IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

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

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF COPIAH COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

HON. JOHN HUNTER STEVENS
MSB#[redacted]
GRENFELL, SLEDGE AND STEVENS
1659 LELIA DRIVE
JACKSON MS 39216
TEL NO. (601) 366-1900
FAX NO. (601) 366-1799
ATTORNEY FOR APPELLANT

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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 3 day of October, 2008.

JOHN HUNTER STEVENS

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STATEMENT OF THE ISSUES

1. Whether the Commission erred in reversing the findings of the Administrative Judge.

2. Whether the Circuit Court erred in not reinstating the findings of the Administrative Judge.

I. INTRODUCTION

Claimant submits that the Order of the Administrative Law Judge dated July 27, 2006, is both well reasoned and based on a substantial weight of the evidence and should have been affirmed by the Full Commission. Employer and Carrier essentially have two arguments which seek reversal of the Commission Order. First, they allege that every doctor with the exception of Dr. Wegener, was wrong in treating the Claimant's admitted on the job injury, based primarily on the absence of electro physiologic testing which indicated carpal tunnel syndrome. This is despite the fact that the Claimant had significant objective and subjective symptoms of carpal tunnel syndrome which unrefutably improved after the surgery. Employer and Carrier's position on this issue is without merit and borders on frivolous.

With regard to the second issue, Employer and Carrier apparently find a problem with the fact that the temporary total disability was awarded over a three year period. This is despite the fact that a sole reason for this was the delay of the Employer and Carrier in refusing to authorize the surgery without a real defense. Clearly based on the unequivocal and significant medical treatment, not only from her physicians, not including the Employer's evaluation by Dr. Wegener paid for solely for litigation, it is unequivocal that she was not at MMI and therefore she is owed temporary disability for that period which she was unable to work, especially since she was refused accommodations after she requested light duty in March of 2002.

Thirdly, Employer and Carrier now seek to question the extent of industrial disability to each upper extremity which is a quite conservative award considering the fact that the Claimant has always done an assembly line repetitive work and there is no question that she is unable to return to that type of employment. Further, Employer and Carrier put forth no evidence to refute the extent

of disability, no vocational rehabilitation and absolutely no evidence to question the significant job search efforts undertaken by the Claimant. As such, this case should be affirmed or alternatively, amended to reflect 100% industrial loss. The Claimant's appeal this issue to the extent that the Administrative Judge's Order was modified by the Full Commission. On appeal to the Full Commission by the Employer and Carrier, the Full Commission affirmed the Administrative Judge's Order on February 13, 2007; however, reversed as to the permanent disability award limiting the permanent partial disability benefits to the five percent (5%) medical impairment rating assigned by Dr. Lindley. Claimant appealed the modification by the Full Commission urging this Court to set aside that modification and reinstate the findings of the Administrative Judgment. Then the Employer and Carrier appealed the Full Commission's Order finding that the Claimant sustained an injury on the job. This argument responds to that appeal as the cross-appellee Claimant urges that the Administrative Law Judge's findings should be reinstated.

II. STATEMENT OF FACTS

The Claimant, Karen Johnson, was a long-term employee of Sanderson Farms. She worked for almost ten (10) years in all aspects of chicken processing, all of which it is undisputed involved repetitive manual labor and lifting. She does not have a high school diploma and her work history before Sanderson Farms was a seamstress at Burnstein Brothers, a sewing factory which also involved repetitive work. Over a period of time culminating in the spring of 2002, Ms. Johnson began to have significant pain and numbness and problems in both of her wrists as a result of the repetitive work. This is undisputed that it affected her ability to work. She made numerous requests to see the plant nurse and physicians; however, she continued to be returned to the line which involved continued repetitive work which progressively worsened her condition. She finally sought treatment from Dr. Santos, her physician, who requested that she do a job that was not repetitive

