

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2008-WC-01352-COA**

**ARMENIA FAIR**

**APPELLANT**

**VERSUS**

**BEAU RIVAGE RESORTS, INC.  
(SELF INSURED)**

**APPELLEE**

**APPEAL FROM THE**

**CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE/EMPLOYER AND CARRIER,  
BEAU RIVAGE RESORTS, INC. (SELF INSURED)**

**ORAL ARGUMENT NOT REQUESTED**

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(Self Insured)*

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**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons may 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. Honorable Lisa Dodson, Circuit Court Judge, Harrison County,  
Mississippi;
2. Armenia Fair, Claimant;
3. Beau Rivage Resorts, Inc. (Self Insured), Appellee/Employer/Self-Insured;
4. Honorable Mark Henry, Administrative Judge, Mississippi Workers'  
Compensation Commission;
5. Liles Williams, John Junkin and Augustus Collins, Commissioners,  
Mississippi Workers' Compensation Commission;
7. James K. Wetzel, Esq., with the law firm of James K. Wetzel &  
Associates,  
Attorneys for Claimant Armenia Fair; and,

8. Tristan R. Armer, Esq. and Harry J. Schmidt, with the law firm of Heidelberg, Steinberger, Colmer & Burrow, P.A., Attorneys for Employer and Self Insured Beau Rivage Resorts, Inc.

A handwritten signature in black ink, appearing to read 'T. Armer', is written over a horizontal line.

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Insured

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**STATEMENT OF THE ISSUES**

- I. The Mississippi Workers' Compensation Commission found as a matter of fact that the claimant's injury was a temporary aggravation of a pre-existing injury.**
- II. The Mississippi Workers' Compensation Commission's decision to find Ms. Fair suffered a temporary aggravation of her pre-existing condition is supported by substantial evidence and limited her disability benefits to the period of the temporary aggravation.**



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**STATEMENT OF THE CASE**

This case was initially heard by Administrative Law Judge Mark Henry, who issued his initial findings of fact and conclusions of law to the Full Commission on June 8, 2006. ALJ Henry ordered the employer to pay benefits from the date of the injury until the date of "maximum medical improvement." He essentially found the work-related injury exacerbated the pre-existing injury and that he was unable to determine if the cancer treatment was an intervening superseding cause.

The Mississippi Workers Compensation Commission did not accept all of the Administrative Law Judge's conclusions. Instead, the Commission issued an Order on December 20, 2006, ordering the Employer to pay Ms. Fair benefits from February 21, 2004, to September 1, 2004 for a period representing the temporary aggravation of her pre-existing condition. This period is factually identical to the date of injury until the date the claimant's orthopedist stated that she had returned to her pre-injury condition. (R.E. 2, C.R. at 123-126;158-160.)

Ms. Fair appealed the Order of the Mississippi Workers' Compensation Commission to the Circuit Court of Harrison County alleging that the Commission's decision was not based upon substantial evidence. The Circuit Court affirmed the Commission. Clearly, this Court should affirm the decision of the Circuit Court. The Circuit Court was correct that the real dispute in this case is a factual one. It is an undisputed proposition of law that "appellate courts are bound by the decision of the Mississippi Worker's Compensation Commission as long as the Commission's findings and order are supported by substantial evidence." *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988).

The factual findings of the Commission are supported by substantial evidence. It is undisputed that Ms. Fair had a torn rotator-cuff at least three months prior to her alleged, on-the-job accident. The medical evidence produced shows that Ms. Fair's workplace injury merely aggravated this well-documented, pre-existing, rotator cuff injury. Ms. Fair was only due benefits for the period in which her injury was "*temporarily lighted up*" to produce a disability and is simply not due any benefits after her pre-existing condition returned to its pre-injury status. As the corollary to the *Rathborne* rule states, *when the effects of the injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable.* [emphasis added] *Rathborne, Hair & Ridgeway Box Co. v. Green*, 237 Miss. 588, 594 (1959). The medical evidence, including the opinion of Dr. Salloum and MRI films, and Ms. Fair's testimony support the finding that on September 1, 2004, Ms. Fair no longer had an occupational disability associated with the aggravation of her pre-existing condition.

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**STATEMENT OF RELEVANT FACTS**

Ms. Armenia Fair was employed by the Beau Rivage as a gift shop cashier. Her job entailed assisting customers and operating the cash register. This job did not require her to do any type of heavy lifting or heavy physical activity. (R.E. 1, C.R. at 36.)

