr. McCloskey found the Claimant to be totally disabled due to the fact that his condition did not improve as expected. (WC Exh. 3).

In his deposition, Dr. McCloskey testified that the Claimant's injuries were caused by the December 19, 2004 accident at First Chemical, that the various histories he provided to his treating physicians were consistent, and that in his opinion, even if the Claimant had a pre-existing neck injury, he was able to perform heavy work up to the day of the accident on December 19, 2004, and not after. (WC Exh. 2; 9-14). Dr. McCloskey considered the disc herniation to be a significant disabling injury. Id. It is uncontested that the Claimant never returned to heavy work after this injury, except when he tried to climb the ladder after returning to work from his Christmas vacation.

B. The Employer/Carrier's Defense

To justify its failure to pay Workers' Compensation benefits to Mr. Taylor, First Chemical's position was presented to the ALJ in closing by its attorney, Robert Briggs.

> "This injury was already starting to happen. Obviously, when he went to Alabama on his vacation, he picked up some limb and he herniated it. I mean, that's the only reasonable conclusion you come to... So the inference, the circumstantial evidence, point to the fact that he actually did injure himself during his vacation back in Alabama cleaning up his yard." (ALJ Tr., p 83).

In two sentences, the employer argues first, that the Claimant had a pre-existing condition, and second, that he really was injured after the accident during the Christmas vacation picking up limbs. However, there is no evidence to support this alleged later injury. The only testimony relating to the Claimant picking up limbs came from one of his supervisors, Henry Wilkins. Mr. Wilkins remembered that after Hurricane Ivan, which hit Alabama in September of 2004, weeks or months before the December injury, Mr. Taylor complained occasionally that he was tired after picking up limbs at his in-laws' home in Atmore, Alabama after the storm.

When questioned about this, Mr. Taylor remembered that just after Hurricane Ivan struck, he picked up a few limbs weighing less than 20 pounds, but that the bulk of the clean-up was done

by others. (ALJ Tr. 46-47). This was confirmed by his mother-in-law, Bobbie Frazier, who testified that her yard was cleaned up by people from the Baptist Association, and that cleanup was completed within a month. (ALJ Tr. 60-61). There is no testimony from anyone that the Claimant did anything during the 2004 Christmas vacation other than rest and attend a safety meeting. Certainly, there is no proof or testimony that he was picking up limbs, and Mr. Briggs made this assertion with nothing in the record to back it up.

As for the employer's claim that the injury was pre-existing, there is a record from Dr. Westbrook dated August 17, 2004, where the Claimant complained of pain in his left shoulder, which the Claimant subsequently described as a rotator cuff tear. (WC Exh. 5; R.E. 44-46; ALJ Tr. pp. 13-14). Dr. Westbrook did an x-ray of his left shoulder, which was normal. The Claimant called Dr. Westbrook again on October 6th about his shoulder, and asked for something to help with the pain. However, there was no visit, as Mr. Briggs claimed, and the Claimant did not miss any work because of his shoulder. The Claimant, even as late as the hearing, distinguishes between the pain in his shoulder and the pain associated with his neck injury, claiming that the earlier pain prevented him from moving his arms in certain positions. (ALJ Tr. 13-14). It is undisputed that the Claimant's shoulder never prevented him from working and that he worked continuously until the date of his injury on December 19, 2004. Dr. Wolfson, the Employers Medical Examiner hired by the Employer and Carrier testified that Mr. Taylor could not have worked after he herniated his disk because it was too large and his treating physician, Dr. McCloskey found it to be disabling as well.

C. Credibility of Witnesses

While issues of credibility are presented by this claim, it is respectfully submitted that they do not involve the Claimant. Part of the confusion about the Claimant's medical condition stems from the fact that Mr. Briggs, in his examination of the Claimant and Dr. McCloskey, questioned them repeatedly about the treatment the Claimant received for his prior shoulder injury by Dr. Fineburg. (ALJ Tr. 49; WC Exh. 2 p. 16-17). Mr. Briggs' assumption that Dr. Fineburg had treated the Claimant for his prior shoulder injury was wrong, as the Claimant was treated by Dr. Westbrook.