work. Despite these representations, at no point did the Employer and Carrier provide her with work that was not repetitive. In fact, per the admission of the Employer's and Carrier's lone witness in March of 2002, Ms. Johnson's prior attorney wrote a letter specifically making a claim for workers' compensation benefits and specifically stating "Ms. Johnson has been told she cannot work in the plant due to her restrictions and has been told to find other employment due to the on-the-job injury". (T-49). Subsequent to that, over a period of approximately three (3) years, the Claimant continued to try to get treatment for her chronic condition, treatment which was denied, specifically including the treatment from Dr. Santos and his referral to Dr. Sheila Lindley at University Orthopaedic Associates, who specializes in treatment of hand conditions, including carpal tunnel syndrome, tendinitis and related conditions that are known to come from repetitive assembly line type work. The record is devoid of any evidence whatsoever that any effort was made from April 2002 up until the time of the hearing wherein the Employer and Carrier made any legitimate effort whatsoever to accommodate the restrictions from any physician, including Dr. Santos and Dr. Lindley regarding repetitive work. This includes the periods after litigation was initiated and that the Employer and Carrier knew of the restrictions of the Claimant, which was no repetitive work.

Subsequent to the inquiry that the Claimant was at least on temporary restricted duty of no repetitive work, at all periods from March of 2002 up until the time of the hearing, Employer and Carrier made no effort to undertake to offer accommodations or offer any type of re-employment, but instead just simply kept her identified as an employee, knowing full well that she had requested accommodations and made them known of the fact that she had been refused re-employment as early as March of 2002 per her prior attorney's correspondence. During the subsequent course of treatment with many physicians, all of whom, with the exception of the Employer's Medical Examination, Dr. Wegener, indicated continued chronic complaints, objective signs of problems

with both arms, identified as either tendinitis or bilateral carpal tunnel syndrome. At all times throughout the approximately three (3) year period, Claimant continued to have persistent hand pain and numbness that prevented her from working. This was confirmed by all doctors' medical reports, including the Employer's Medical Examination by Dr. Wegener.

In addition to the diagnosis of bilateral carpal tunnel syndrome from the primary treating physician, Dr. Sheila Lindley, who treated the Claimant over approximately a three (3) year period, the Claimant saw another hand specialist, Dr. Chris Etheridge with Mississippi Sports Medicine, an orthopaedic clinic, who saw the Claimant on January 12, 2004 and his physical examination found that she was "immediately positive compression test in less than 10-15 seconds. Positive tennels in each hand, carpal tunnel area." Other findings substantiated Dr. Ethridge to set forth in his plan "we will schedule her for right carpal tunnel release as an outpatient, IV regional anesthetic". See Exhibit CL-11.

Dr. Lindley testified extensively to the fact that she had a negative electro physiologic testing was not in and of itself indicative that she did not have bilateral carpal tunnel syndrome.[1] In addition, she had significant objective findings and furthermore, consistent with Dr. Lindley's 2-3 year course of treatment on the Claimant, Dr. Lindley testified unequivocally, based on reasonable medical probability that she had carpal tunnel syndrome which was aggravated/caused by the job. Additionally, in addition to her exhaustive deposition testimony, the operation record from the

[1]It is important to note that Dr. Lindley's deposition was taken on two different occasions. She testified extensively that her diagnoses were based in part, not only on her objective findings, but on exhaustive studies relating to hand surgery and carpal tunnel syndrome by other physicians. It is important to note that Dr. Wegener, in his inability to come up with a diagnosis, has not based his opinions on anything other than the fact that he just simply could not come up with a diagnosis. There was no deposition taken of Dr. Wegener where he explained his diagnosis other than he simply could not come up with one. This is despite the fact that multiple other physicians continued to document her continued hand symptoms and continued to treat her for her condition that he could not diagnose.

surgery verified the right carpal tunnel syndrome and the findings from Dr. Lindley wherein she stated, "dense compression of the patient's median nerve at the level of the carpal canal". See Exhibit EC-6, operative note of October 8, 2004.

Subsequent to her release of treatment which was prolonged by the refusal of the Employer and Carrier to authorize the surgery from Dr. Lindley, the Claimant was assigned permanent restrictions similar to those that she has been assigned going back to March of 2002. The Employer and Carrier, knowing full well that she had been released at maximum medical improvement and even becoming aware of significant job search efforts undertaken by Ms. Johnson, the record is totally devoid of any effort whatsoever to re-hire her or bring her back to any job at Sanderson. Furthermore, there was no effort to obtain a vocational rehabilitation specialist to find alternative employment within her restrictions. It is unrefuted in the record that there is no way she could return to the substantial acts of her usual employment.