Ms. Fair had an extensive medical history regarding her injured shoulder before her on-the-job injury. (R.E. 1, C.R. at 36-40.) Her primary care physician, Dr. Reza Motakhaveri, diagnosed Ms. Fair with a rotator cuff injury on October 24, 2001, approximately two and a half years prior to Ms. Fair's date of injury in this matter. (R.E. 4, C.R. at 249.) Dr. Motakhaveri provided Ms. Fair with medication and injections to treat her shoulder injury. (Id.) The following year, on December 20, 2002, Ms. Fair was again treated by Dr. Motakhaveri for pain in her right shoulder. (R.E. 4, C.R. at 275.) At this visit, he provided another focal injection to treat the pain. (Id.) Ms. Fair returned to Dr. Motakhaveri on March 7, 2003, reporting that the prior injections had provided relief, but the pain had returned in the past few weeks. (R.E. 4, C.R. at 277.) The pain was so

significant that while he continued prescribing Celebrex, Dr. Motakhaveri also prescribed Lortab for pain. (Id.) Finally, on October 27, 2003, Ms. Fair again returned complaining of shoulder pain, and Dr. Motakhaveri noted that Ms. Fair had a good response to the injections, but the symptoms returned after only a few months. (R.E. 4, C.R. at 279.) Because the injections were no longer effective in treating her condition, he referred Ms. Fair to orthopaedist Dr. George Salloum for evaluation. (Id.)

Ms. Fair was initially treated by Dr. Salloum on December 17, 2003. (R.E. 3, C.R. at 166.) She related to Dr. Salloum that she had fallen approximately seven (7) years earlier and was told at that time that she had a torn rotator cuff injury. (Id.) On December 17, 2003, Ms. Fair told Dr. Salloum that her shoulder had constant aching pain with the severity being an eight (8) on a scale of one (1) to ten (10). (Id.) Despite a differing account to Dr. Motakhaveri, Ms. Fair told Dr. Salloum the shoulder healed until approximately four (4) months prior to her visit when it began to bother her again. (Id.) She further stated that the cortisone shots provided by Dr. Motakhaveri did not help very much, specifically that they did not last very long. She claimed to have difficulty: 1) lifting her shoulder, 2) pain when driving, 3) pain when holding her arms out in front of her, 4) lifting objects, and 5) difficulty sleeping at night. (Id.)

After his initial meeting with Ms. Fair, Dr. Salloum diagnosed her with a right shoulder rotator cuff tear with severe impingement, ordered an MRI, and planned to schedule her for shoulder decompression and a distal clavicle resection. (Id.) Dr. Salloum, upon review of the MRI results, characterized Ms. Fair's injury as a torn rotator cuff with "severe calcification of her cordico-chromial ligament which will result in outlets stenosis and

impingement in her shoulder. (R.E. 4, C.R. at 166; 169; 184.) She has *short-lived good results with cortisone injection*, which I feel is a good predictor for postoperative recovery.” (R.E. 4, C.R. at 166, 169, 184, emphasis added.)

At trial Ms. Fair testified her shoulder continued to bother her during the period leading up to her injury. (R.E. 1, C.R. at 21; 40.) She had pain when running the sweeper, combing her hair, and other such activities. (Id.) She reported that her shoulder would just start hurting while she was sitting and that the pain would keep her up at night. Despite all of this, she continued working because her job only required light physical activity and did not require pushing, pulling, or raising her arms. (R.E. 1, C.R. at 21; 40.)

On February 21, 2004, Ms. Fair testified that while walking at work she stumbled into a wall. Ms. Fair alleged this stumbling event caused her an on-the-job injury.

In describing her limitations after the injury on February 21, 2004, Ms. Fair noted very similar limitations, stating that her arm would get tired after dusting or similar activities and the pain would cause her to wake up during the night, noting that these problems would come and go. (R.E. 1, C.R. at 21; 32; 40.) It is also noteworthy that in the month prior to her accident Ms. Fair was given a written warning and counseling notice regarding her absences from work. She had been charged with twelve negative points, thus placing her in a position to be terminated from her job. (R.E. 1, C.R. at 35.) After her injury, Ms. Fair never attempted to return to work with the Employer.

On January 12, 2004, Ms. Fair underwent a biopsy of her breast. She was diagnosed with breast cancer and was subsequently scheduled for surgery on March 11, 2004. Ms. Fair worked until February 23, 2004. She underwent a radical mastectomy on March 11, 2004,

and subsequently endured extensive chemotherapy over the next several months. (R.E. 4, C.R. at 282; 287-288.) Ms. Fair took a family medical leave of absence for the surgery and chemotherapy. (R.E. 6, C.R. at 611.) During this period she applied for and received approximately six (6) months of disability benefits through her group disability plan and drew approximately half her regular salary during this time period. (R.E. 6, C.R. at 620-622.)