(R.E. 44-46; WC Exh 5). Indeed, the Claimant had not been treated by Dr. Fineburg, who was his general physician, since January of 2001. (WC Exh. 5). After his injury the Employer sent the Claimant to a different Dr. Fineburg (the young one), who is a different doctor altogether. (R.E. 28, 30; WC Exh. 5; Depo p. 63-64). There is no question that the Claimant discussed with Dr. McCloskey his prior shoulder problems for which he was treated by Dr. Westbrook, as they are reported in Dr. McCloskey's notes as a prior rotator cuff injury. (R.E. 65; Exh 3) Thus, Mr. Briggs confused the Claimant and the treating physicians with his incorrect assertions about Dr. Fineburg's records, and apparently the Judge as well. In fact, Dr. McCloskey did have the records of young Dr. Fineburg's treatment of the Claimant's injury. (WC Exh. 3). He knew of the prior shoulder problems and testified that because the Claimant was able to continue to perform his job duties after being treated in August for a shoulder injury, he still believed the injury of December, 2004, to be the cause of the C5-6 herniation. (WC Exh 2, p. 15) Dr. Wolfson, the EME agrees that the herniation could not have happened before December 19, because he was of the opinion that the Claimant could not have continued to work. (WC Exh. 1, p. 10).

This brings forth a separate issue, which derives from the fact that Dr. Wolfson, in his opinion relied upon a critical and material misrepresentation made to him by the Employer and Carrier's attorney, which is unsupported by the record.. According to Dr. Wolfson's deposition, in formulating his opinions he relied upon his examination of the Claimant, Dr. McCloskey's deposition, medical records from Dr. McCloskey, an MRI of the Claimant, and information obtained during a meeting with Mr. Briggs. (WC Exh. 1, pp. 6-7; WC Exh. 4). Some of the information provided by Mr. Briggs must have been erroneous, because Dr. Wolfson testifies incorrectly that Dr. McCloskey stated in his operative note that the Claimant's herniation was one of the largest disc herniations that he had ever seen. (WC Exh. 1, p. 10, 18). That statement does not appear in the operative report, or anywhere else that we can find. (Exh. 3). We do know that Dr. Wolfson was advised by the Carrier's attorney that the Claimant performed heavy work at home after his injury, and that Dr. Wolfson relied upon it:

Q. You received that information from Robert Briggs, the attorney?

A. In part. The only information I received from Mr. Briggs was regarding him performing heavy work at home after the injury date. (Exh. 1, pp. 12-13).

Additionally, Dr. Wolfson was advised by Mr. Briggs, or at least understood from their meeting, that the Claimant did not have any symptoms, or present with any symptoms, for 10 days following his injury. (WC Exh. 1, pp. 13-14).

We do not know exactly what information was relayed to Dr. Wolfson by Mr. Briggs, but whatever it was, it was hearsay and unreliable. However, Dr. Wolfson did rely on it as a cornerstone of his opinions. Dr. Wolfson testified that it was his opinion that the Claimant would not have been able to work following the cervical herniation. (WC Exh 1, p. 10) Since he was told by Mr. Briggs that the Claimant performed heavy work after his accident on the job, he opined that the work injury could not have caused the herniation.

Given the unreliable nature of the information presented to Dr. Wolfson, his opinions are unfounded.. The proof shows that the Claimant reported his injury at the beginning of his next work day following his injury. He has offered a credible explanation of his failure to report it earlier–he was concerned about reporting a lost time accident which could affect bonuses company wide, and as he so aptly put it, "I lived with pain constantly with my lower back, so why complain?" (ALJ Tr. 47).