Based on the foregoing, the Claimant submits that the Administrative Law Judge correctly found that the Claimant had sustained a loss of wage earning capacity and there was no evidence to refute that she could return to her usual occupation which she had done her total working career, despite the fact that she was unable to find any re-employment despite exhaustive job search efforts and the Judge found that she had a less than 100% loss of wage earning capacity. This is again despite the fact that there was evidence of a rebuttal presumption of permanent total disability of which the Employer and Carrier produced no evidence whatsoever to rebut said presumption. The Claimant submits that, if anything, the Commission should modify or amend the Administrative Law Judge's Order to reflect that she had sustained at 100% loss of wage earning capacity to each upper extremity which is based on the substantial evidence in the record.

III. SUMMARY OF THE ARGUMENT - Issue No. 1

The Claimant met her burden of proving a work related injury to both of her arms. When reviewing all of the treating physicians' reports, including Dr. Sheila Lindley, a hand surgeon at University Orthopaedic Associates, all of the treating physicians who treated her over a significant period of time, found that she had hand problems, despite a negative EMG had significant objective and subjective symptoms of bilateral carpal tunnel syndrome. There is no question that the Judge was correct in adopting the findings of Dr. Lindley. Most significantly is, not only Dr. Lindley's testimony, but the testimony of the Claimant was that after she ultimately did undergo the carpal tunnel surgery, her symptoms got better.

Relying on the findings of Dr. Lindley, including another hand surgeon in Jackson, Dr. Ethridge, the Judge, adopting the long-established principles that are held by not only the Supreme Court, but this Commission, that treating physicians' opinions are afforded more credibility and weight than those of a physician who has examined the Claimant solely for purposes of testifying and did not establish a physician-patient relationship. This issue has been exhaustively addressed both by the Mississippi Supreme Court and Court of Appeals and recently by the Commission. Generally taking this fact that the proposition that under the Workers' Compensation Act, treating physicians' opinions carry more weight than those of physicians who examined the Claimant solely for purposes of testifying. *Clements vs. Welling Truck Service, Inc. 739 So.2d 476, 477, n.1, (Miss. 1999)*. It is further understood that Mississippi law does not require the Commission to give a treating physician's opinion more weight than an expert witness' opinion; however, in this case there is no significant evidence of the expert litigation doctor's opinion, only that he could not come up with a diagnosis. What is even more amazing is that not only could Dr. Wegener not come up with a diagnosis, the Commission still adopted his opinions as to impairment ratings which is further

evidence totally lacking what the law determines to be substantial. To affirm the findings of the Commission in relying at all on the unsubstantiated vague undiagnosable opinions of Dr. Wegener, who saw the Claimant on one occasion and could not come up with a diagnosis would amount to a reversal of a rule of law that has been in effect since the origination of the Mississippi Workers' Compensation Act. From this case, it is simply not a measure of competing physicians, but totally and unequivocal lack of medical evidence against TWO treating doctors. Amazingly, the only evidence that the Employer and Carrier have put forth indicating that Dr. Lindley was wrong and that her surgery was not reasonable and necessary, was the defamatory accusation that she committed medical malpractice, despite having no evidence to the contrary other than Dr. Wegener not disputing that she had a problem with her hands, but that he simply could not diagnose carpal tunnel syndrome. The position of the Employer in regard to the findings of the Judge relating to Dr. Lindley's and Dr. Ethridge's diagnoses are frivolous and without supporting evidence other than a slanderous accusation that Dr. Lindley committed malpractice. Issue No. 1 is without merit and if anything, the Claimant submits that the Employer and Carrier should respectfully withdraw said issue on appeal based on the blatant unsubstantiated allegations that Dr. Lindley committed malpractice.

Issue No. 2
Period of Temporary Total Disability

Amazingly, after acknowledging the Claimant had an admitted injury back in 2002, and the Employer and Carrier disputed the relationship of that injury in payment of medical and delayed the Claimant's treatment over a period of over three years when the Claimant was unable to work and at all times from March 19, 2002 up until April 14, 2005, was under treatment from any number of physicians and was not at MMI and was not able to work. Instead, Employer and Carrier elected

to deny the medical on this claim which caused the three year period of temporary total disability, should not be rewarded for wrongfully denying the Claimant's claim when the overwhelming medical treatment indicated she had an ongoing problem related to the job which turned out to be carpal tunnel syndrome for which she had surgery. No evidence to refute that she was not temporarily totally disabled throughout that total period of time unless you believe that she did not have an occupational injury which the only evidence to support that is the findings of the Employer's and Carrier's litigation retained expert, Dr. Eric Wegener, who could not make a diagnosis. This issue is without merit.