Dr. Motakhaveri treated Ms. Fair for the alleged on-the-job injury immediately after the accident. At the March 3, 2004, visit she claimed that she had not had any pain in her shoulder for a long time prior to the accident. (R.E. 4, C.R. at 277.) This directly contradicts her entire documented, medical history with Dr. Motakhaveri and Dr. Salloum. Ms. Fair testified at trial that she had all the same symptoms and complaints from her first visit to Dr. Salloum in December 2003 through the time of the accident. (R.E. 1, C.R. at 21; 32; 40.)

Dr. Motakhaveri referred Ms. Fair back to Dr. Salloum, who treated her on April 6, 2004. After this visit, Dr. Salloum reported that Ms. Fair remained a candidate for surgical intervention to include a decompression and a rotator cuff repair. He notes that he reviewed both of her MRIs (the one conducted in December 2003 and the one since the accident) and they "were very similar in nature with similar findings." (R.E. 3, C.R. at 170; 172.)

On June 1, 2004, Dr. Salloum responded to a list of written interrogatories provided by the Employer to determine whether his treatment was related to the pre-injury condition or for a new condition. (R.E. 3, C.R. at 159.) In summary, Dr. Salloum responded that Ms. Fair reported at her initial visit, prior to the accident, that she had injured her shoulder seven (7) years prior. After Ms. Fair's first office visit, surgery was tentatively scheduled and work

restrictions were indicated at that time. Dr. Salloum clearly stated that Ms. Fair presented the same complaints at her first post-injury office visit as she did at her last pre-injury office visit. The first MRI results showed chronic, not acute, shoulder injuries, and he reached the same conclusion from viewing the second, March 9, 2004, MRI results. He recommended the same surgery to Ms. Fair both before and after the accident, and his recommendation of surgery addresses the same findings as his initial recommendation for surgery. He reports that Ms. Fair returned to her pre-incident status regarding the February 21, 2004, accident. (See R.E. 3, C.R. at 159-160.) On April 28, 2004, he stated that Ms. Fair may return to work with no lifting or use of her right upper extremity. (R.E. 3, C.R. at 160.)

In addition to his extensive responses provided on June 1, 2004, a "To Whom It May Concern" letter was provided from Dr. Salloum's office, though it is unclear who drafted the language of this letter. The letter notes, contrary to the medical records, that Ms. Fair had relief from cortisone injections prior to her work injury. It further states that her work injury has caused an *unrelenting* exacerbation of her pain. However, the letter also states that Dr. Salloum's office would like to perform the same surgery he had tentatively scheduled in December 2003. Despite the factual inaccuracies of the letter, the ultimate recommendation was identical to his recommendation prior to the work injury, further confirming his prior statements that Ms. Fair suffered from the same injury prior to the accident as she did after the accident.

After completing her cancer treatment and being released by her oncologist, on or about February 10, 2005, Ms. Fair began working as a greeter at Wal-Mart, initially working twenty (20) hours a week. (R.E. 1, C.R. at 31; 46-47.) After Hurricane Katrina Ms. Fair

was transferred to the Wal-Mart on Highway 49 where she was began working as a salesperson in the Ladieswear Department forty (40) hours per week at a rate of \$8.50 per hour where she remained through the date of her initial hearing. (Id.) In response to questioning by her attorney Ms. Fair admitted that she never tried to go back to the Beau Rivage to find work after her oncologist released her. (R.E. 1, C.R. at 31-32.)



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**STANDARD OF REVIEW ON APPEAL**

"Appellate review of compensation claims is a narrow one. The standard of review utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well settled." *Atlas Roll-Lite Door Corp. v. Ener*, 741 So. 2d 343, 346 (Miss. Ct. App. 1999). The Mississippi Supreme Court has stated "that the findings and order of the Workers' Compensation Commission are binding on the Court so long as they are 'supported by substantial evidence.'" *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Fought* at 317). An appellate court is bound even though the evidence would convince that court otherwise if it were instead the ultimate fact finder. *Barnes v. Jones Lumber, Co.*, 637 So. 2d 867, 869 (Miss. 1994). It should also be noted that "the Commission may accept or reject an administrative judge's findings." *Id.*

Under settled precedent, appellate courts may not hear evidence in compensation cases. Rather, their scope of review is limited to a determination of whether or not the decision of the commission is supported by the substantial evidence. If so, the decision of the commission should be upheld. The circuit courts act as intermediate courts of appeal. The Supreme Court, as the circuit courts, acts as a court of review and is prohibited from hearing evidence or otherwise evaluating evidence and determining facts. 'While appeals to the Supreme Court are technically from the decision of the

Circuit Court, the decision of the commission is that which is actually under review for all practical purposes.'