There are also mistaken assumptions contained in the deposition of Dr. Wolfson. First, although Dr. Wolfson testifies that he performed an "IME" of the Claimant, that is not the case. He was not appointed by the Commission to perform an "independent" exam. He was retained by the Employer as an Employer Medical Examiner. Dr. Wolfson testified that he thought he was in a better position to give opinions regarding causation than a treating physician because "an independent medical evaluation can give more information in regard to that because that doctor is

given all of their records and is able to be more objective because they have information from multiple sources". (WC Exh. 1, p. 20). Judge Wilson quoted this remark by Dr. Wolfson in her opinion. However, the Workers Compensation Statutes do not allow employer medical examiners to address causation. Their only roles are to address the extent and duration of permanent and partial disability and to address the necessity of treatment as will be shown later. Dr. Wolfson relied on the assertions of the employer's attorney, and, by his own admission, did not have any of Dr. Fineburg's records or medical records from anyone other than Dr. McCloskey. (WC Exh. 1, p. 15; WC Exh. 4). There is no support in the record for Judge Wilson's finding that Dr. Wolfson reviewed Dr. Fineburg's records and was therefore in a better position to address causation, even if he were so permitted. Since both doctors had the same information, deference shown have been shown to the treating physician, Dr. John McCloskey.

Given the shaky foundation for Dr. Wolfson's opinions, issues regarding the Claimant's credibility seem relatively minor. While there are a few inconsistencies in the histories obtained by various doctors, the treating doctors did not find them to be significant. There is no way to know whether some or all were the result of the Claimant's telling or the physician's recording. They are largely consistent, and certainly for a man who is taking many medications for problems ranging from the pain in his neck to diabetes and heart problems. Given these circumstances, and the number of times that the Claimant had to report what happened, it is remarkable that his histories are consistent. Most of the doctors related the history they were given in a sentence or two, when it took nearly a page of this brief to provide a relatively complete picture of the air pack, its cabinet, the clamps, the proper way to put the harness on or the proper way to take it off. It is only human, that some physicians would pick up on certain aspects of the mechanics of this incident and not others.

The Employer and Carrier also argue that the herniation could not have occurred on the job because Mr. Taylor failed to report it and it was a big herniation. Mr. Taylor, however, has to be considered as a whole person. Years before, in 1991, Mr. Taylor had herniated a disk in his lumbar spine while working at First Chemical. Dr. McCloskey had treated him and recommended surgery.

Mr. Taylor decided that he would rather live with the pain than have the surgery because he was afraid he could not continue to work at his job if he went forward. He had learned to live with pain, and how to tolerate it. He was a tough as any veteran of the NFL, most of whom will sustain injuries that would disable an average person, and yet they continue to play. To completely disregard his account of the injury because he waited to report it until he knew he could not function at his job is to do him a great disservice. As he said, he had been working hurt for years. Even his Employer recognized his loyalty and his admirable work ethic and gave the judge no reason at all to question Mr. Taylor's integrity.

III.

SUMMARY OF THE ARGUMENT

Under the law applicable to Mississippi Workers' Compensation proceedings, in order to advance the beneficent purposes of the Act, doubtful cases should be resolved in favor of compensation. *Duke Ex. Rel. Duke v. Parker Hannifin Corp.*, 925 So.2d 893, (Miss. Ct. App. 2005). The Administrative Law Judge committed clear error when she found that the Claimant had failed to prove his claim by a preponderance of the evidence. In order to make this finding, the Administrative Law Judge and the Commission had to reject out of hand all of the testimony of the Claimant, which they had no grounds to do. Under the law, if the testimony of a Claimant is undisputed, it generally should be accepted as true. *Waffe House, Inc. v. Allam*, 976 So.2d 919, (Miss. Ct. App. 2007). The only cases where the Courts have rejected a Claimant's testimony, is where they have failed to report their injury either to their employer or their treating physicians for a substantial period of time. In this case, the Claimant reported his injury the next work day following his injury.

The Administrative Law Judge, and the Commission, relied heavily upon the opinion of the Employer's medical examiner, Dr. Eric Wolfson, in finding that the Claimant could not have injured himself at work. Unfortunately, Dr. Wolfson's opinions are flawed because he was given erroneous information that is unsupported by the record in this matter. He was told by the Employer's attorney

that the Claimant had engaged in heavy manual labor following his alleged injury at work. This simply is not true. Dr. Wolfson believed that the Claimant continued to work at his job after his injury. Again, this is not true.