The Act provides that if a Claimant is not at MMI and even if she has been released for some light duty work during her treatment period, if accommodations were not made to her, then Employer and Carrier are required to continue to pay temporary total disability benefits. Here it is undisputable that the Claimant attempted to return to work with light duty restrictions from Dr. Santos. The Employer and Carrier admittedly received evidence of these restrictions and made no efforts to accommodate these restrictions throughout the extended period of time while she was undergoing treatment.

Claimant testified that no one from Sanderson Farms had communicated with her since 2002 about going back to work with them despite having brought them the excuse from Dr. Santos. Claimant testified:

> Q. And that since you went back with the--to see Jean and showed the excuse to Jean Boone for no repetitive work?
>
> A. Correct.
>
> Q. Now, did that--did you see--what was the reason why you have not been back to Sanderson Farms since you got these same restrictions that you had in '02?
>
> A. Because of the first time when I went, when I had first saw Santos, Ms.

> Boone had already told me it wasn't no work there for me, so I assumed they were going to tell me the same thing; that it wasn't nothing there that I could do. And everything that's in there require you to use your hands. It's repetitive work.

(T-15, 16).

Employer did not even call Jean Boone to refute these conversations. Instead, Employer called Margaret Easterling who testified as follows:

> Q. Now, Ms. Easterling, would you agree with me that nobody from Sanderson Farms or any representative on behalf of Sanderson Farms has made any communication with either myself or Ms. Johnson since April of 2002 to try to get her--make her any accommodation for any job even after she got released by Dr. Lindley?
>
> A. We were contacted in March of '02 that Mr. Floyd Doolittle was her attorney, and we were never notified that she was removed and I do not contact employees that are represented by counsel. We work that through the counsel.

(T-48).

Ms. Easterling further testified:

> Q. --you have made no effort to try to bring her back and offer her any job within her restrictions?
>
> A. All communication would have been made through workers' comp and her attorney, which on record was Mr. Doolittle. I have no--
>
> Q. And you're not aware of any communications through Liberty Mutual or your attorneys making her any kind of representation--
>
> A. I do not--
>
> Q. --of bringing her back.
>
> A. I do not have records of their communication.

(T-49).

It is undisputable that there is no records of communication or any record whatsoever where the Employer and Carrier made any effort to offer accommodations after April 22, 2002 up until the

point of the hearing, a period of four years. As such, the law requires that they pay her temporary total disability payments. for the time period when she was not at MMI and with a work excuse of light duty since no accommodation was made.

Issue No. 3
Judge's Findings of Industrial Loss

The Full Commission improperly modified the findings of the Administrative Law Judge as to industrial loss. The evidence supports the findings of the Administrative Law Judge is overwhelming. The evidence to support the Commission's lowering of those industrial awards is almost nil. They rely solely on the evidence of the paid expert, Dr. Wegener, and rely on his low impairment ratings, despite the fact that he could not come up with a diagnosis. Employer's and Carrier's appeal of this issue is likewise without merit and the Employer and Carrier submitted no evidence whatsoever to substantiate the findings of the Administrative Law Judge. Again, both Issue No. 2 and 3 go back to the issue of whether or not treating physicians are given more weight as opposed to the paid litigation expert who cannot even make a diagnosis. If you find that it was appropriate for the Judge to rely on the findings of Dr. Lindley, Dr. Ethridge and Dr. Santos, then these two issues are rendered moot by those findings. The evidence is undisputable that Ms. Johnson cannot return to the substantial acts of her usual employment. The evidence is undisputable that over a three year period, knowing that the Claimant had restrictions and after being notified as early as March 22, 2002, that she had been refused accommodation for her restrictions and had been told to find another job, not one single effort was made to either accommodate her restrictions, return her to work or offer vocational rehabilitation services.