Dunn, Mississippi Workmen's Compensation, § 286, n. 39 (1982); *Atlas Roll-Lite Door Corp. v. Ener*, 741 So. 2d 343, 346 (Miss. Ct. App. 1999); *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991).

As stated, the substantial evidence rule serves as the basis for appellate review of the commission's order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a 'mere scintilla' of evidence, and that it does not rise to the level of 'preponderance of the evidence.' It may be said that it 'means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.

*Atlas Roll-Lite Door Corp. v. Ener*, 741 So. 2d 343, 346 (Miss. Ct. App. 1999); *Delta CMI v. Speck*, 586 So. 2d 768, 772-73 (Miss. 1991).

"A finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act." *Weatherspoon v. Croft Metals, Inc.* 853 So. 2d 776, 780 (Miss. 2003).

In *Hardaway v. Bradley*, 876 So. 2d 793 (Miss. 2004), the Supreme Court of Mississippi held (citing *Baugh v. Cent. Miss. Planning & Development Dist.*, 740 So. 2d 342, 344 (Miss. Ct. App. 1999), quoting *Oswalt v. Abernathy & Clark*, 625 So. 2d 770, 772 (Miss. 1993)), that when examining conflicting opinions by medical experts, appellate courts "will not determine where the preponderance of the evidence lies . . . the assumption being

that the Commission as trier of fact, has previously determined which evidence is credible, has weight, and which is not." *Hardaway* at 796. The Commission is charged with weighing the conflicting medical evidence and making the proper conclusion. While *Hardaway* involved competing doctors' opinions, the same principle applies to the slightly conflicting September 1, 2004 and December 12, 2004 letters of Dr. Salloum. (C.R. at 154; 157-160.) In the case at bar the Commission weighed the records, including the two (2) slightly contradictory opinion letters, and determined that Ms. Fair's injury was a temporary aggravation of a pre-existing injury.

"Disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." V. Dunn, Mississippi Workmen's Compensation, § 72 (3d ed. 1982). "Because a Commission determination of disability constitutes a finding of fact, a reviewing court must employ the 'substantial evidence' standard of review." V. Dunn, Mississippi Workmen's Compensation § 72.1 (3d ed. 1982), *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 828 (Miss. 1991). A conclusion that the employee is disabled rests on a finding that the claimant could not obtain work in similar or other jobs and that the claimant's unemployability was due to the injury in question. Dunn, Mississippi Workmen's Compensation, § 72.1 (3d ed. 1982). Therefore, the decision of when Ms. Fair's period of "disability", if any, ended, is also a factual determination made by the Commission and cannot be re-weighed as long as the decision is supported by substantial evidence.

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**SUMMARY OF THE ARGUMENT**

Ms. Fair's appeal centers on factual questions decided by the Mississippi Worker's Compensation Commission. Ms. Fair had a pre-existing condition. The Commission found that as a matter of fact her condition was temporarily aggravated by bumping into a wall at work. As a matter of fact, Ms. Fair's disability from this aggravation did not last beyond September 1, 2004. The medical evidence was clear that, despite Ms. Fair's assertions to the contrary, Ms. Fair did not suffer any new disability. Ms. Fair did not prove that she suffered a permanent injury.

The Commission considered the entire body of evidence, including a succinct statement of medical opinion by Dr. Salloum. This medical evidence before the Commission is substantial evidence that supports the Commission's findings of fact and conclusions of law that Ms. Fair suffered a temporary aggravation of a pre-existing condition.

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**ARGUMENT**

**The Mississippi Workers' Compensation Commission decided as a matter of fact that the claimant's injury was a temporary aggravation of a pre-existing injury.**

The Mississippi Worker's Compensation Commission found that Ms. Fair met her burden of proof that she suffered a temporary aggravation of a pre-existing condition. While disputed, this decision is not contested by the Employer in this appeal. The Commission did not find, however, that the claimant met her burden of proof, or established a *prima facie* case that the workplace accident caused a permanent injury. Therefore, no burden of proof ever shifted to the Employer regarding the allegation that Ms. Fair suffered a permanent injury. Instead, the Commission focused on whether Ms. Fair proved beyond a preponderance of the evidence that she suffered more than a temporary aggravation of her pre-existing condition. The Commission's decision that Ms. Fair did not meet this burden of proof was reached by resolving contested, factual issues.