The Administrative Law Judge believed that Dr. Wolfson had reviewed Dr. Fineberg's records and that Dr. McCloskey had not giving her a basis for favoring Dr. Wolfson over Dr. McCloskey. Again, this has proven to be untrue. Both doctors reviewed the same records and Dr. McCloskey had the distinct advantage, both in fact and in law, of being the Claimant's treating physician. *Johnson Electric Automotive, Inc. v. Colebrook*, 2008 MS A0507.007 (Miss. Ct. App. May 6, 2008)

Under the applicable law, and given the facts relied upon by the Commission which are unsupported by the record, this case warrants reversal and the determination that the Claimant is entitled to permanent and total disability benefits under the Workers' Compensation statutes.

IV.

THE LAW

A. Standard of Review

On Appeal, this Court reviews an order of an administrative agency to determine whether it was supported by substantial evidence, arbitrary or capricious, beyond the power of the lower authority to make, or in violation of some statutory or constitutional right of the complaining party. URCCC 5.03. In Workers' Compensation cases, the Commission is the ultimate fact finder. *Natchez Equipment Co. v. Gibbs*, 623 So.2d 270, 273 (Miss. 1993). The decision of the Commission will be reversed only "where issues of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision is arbitrary and capricious." *Department of Health v. Stinson*, 988 So.2d 933, 936 (¶8)(Miss. Ct. App. 2008). While the Claimant bears the burden of proving his entitlement to benefits, doubtful cases must be resolved in favor of compensation in order to "fulfill the beneficent purposes of the statute." *Duke Ex. Rel. Duke v. Parker Hannifin Corp.*, 925 So.2d 893, 897-98 (¶15)(Miss. Ct. App. 2005); *Marshall Durbin*

Cos. v. Warren, 633 So.2d 1006, 1010 (Miss. 1994).

As to matters of law, this Court conducts a *de novo* review. *KLLM, Inc. v. Fowler*, 589 So.2d 670, 675 (Miss. 1991).

The Appellate Courts will not hesitate to reverse where no evidence or only a scintilla of evidence supports a Workers' Compensation Commission decision. *Waffle House, Inc. v. Allam*, 976 So.2d 919, p. 922 (¶8) (Miss. Ct. App. 2007); *Foamex Products, Inc. v. Simons*, 822 So.2d 1050, 1053 (¶11)(Miss. Ct. App. 2002).

When the above standards are applied to this case, it is respectfully submitted that reversal of the case is required.

B. The Claimant's Injury is Compensable Under the Statutes

In her opinion, the Administrative Law Judge found that the Claimant failed to prove his case by a preponderance of the evidence. While the Judge's reasoning is not entirely clear, a close reading of the opinion indicates that she is rejecting the Claimant's testimony all together which he was injured on the job, or at least, that his on the job injury caused his disability.

As the Court is aware, the workers' compensation statutes define injury, in relevant part as "accidental injury....arising out of and in the course of employment without regard to fault which results from an untoward event...if contributed to or aggravated or accelerated by the employment in a significant manner". Miss. Code Ann. §71-3-3 (1972). In order for a claim to be compensable, the Claimant's injury "need only be connected to his employment". *Imperial Palace Casino and Great American Insurance Company v. Wilson*, 960 So.2d, 933, 936 (Miss Ct. App.. 2006); *Sharpe v. Choctaw Elecs. Enters.*, 767 So.2d, 1002, 1005 (Miss. 2000).

An employee's work does not need to be the "sole source of the injury". *Chapman v. Hanson Scale Co.*, 495 So.2d, 1357, 1360 (Miss. 1986). An injury is compensable "even when the employment aggravates, accelerates or contributes to the injury". Id. At 1360. In this case, the Claimant has presented substantial proof that his employment caused or contributed to his injury in a significant manner. He could perform heavy work before the December 19th injury

and not after. He had, according to Dr. McCloskey, a large acute herniated disc at C5-6 that Dr. McCloskey found to be caused by the December 19 injury. While the Claimant had other problems, there is really no doubt that the herniation is what prevented this employee, who was used to working hurt, from returning to his regular job. His willingness to try to work, even after his surgery, demonstrates that he was no malingerer. Certainly Mr. Taylor did not deserve to have his credibility called into question when there is nothing to support the employer's assertion that the Claimant fabricated this accident out of thin air. (ALJ Tr. 50). In fact, the Employer admitted that the accident occurred in its answer to the Claimant's Petition. Mr. Taylor's dedication to his job and his employment history are proof of his loyalty to a company that has no such feelings for him.

