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IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

KAREN JOHNSON	**CLAIMANT/APPELLANT**
VS.	**NO. 2008-WC-01218-COA**
SANDERSON FARMS, INC. **A SELF-INSURED**	**EMPLOYER/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Karen Johnson, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. Karen Johnson, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Sanderson Farms, Inc., Appellee;
4. Ryan J. Mitchell, Esq., Counsel for Appellee.

THIS the 17th day of November, 2008.

JOHN HUNTER STEVENS

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REPLY BRIEF OF APPELLANT/CROSS APPELLEE

INTRODUCTION

Nothing in the argument set forth by the employer justifies a finding that the substantial medical evidence and testimony, along with the unrefuted testimony of the claimant would justify the reversal of the portion of the claim finding that claimant sustained a legitimate injury on the job, after working there for approximately ten years, other than the speculative testimony of one litigation physician who could not diagnose a condition. However, the Commission refused to follow the law in reversing the Administrative Law Judge's findings of industrial disability, essentially finding the claimant sustained no industrial disability in excess of her medical impairment rating.

DISCUSSION

The employer and carrier seek reversal of a finding that the claimant did not sustain an injury on the job despite what would, in effect, require this Court to ignore not only the substantial medical evidence of multiple treating physicians but the unrefuted testimony of the claimant. Furthermore, the employer has brought forth no evidence of medical malpractice which it alleges is a basis for reversal. Quite simply put, this is because the evidence submitted by the employer by Dr. Wegner, the litigation doctor, is shear speculation. Claimant's multiple treating physicians over an extended

period of time found her to have sustained an injury which required surgery. This was substantiated by the claimant's own testimony being in an industry that is known to have repetitive overuse injuries. Her testimony over the course of a period of time included the fact that the surgery helped her condition. The employer's argument with regard to the proof submitted by the claimant from her medical doctors, including it's assertion that Dr. Sheila Lindley of the University Medical Center committed malpractice, is frivolous.

The primary issue that Appellant/Claimant below argued was, despite the lack of admissible evidence, the Commission saw fit to take away completely the industrial disability awarded by the Administrative Law Judge. This is without a basis in law or fact. It was apparent, in fact, from review of the facts that the Commission itself refused to not only follow the law, but ignored the facts. By assuming that the claimant was entitled to only the medical impairment rating of five percent to each upper extremity, an amount which is required to be awarded by law, is abhorrent. This ignores a significant repetitive work history over an extended period of years. It ignores significant restrictions which prevent the claimant from returning to <u>any</u> of the previous jobs she has had in her work life. It ignores significant job search efforts which were not questioned except within the mechanics of how the claimant filled out some job applications. It further ignored the fact that the employer/carrier made no effort whatsoever to provide vocational rehabilitation services or provide no accommodation or a return to work despite acknowledging that it had been provided with a light duty work excuse as far back as 2002. The employer/carrier made <u>no</u> effort to accommodate or provide vocational rehabilitation. This matter had been in litigation with the employer/carrier, knowing full well the extent of any injuries by virtue of the fact that it had been produced all medical records and even deposing the treating physician on <u>two</u> different occasions. Finally, it ignored the

fact that the employer/carrier provided no vocational rehabilitation services to the claimant, individually, nor even to such testimony before the Commission. Quite frankly, it is amazing that this Commission would ignore all of these facts inasmuch as this substantial evidence justifies a finding of a one-hundred percent industrial loss to each upper extremity. Further, the applicable law requires reversal as to the minimal industrial rating and the clear erroneous finding by the Commission that the claimant is only entitled to a medical impairment rating. This finding flies in the face of the well settled findings of this Court concerning scheduled member injuries. The facts created a presumption that was not refuted by the employer.

Specifically, this Court discussed scheduled member injuries in *McDonald v. I. C. Isaacs Newton Company*, 879 So.2d 486, (Miss. Ct. App.2004) in discussing occupational loss for an upper extremity injury and held:

> Where a permanent partial disability renders a worker unable to continue in the position held at the time of injury, such inability creates a rebuttable presumption of total occupational loss of the member, subject to other proof of the claimant's ability to earn the same wages which the claimant was receiving at the time of injury.

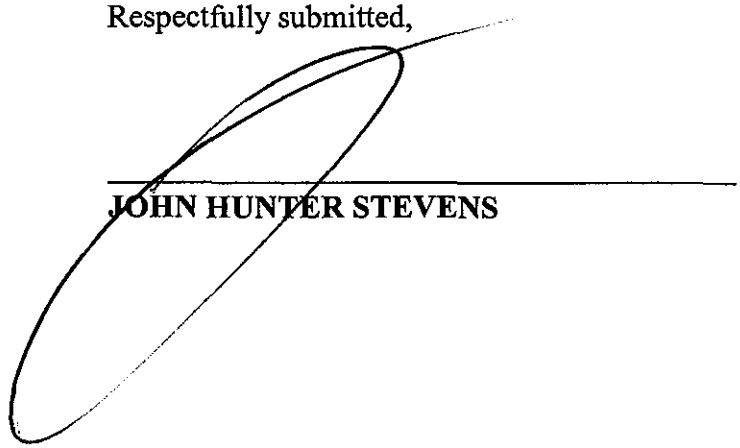
McDonald v. I. C. Isaacs Newton Company, 879 So. 2d 486, 489-490 (Miss. Ct. App. 2004).

In the instant case, the employer/carrier did nothing to rebut the presumption of total occupational disability. Furthermore, it did nothing to disprove that the claimant was unable to continue in the positions she held which involved significant repetitive work or in any other positions she had ever held while in her work life based on her unrefuted testimony. Finally, other than certain representations in some of the work applications, the employer and carrier have no proof to rebut the claimant's inability to return to her substantial usual employment. The law requires the reversal of the Commission's finding of anything less than 100% industrial disability to a scheduled member.

CONCLUSION

There is no evidence in this record that the claimant can actually do any job within her complete prior work history. Based on her ten year employment with the employer, this employer can do nothing but speculate and engage in a character assassination against not only the claimant but also her treating physician by alleging medical malpractice and, instead, have no proof of the claimant's employability. For the employer/carrier to allege defamatory allegations against a well recognized hand specialist at the University of Mississippi Medical Center, they would not only have to have more than the speculative proof of a doctor that could not diagnose carpal tunnel, but would also have to have some proof of medical negligence by this same litigation physician. The evidence to suggest that is totally lacking. Therefore, employer/carrier is unable to rebut this presumption, and the claimant respectfully submits that this Court reverse the findings of the Commission and find that this claimant, in accordance with prior holdings of this Court and the facts, sustained a 100 percent industrial loss to each upper extremity.

Respectfully submitted,



JOHN HUNTER STEVENS

CERTIFICATE OF SERVICE

I, John Hunter Stevens, attorney for Claimant/Appellant, hereby certify that I have this day served by First Class United States Mail, postage fully prepaid, the above and foregoing *Reply Brief of Appellant/Cross Appellee* upon the following:

Honorable Lamar Pickard
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Ryan Mitchell, Esq.
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THIS the 17 day of November, 2008.

JOHN HUNTER STEVENS