The facts of this case clearly establish that Ms. Fair had a pre-existing injury to her shoulder. Truly, no real dispute exists that Ms. Fair had a pre-existing rotator cuff tear. The real issue and question of fact was whether the previously torn rotator-cuff was temporarily

aggravated by stumbling into a wall at work. At a minimum, the medical evidence shows that the effects of this pre-existing injury waxed and waned over a seven (7) year period of time. The substantial medical evidence also shows that the injury had "*lighted up*" by at least October of 2003, well before her accident on February 21, 2004. Further, whether she had a "disability" related to the workplace injury, and whether the "disability" ended on or before September 1, 2004, are both questions of fact. Ms. Fair bore the burden of proof on these issues. From a factual standpoint, the Commission found that she did not meet her burden of proof that bumping into a wall on February 21, 2004 caused a permanent injury or any injury beyond a temporary aggravation.

Even Ms. Fair's own testimony created questions of fact for the Commission to resolve. Ms. Fair offered inconsistent and conflicting descriptions of her condition throughout, but her physician's diagnoses remained constant. As outlined previously, Ms. Fair reported pain in her shoulder at office visits to Dr. Motakhaveri on October 24, 2001, December 20, 2002, March 7, 2003, and October 27, 2003. However, in December 17, 2003, she stated that she had fallen and injured her rotator cuff in 1996, but it had healed and had not bothered her until approximately August of 2003. Further conflicting evidence is that after her workplace accident, and at her March 3, 2004, visit to Dr. Motakhaveri, Ms. Fair reported that she had not had any pain in her shoulder for a long time. Therefore, there was a question of fact as to the effect of the bumping incident on her torn rotator-cuff as felt by Ms. Fair.

Further, Ms. Fair's testimony at trial that the "pain was different" is not conclusive. During the hearing she testified as follows:

- Q. Could you just generally tell the Judge what kind of problems you had, what kind of treatment you had and just fill us in exactly what was going on up to December of '03 with that shoulder?
- A. Well, when I would raise my arm, it would like, pop crack and you — and I went to Dr. Motakhaveri and he gave me a Cortizone shot and that made it feel better.

(R.E. 1, C.R. at 18-20.) Yet, after seeing Dr. Motakhaveri about her shoulder in October of 2003, Dr. Motakhaveri no longer felt that administering Cortizone shots were an effective treatment - he referred Ms. Fair to Dr. Salloum, an orthopaedic specialist. Ms. Fair told Dr. Salloum that the Cortizone shots were not effective. (R.E. 3, C.R. at 166.) After the initial visit, Dr. Salloum recommend surgery - not additional Cortizone shots.

This change in the course of her medical care regarding her shoulder all occurred in the two (2) months prior to the workplace accident. Therefore, Ms. Fair's argument that the pain was different after her injury is belied by the fact that beginning in October of 2004 her pain was different. She told Dr. Salloum that Cortizone shots no longer could control her shoulder pain. On December 13, 2003, for the first time ever, she was told by a doctor that she needed surgical intervention to relieve her shoulder pain. The escalation in her pain had already occurred prior to February 21, 2004, the date of her workplace accident. The surgery, and the subsequent relief from shoulder pain, did not occur due to Ms. Fair's diagnosis of cancer.

Ms Fair also testified:

- Q. How was your shoulder between the first time you saw Dr. Salloum up until the date of your accident on February 21<sup>st</sup>?
- A. My shoulder was still bothering me. If I raised my arm or try to run the sweeper or comb my hair or anything like that, my shoulder would bother me.

(C.R. at 21.)

Ms. Fair, when asked again, if the pre-injury pain was different from the post-injury pain, she testified:

- A. Well, for one thing, like I said, the pain, it was most like when I move my arm, I would just feel like a crack, you know. Okay. This pain was different. It would just ache all the time. I couldn't raise my arm. I couldn't push on anything. I couldn't pull on anything.

Her testimony is again belied by the same medical records that Ms. Fair alleges the Commission ignored in reaching its decision. On December 13, 2003, Ms. Fair clearly told Dr. Salloum that the shoulder had a "constant aching pain." (R.E. 3, C.R. at 166.)

Finally, both the pre-injury and post-injury MRI films of Ms. Fair's shoulder are identical. There simply is no biological or objective change in her condition demonstrated on the MRI films. Her physicians' descriptions of her injuries remained more consistent. For several years before the accident the records show that Ms. Fair received temporary relief from Cortizone injections, but ultimately her pain would return. Dr. Motakhaveri, after stating his belief that Ms. Fair suffered from a torn rotator cuff, referred her to Dr. Salloum. The Cortizone treatment was apparently no longer effective at controlling her pain. At her office visits with Dr. Salloum, Ms. Fair stated that she was unable to lift her shoulder and lift objects and she had pain when driving, holding her arms out in front of her, and difficulty sleeping at night, and reported her pain as an 8 on a scale of 1 to 10. Ultimately surgery was planned but did not occur in light of her cancer treatment. Dr. Salloum recommend surgical intervention to treat the injury.