There can be no question that testimony of the Claimant proved his entitlement to benefits by a preponderance of the evidence. In order to find otherwise, the Administrative Law Judge had to find that nothing the Claimant said was credible, despite the fact that his testimony is uncontradicted. As the Court recognized in *Johnson Electric Automotive, Inc. v. Colebrook*, 960 So.2d 933, (Miss. Ct. App. 2008), the Court of Appeals considered a factual situation very similar to the case at bar. As often happens, the Claimant *Ms. Colebrook* had given, or her physicians had recorded, slightly inconsistent dates and/or versions of her injury. The Administrative Law Judge denied the claim finding that the Claimant was not credible. The Commission reversed, because it found that minor inconsistencies in the histories provided by Claimants to their physicians do not justify a total disregard for the Claimant's testimony. As the Court of Appeals recognized in *Waffle House, Inc. v. Allam*, 976 So.2d 919, 922, is the standard to be used in assessing a Claimant's credibility, is as follows:

> When a Claimant's testimony is undisputed and not so unreasonable as to be unbelievable, taking into account the factual setting of the claim, her testimony generally ought to be accepted as true.

There is nothing in this record to contradict the testimony of the Claimant other than a few minor

inconsistences in the Claimant's own testimony, which were corrected. His inconsistencies are no different from those considered by the Court in *Colebrook* or *Allam*. Given the beneficent purposes of the Workers' Compensation statutes, it is respectfully submitted that the Claimant has offered sufficient evidence to prove his claim by a preponderance of the evidence and that outright rejection of his testimony was not justified.

The Commission and the Courts occasionally have denied benefits based upon an employee's failure to report an injury. On the few occasions that claims have been denied for this reason, it is because a Claimant failed to report his injury within 30 days, as required by statute. Miss. Code Ann. §71-3-35 (Supp. 2006). Mr. Taylor reported his injury on the next work day and well within the time allowed by law. There is no legal basis to deny his claim for failing to report it immediately.

In other cases where benefits were denied, there have always been many more reasons to disbelieve the claimant than there are here. In *Jones v. Southern Healthcare Agency*, 930 So.2d, 1270 (Miss. Ct. App. 2006), the claimant's benefits were denied because she never reported an on the job injury to her employer or to her treating physicians until after her petition to controvert was filed. Her complaints related to an arthritic condition that her doctor had been treating for over four years prior to the alleged injury. Here, the claimant gave a history of a work related injury to all of his physicians and to his employer on his next work day following the injury. Simply put, there is nothing in the record to contradict the Claimant and no reason to reject his testimony or impugn his integrity.

C. Treating Physician or EME?

The Claimant's treating physician, Dr. McCloskey has testified that it is his opinion, based on a reasonable medical probability, that the incident at work described by the Claimant caused the injury to his cervical spine.

While the EME, Dr. Wolfson, disputes this, he apparently relied upon unfounded hearsay fed to him by the Employer's prior counsel. In a similar case, the Commission found an injury to

be compensable because the Claimant's treating physician determined that it was a new injury, even though various EMEs testified that it was pre-existing. *Johnson Electric Automotive v. Colebrook*, 2008 MS A0507.007 (Miss. Ct. App. May 6, 2008). In finding Ms. Colebrook's injury to be compensable, the Commission relied upon its familiar rule giving deference to a treating physician where there are competent opinions on both sides of a medical question. (Id. at ¶7) In this case, Judge Wilson and the Commission failed to follow this rule. They also failed to follow the Workers Compensation statutes when they decided this case based upon an EME's opinion as to causation. Miss. Code Ann. 71-3-15 (1) (1972) provides:

> . . .Should the employer desire, he may have the employee examined by a physician other than of the employee's own choosing for the purpose of evaluating temporary or permanent disability or medical treatment being rendered. . . ."

This statute does not allow an EME examination for the purpose of contesting the existence of a work related injury or causation. The inaccurate information supplied to him materially affected his opinions.