There is furthermore, not one iota of evidence which substantiates or refutes that the significant job search efforts undertaken by the Claimant was a sham or not valid. The Employer

and Carrier are required to disprove that the job search efforts were legitimate. There is no evidence that the Claimant did not adequately try to find a job, nor is there any evidence that the Employer and Carrier made her any offer of re-employment after April of 2002. Since it is undisputed that the Claimant can not return to her substantial acts of employment, she should have been awarded 100% industrial loss to each upper extremity, especially since her total job history, after dropping out of high school, involved repetitive assembly line type work. Her legitimate job search yielded no employment offers and the Employer and Carrier made no effort to rebut the presumption of total permanent disability by testimony of a vocational expert. Despite this, if anything, this Court should amend the findings as to industrial loss to provide for a 100% industrial loss to each upper extremity. Employer and Carrier are disappointed in the award, and therefore requesting a reduction in the amount of the industrial loss. However, they submit no evidence whatsoever which would substantiate same. Specifically, made no effort whatsoever to accommodate their employee's restrictions, knowing full well that she was out looking for work and had been released with permanent restrictions by Dr. Lindley, but made no effort at all to try to find her a position up to the time of the hearing or for the three (3) years before the hearing. All the while knowing this information, Sanderson kept her on the books as an employee. The Commission erred in modifying this portion of the Judge's Order.

IV. CONCLUSION

Employer and Carrier basically are arguing that the Judge is wrong to award any benefits to the Claimant, dispute each and every physician other than Dr. Wegener (a paid non-treating litigation expert) that the Claimant even had a problem, delayed in authorizing medical treatment thereby causing a significant delay in the Claimant getting to MMI and basically submitted no evidence to refute that the Claimant sustained an industrial loss. Furthermore, they have submitted

no evidence to refute the findings of the primary treating physician, specifically Dr. Lindley, and instead made nothing more than slanderous accusations that Dr. Lindley committed malpractice against the Claimant. The Commission was in error to reverse the findings of the Administrative Law Judge with regard to the primary treating physicians, there must be some evidence of this accusatory malpractice that the Employer and Carrier so allege. There is no evidence in the record to substantiate their blatant slanderous accusations against Dr. Lindley. The Employer accuses Dr. Lindley of fraud, an accusation which must be proven by clear and convincing evidence. Dr. Wegener is the only doctor who said that he could not diagnose carpal tunnel syndrome. He may have disagreed with Dr. Lindley, but he certainly did not accuse her of malpractice. Even he gave the Claimant a shot for objective symptoms in her wrist, and apparently the Employer and Carrier would surmise that this is malpractice as well. In any event, the Commission was wrong to interfere with the Judge's Order.

The Employer and Carrier would have this Court ignore the long recognized principles relating to treating physicians discussed, and further wholly ignores the basic premise of the Mississippi Workers' Compensation Act to give liberal interpretation and even close questions should be in favor of the injured worker. See *Stewart vs. Singing River Hosp. System, 928 So.2d 176 (Miss. Ct. App. 2005)*. When you look at the Claimant's longstanding continued complaints of problems with her hands (after 10 years of work) with the course of treatment with the many physicians, including the surgery and the fact that it made her condition better, and the diagnostic and exhaustive conservative treatment and ultimate surgery undertaken by Dr. Lindley. Therefore, the Administrative Judge's findings should be reinstated in full and the Commission's modification of said Order reversed, as the Commission's modification ignores the law and is not supported by the substantial evidence.

Multiple physicians support that the Administrative Law Judge's findings were supported by the overwhelming weight of the evidence. The Commission continually refuses the clear meaning and intent and import of the Workers' Compensation Act by amending the Administrative Law Judge's Order to lower the award compared to a litigation expert's opinions who saw the claimant on one occasion and could not even come up with a diagnosis. The Commission completely and wholly ignored the wealth of evidence and law substantiating the Administrative Judge's findings.

Respectfully submitted,

JOHN HUNTER STEVENS

CERTIFICATE OF SERVICE

I, John Hunter Stevens, attorney for claimant, hereby certifies that I have this day served by First Class United States Mail, postage fully prepaid, the above and foregoing *Appellant's Brief to the Supreme Court* upon the following counsel for the employer and carrier:

Honorable Lamar Pickard
P. O. Box 310
Hazlehurst, MS 39083

Ryan Mitchell, Esq.
P. O. Box 1289
Laurel, MS 39441-1289

THIS the 3 day of October, 2008.

JOHN HUNTER STEVENS