Compared to her pre-accident condition, Ms. Fair's workplace injury was described by Dr. Salloum as "very similar in nature with similar findings." The MRI taken just after the second injury was described as chronic, not acute, shoulder injures, and second MRI was



described in similar fashion. There can be no doubt from the record that Ms. Fair's injury is an exacerbation of the pre-existing injury. But again, questions of fact existed as to whether the tear was really aggravated by the workplace accident, for how long this aggravation lasted and whether the aggravation produced a period of disability.

Ms. Fair's extended absence from work was not caused by her shoulder, but by her cancer treatment. Wholly absent from the record is any doctor's testimony or record that Ms. Fair should remain off from work or on a limited duty because of her shoulder injury. Instead, according to a report of oncologist Dr. Harris, Ms. Fair made the decision on February 16, 2004, to have her cancer-related surgery. (R.E. 5, C.R. at 326.) This was five (5) days prior to the workplace injury. Ms. Fair underwent surgery on March 11, 2004, followed by chemotherapy treatment for several months. Therefore, a question of fact as to the cause of Ms. Fair's disability existed.

"Disability" is Ms. Fair's inability to earn wages in the same of similar, pre-injury employment. The medical opinion of Dr. Salloum was that Ms. Fair was able to return to work on April 28, 2004, with her same pre-incident status by June 1, 2004. (R.E. 3, C.R. at 157;160.) Therefore, substantial evidence exists that Ms. Fair's disability, if any at all, ended on or about April 28, 2004. Despite her ability to return to work for her shoulder injury, Ms. Fair did not return to the workforce until February 10, 2005. She began working as a part-time greeter at Wal-Mart. Ultimately, however she returned to full-time work at Wal-Mart in a sales position with similar requirements as to her previous position with the Employer.

Ms. Fair did attempt to return to Employer after her accident. She applied for leave from work due to her cancer. She applied for and received short term disability payments

as a consequence of her cancer. Dr. Salloum's records returned her to light duty on April 28, 2004. Ms. Fair testified that he job was light duty and did not involve pushing or pulling.

Therefore, there is a lot of conflicting evidence that her disability, if any, was caused by a work accident. There is substantial evidence that Ms. Fair could have returned to her pre-injury employment on or after April 28, 2004. But at a minimum, the resolution of the issue of whether the work accident produced an aggravation that resulted in a disability and for how long the disability lasted are both questions of fact to be resolved by the Commission.

Ms. Fair emphasizes that in his December 2, 2004 letter, Dr. Salloum changed his opinion that her injury was a temporary aggravation. (R.E. 3, C.R. at 154). However, Dr. Salloum did not state such in his letter. At best, he stated her pain was "unrelenting". (Id.) Even if Dr. Salloum changed his opinion, as argued by Ms. Fair, this change is of no real import because it merely creates conflicting medical evidence, and which conflicting evidence is chosen as credible remains the sole province of the Commission. See *Hardaway v. Bradley*, 876 So. 2d 793 (Miss. 2004). Moreover, simply because there is a conflict of medical opinion the Commission is not bound to automatically accept Ms. Fair's version because she gets the "benefit of any doubt." *Id.*

After weighing the entire record, including Ms. Fair's often inconsistent testimony, the MRI results that were identical pre-injury as post, the absolute lack of a succinct doctor's opinion stating any definite period of disability, Dr. Salloum's succinct answers concerning her condition, and Ms. Fair's return to gainful employment at WalMart after resolving her

cancer issues, the Commission found that the aggravation of her pre-existing injury was only temporary. This was clearly a question of fact resolved by the Commission.

Therefore, it is clear from a review of the record that the issue upon which Ms. Fair bases her appeal is a factual one. While Ms. Fair's appeal is characterized in terms of whether the Commission failed to consider certain evidence, the real issue is that the Commission did not accept Ms. Fair's view of the factual evidence.

**The Mississippi Workers' Compensation Commission's decision to find Ms. Fair suffered a temporary aggravation of her pre-existing condition is supported by substantial evidence and her benefits were properly limited to the period of the temporary aggravation.**

Ms. Fair argues to this Court that the Commission "erred as a matter of law in disregarding the...records...of Dr. George Salloum." (Fair Brief at 5.) This statement essentially summarizes the entire point of Ms. Fair's appeal, and it lands wide of the mark. In essence, Ms. Fair's argument is that because she stated at trial that the pain was different from before and because one line of a medical record states her pain was "unrelenting", then the Commission had no choice but to disregard all other credible, contrary evidence and ultimately find in her favor. This position is not legally accurate because the Commission may reasonably outweigh evidence favorable to Ms. Fair's claim with other credible evidence not favorable to Ms. Fair. Giving Ms. Fair the benefit of the doubt in disputed cases does not require the Commission to turn a blind eye towards overwhelming, conflicting evidence not in Ms. Fair's favor.