While the claimant does not concede that Dr. Wolfson's opinion is competent in this case, it is clear that here, the beneficent purpose of the Act will be served by resolving any doubt in this case in favor of the opinions offered by the treating physician, Dr. McCloskey. *Alexander v. Forest Hill Nursing Center, Inc.*, MWCC No. 02-06438-H-9709 (September 21, 2005). In this instance, it is clear that the Administrative Law Judge relied heavily on Dr. Wolfson's testimony regarding an IME's superior position to give opinions regarding causation because of the ability to review all of the records. She found specifically that Dr. Wolfson had Fineberg's records and Dr. McCloskey did not. (R.E. 13, 14; C.R. 32-33) Since he was not an IME and since he did not review any records other than those from Dr. McCloskey, this was in error.

The Claimant, of course, has the burden of proving that he is disabled. Under the law, in order to accomplish this, he must first show that he is unable to return to his prior employment, and second, that an effort has been made to find other employment. *Sardis Luggage Co. v. Wilson*, 374 So.2d 826, 828 (Miss. 1979). In this case, the claimant testified that he tried to

return to his former occupation and was refused by Mr. Marsh, who was present at the hearing. (ALJ Tr. p. 28). This testimony is uncontroverted. Mr. Taylor also testified that he tried to find other work but was unsuccessful. (ALJ Tr. 29-34). Under the circumstances, it is respectfully submitted that the claimant has met his burden of proving a work related injury that disabled him. Dr. Wolfson's testimony that he is not disabled is based upon nothing more than speculation about the extent to which the Claimant's disability might be caused by other conditions.

V.

CONCLUSION

Given the beneficent purposes of the Workers' Compensation Act, and the evidence presented by the Claimant, there are more than sufficient grounds to reverse the findings of the Administrative Law Judge, which were affirmed both by the Workers' Compensation Commission and the Circuit Court. First, in order to find that the Claimant had failed to prove his case by a preponderance of the evidence, the Administrative Law Judge had to reject his testimony regarding his injury almost in its entirety. Under the law pertaining to Workers' Compensation, doubtful cases are to be resolved in the Claimant's favor, and their testimony should not be rejected if it is largely uncontested.

The mere fact that the Claimant admitted to cleaning up after Hurricane Ivan, which happened in mid-September, is no proof that he injured himself during his Christmas vacation after December 19, 2004. The Claimant testified conclusively that he did not injure himself after the incident at work that he complains of here. By his testimony, he proved his case by a preponderance of the evidence. In rejecting the Claimant's testimony, the Administrative Law Judge relied heavily upon the opinions expressed by the employer's medical examiner, Dr. Eric Wolfson. Dr. Wolfson, however, admittedly relied upon representations made to him by counsel which were not supported by the record in this case. There is no proof that the Claimant performed heavy work after his injury. He was injured one hour before he went home. He rested for the week that he was off for Christmas.

When he returned, and was unable to climb a ladder, he reported the injury well within the time period allowed by the Workers' Compensation statutes. While the Employer allowed him to sit at a desk following his injury, according to the Claimant, that was not work and certainly not the kind of work contemplated by Dr. Wolfson.

The Administrative Law Judge also erroneously believed that Dr. Wolfson had reviewed Dr. Fineberg's records when in fact, he had not. Dr. Wolfson had no more information before him in the way of records than Dr. McCloskey had. Dr. McCloskey, as the treating physician, had the added advantage of having treated the Claimant on a regular basis, observed him over a period of time, and witnessed first hand the herniation in the Claimant's cervical spine. Even if the Court were to find that it is proper for an EME to address causation, which we maintain that it is not, the Administrative Law Judge in the Court still should have deferred to the Claimant's treating physician and if that is done, benefits should be awarded to the Claimant.

It is therefore respectfully requested that this Court reverse the decision of the Commission and the Circuit Court and award benefits for permanent and total disability to the Claimant and any and such other and further relief as the Court deems appropriate.

In closing, the Claimant would respectfully ask that the Commission review the evidence in accordance with the beneficent purposes of the Act. There is ample proof that Mr. Taylor suffered a work related injury that disabled him.

RESPECTFULLY SUBMITTED on this the 19 day of December, A.D., 2008.

EARL DEAN TAYLOR, Claimant/Appellant

BY: _____
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