Moreover, the Commission did not disregard Dr. Salloum's medical records. Instead, the Commission weighed all the evidence contained in Dr. Salloum's records and then issued its decision. Ms. Fair's appeal and position does not consider the evidence fully supporting the decision of the Commission. That evidence includes a medical record by Dr. Salloum that succinctly states the following:

1. The surgery needed to address her post-injury condition is identical to the surgery Dr. Salloum recommended to address her pre-injury condition;

2. Ms. Fair's complaints to Dr. Salloum on April 6, 2004 were identical to her complaints on December 13, 2003;
3. Ms. Fair indicated the need for work restrictions on December 13, 2003;
4. Ms. Fair's pre-injury condition was chronic, which meant it was likely to occur again without any new or subsequent injury;
5. To a reasonable degree of medical certainty, Dr. Salloum could not state that on-the-job injury was anything more than a temporary aggravation;
6. Ms. Fair had returned to her pre-injury condition as of June 1, 2004;
7. No objective evidence exists to demonstrate within a reasonable degree of medical certainty that Ms. Fair had not returned to her pre-injury condition;

(R.E. 3, C.R. at 159-160.) The Employer, by producing the succinct opinion of Dr. Salloum, produced substantial evidence that Ms. Fair's condition was a temporary aggravation of her pre-existing condition. Additionally, by producing Dr. Salloum's opinion that Ms. Fair may return to her employment, the Employer produced substantial evidence that she no longer suffered a disability. In fact, this medical evidence is the only medical opinion of Ms. Fair's condition in the record that was stated "within a reasonable degree of medical probability."

Ms. Fair treats the term *unrelenting pain* in Dr. Salloum's December 2, 2004 note as if it were a finding of a new condition or state of her injury. But "*unrelenting pain*" on December 2, 2004 is no different than the "*constant aching pain*" Ms. Fair had on December 13, 2003. Thus, the Commission, after reviewing all of the evidence in this

cause, concluded that Ms. Fair did not suffer any injury beyond a temporary aggravation of her pre-existing condition.

It strains reason to conclude that a single word, "*unrelenting*", contained in a December 2, 2004, letter from Dr. Salloum would outweigh the specific medical findings Dr. Salloum recited in his June 1, 2004, record. It strains reason to view the term "*unrelenting pain*" in Dr. Salloum's December 2, 2004, note any different than the "*constant aching pain*" Ms. Fair had on December 13, 2003 - prior to her workplace injury.

Ms. Fair was unable to produce any objective medical evidence or medical opinion that her physical condition changed after February 21, 2004. Additionally, Ms. Fair was also unable to produce any evidence that her physical limitations changed after February 21, 2004.

Most important of all, however, is that the Commission based its findings of fact and order upon clearly stated medical opinions finding no change in her physical condition and limitations. Dr. Salloum's opinion, Dr. Motakseveri's records and the MRI films are all substantial evidence supporting the Commission's decision. Once the Commission makes a decision based upon substantial evidence, the decision cannot be overturned by an appellate court.

The Mississippi Supreme Court has firmly held that,

Our Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies. Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. . . When an administrative agency has performed its function, and has made the determination and entered the order required

of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however since the courts cannot enter the field of the administrative agency.

*Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969). Agency's rulings are to be affirmed unless it is shown that the decision is 1) not supported by substantial evidence, 2) the decision is arbitrary or capricious, 3) the decision is beyond the scope or power of the agency, or 4) it violates a party's constitutional rights. *Sprouse v. Mississippi Employment Sec. Com'n*, 639 So. 2d 901, 902 (Miss. 1994). Ms. Fair does not allege the latter three points, but merely alleges that the Commission's decision was not based upon substantial evidence.

Ms. Fair's brief cites the Mississippi Supreme Court's holding in *McNeese v. Cooper Tire* decision, yet the *Rathborne* rule is the only applicable standard which may be drawn from this case. The *Cooper Tire* case involves an injured worker with spondylolisthesis and three physicians' testimony regarding the extent of his injury. The worker ultimately was diagnosed with slippage in his spine as a result of his pre-existing injury. However, the doctors were unclear whether the slippage in the spine occurred prior to his injury or was a result of his injury. *McNeese v. Cooper Tire*, 627 So. 2d 321, 323 (Miss. 1993). In the matter of Ms. Fair, there is no conflicting testimony as the extent of the rotator cuff injury prior to the injury and after the injury. Ms. Fair was examined by the same two (2) doctors before and after the injury and each clearly states that the unquestioned medical evidence shows that Ms. Fair suffers from the same symptoms and diagnosis before as after her work-related accident.

The extensive documentation of her pre- and post-accident condition constitutes substantial evidence of an aggravation of a pre-existing injury. Well established Mississippi law states that,

when a pre-existing disease or infirmity of an employee is aggravated, lighted up, or accelerated by a work-connected injury, or if the injury combines with the disease or infirmity to produce disability, the resulting disability is compensable. A corollary to the rule just states is that *when the effects of the injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable.* [emphasis added]

*Rathborne, Hair & Ridgeway Box Co. v. Green*, 237 Miss. 588, 594 (1959). In a case involving similar facts, the Mississippi Supreme Court held that with regard to the compensability of a pre-existing injury, the employer and carrier were ordered to pay claimant temporary total disability benefits from the date of injury “thereafter until such time that claimant reaches maximum medical recovery and/or his condition becomes static and a re-evaluation has been made therefor.” *Air Capitol, Inc. v. Benson*, 210 So. 2d 767, 768 (Miss. 1968). See also *Universal Manufacturing Co. v. Barlow*, 260 So. 2d 827 (Miss. 1972) (A worker who aggravates pre-existing injury is entitled to compensation until maximum medical recovery was obtained.)

The Employer has clearly fulfilled its duty to Ms. Fair by providing disability benefits from February 29, 2004, through September 25, 2004. The Full Commission properly determined that because this injury “aggravates a pre-existing disease temporarily and then ceases to combine with the disease to produce the disability, any subsequent disability attributable solely to the disease or infirmity is not compensable.” See Dunn, Mississippi Workers’ Compensation §78 (3d ed. 1982).



In light of the substantial medical evidence supporting the Commission's decision, and the failure of Ms. Fair to provide any real basis for her argument that the Commission's decision was not based on substantial evidence, the Employer respectfully requests this Court to affirm the decision of the Mississippi Workers' Compensation Commission.

### CONCLUSION

This appeal centers upon questions of fact. A question of fact existed whether the claimant suffered from any new disability after she bumped into a wall. Ms. Fair had a pre-existing injury which had "*lighted up*" two (2) months before her workplace accident. Medical evidence was produced that succinctly found she had returned to her pre-injury state and was able to return to her pre-injury employment. Ms. Fair argues that one (1) doctor's record stating that she suffered "*unrelenting pain*" established a disability that was not considered by the Commission. But at best, the existence of the medical record created a fact question for the Commission to decide.

The Commission reviewed the entire record and did not find that Ms. Fair met her burden of proof to establish that she suffered anything more than a temporary aggravation of her pre-existing injury. (R.E. 2, C.R. at 123-126.) Instead, the Commission found that Ms. Fair had proven she suffered only a short period of disability when her pre-existing, torn rotator-cuff was aggravated. R.E. 2, C.R. 126.) But based upon substantial evidence, that temporary period ended on September 1, 2004, when Dr. Salloum rendered an opinion within a reasonable degree of medical certainty that Ms. Fair could have returned to her pre-injury employment as early as April 28, 2004. Further, based upon the identical pre-injury and post-injury MRI films combined with Ms. Fair's inconsistent testimony wherein she failed

to state a single articulable reason as to how her pre-existing injury was any different than her post-accident injury, the Commission's findings of fact and order were predicated upon substantial evidence.

For the aforementioned reasons Employer, Beau Rivage Resorts, Inc., respectfully requests this Court affirm the decision of the Circuit Court of Harrison County and the Mississippi Workers' Compensation Commission.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Tristan R. Armer, of the law firm of Heidelberg, Steinberger Colmer & Burrow, P.A., do hereby certify that I have this date served by United States Mail, postage paid, a true and correct copy of the above and foregoing Brief of Appellee to James K. Wetzel, Esq., Post Office Box I, Gulfport, MS 39502.

Respectfully submitted, this the 12<sup>th</sup> day of December, 2008.

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**CERTIFICATE OF SERVICE**

I, Tristan R. Armer, of the law firm of Heidelberg, Steinberger Colmer & Burrow, P.A., do hereby certify that I have this date served by United States Mail, postage paid, a true and correct copy of the above and foregoing Brief of Appellee to James K. Wetzel, Esquire, Post Office Box I, Gulfport, MS 39502; to the Honorable Mark Henry, Administrative Law Judge, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39293-5300; and to Honorable Lisa Dodson, Harrison County Circuit Court Judge, P. O. Box 1461, Gulfport, MS 39502.

Respectfully submitted, this the 12<sup>th</sup> day of December, 2008.

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