IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-WC-01352-COA

ARMENIA FAIR, APPELLANT

VERSUS

BEAU RIVAGE RESORTS, INC. (Self-Insured)

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI CIVIL ACTION NO. A2402-2007-022

BRIEF OF APPELLANT ARMENIA FAIR

(ORAL ARGUMENT REQUESTED)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-2C-01352-C0A

ARMENIA FAIR **APPELLANT**

VERSUS

BEAU RIVAGE RESORTS, INC. **APPELLEE**
(Self-Insured)

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 judges of this Court may evaluate possible disqualifications or recusal.

Armenia Fair (Claimant)	Appellant
James K. Wetzel with the law firm of James K. Wetzel & Associates	Counsel for Appellant
Beau Rivage Resorts, Inc. (Employer – Self Insured)	Appellee
Karl R. Steinberger, with the law firm of Williams, Heidelberg, Steinberger & McElhaney	Counsel for Appellee
Honorable Mark Henry, Mississippi Workers' Compensation Commission	Administrative Law Judge
Honorable Lisa Dodson, Harrison County Circuit Court	Circuit Court Judge

JAMES K. WETZEL, Counsel for
Armenia Fair, Claimant/Appellant

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STATEMENT OF THE ISSUES

I. **THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND FACT IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION REVERSING THE DECISION OF THEIR ADMINISTRATIVE LAW JUDGE DATED JUNE 8, 2006, AND ONLY ORDERING THAT THE EMPLOYER AND CARRIER PAY TO CLAIMANT MEDICAL AND TEMPORARY DISABILITY BENEFITS FOR A PERIOD OF FEBRUARY 21, 2004 TO SEPTEMBER 1, 2004, AS RELATED TO CLAIMANT'S RIGHT SHOULDER INJURY.**

II. **THE CIRCUIT COURT ERRED IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION'S DECISION TO REVERSE THE ADMINISTRATIVE LAW JUDGE AS SAME IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND TOTALLY DISREGARDED CERTAIN MEDICAL TESTIMONY SUPPORTING MEDICAL CAUSATION.**

INTRODUCTION

This is an appeal by Armenia Fair who filed a workers' compensation claim against her employer, Beau Rivage Resorts, Inc. For convenience hereinafter in this brief, the Appellant, Armenia Fair, will be referred to as Ms. Fair, and the Appellee, Beau Rivage Resorts, Inc., will be referred to as the Employer.

Ms. Fair is appealing a Circuit Court order dated July 16, 2008 (R.E.6) affirming a decision of the Mississippi Workers' Compensation Commission dated December 20, 2006. (R.E.5). As can readily be ascertained from the Commission's decision, two Commissioners elected to reverse the administrative law judge's decision dated June 8, 2006, (R.E.4) and the third Commissioner, Schoby, dissented and held that he would affirm the opinion of the administrative law judge. The order of administrative law judge, Mark Henry, handed down on June 8, 2006, concluded, *inter alia*, as follows:

Findings of Fact and Conclusions of Law

> The Employer contends that the stipulated injury of February 21, 2004, was nothing more than a temporary aggravation of a pre-existing condition, that Ms. Fair's right shoulder has returned to its pre-injury condition, and that consequently Ms. Fair is entitled to neither shoulder surgery nor permanent disability benefits. On this point, it is clear that Ms. Fair experienced right shoulder pain before the injury. In fact, a pre-injury MRI performed on December 24, 2003, showed degenerative changes and a chronic rotator cuff tear. Also, Dr. Salloum stated on September 1, 2004, that Ms. Fair's pre– and post-injury symptoms were the same and that the pre- and post-injury MRI's showed the same condition.
>
> On the other hand, Ms. Fair testified that her post-injury pain was new and different from any she had experienced previously. In addition, Dr. Motakhaveri agreed with Ms. Fair's assessment when he wrote on March 3, 2004, that Ms. Fair "clearly has significant change and pain today." Finally, with the advantage of having treated Ms. Fair for three more months after his September 1, 2004,

statement, Dr. Salloum apparently changed his mind when he opined on December 2, 2004, that Ms. Fair "has had a severe exacerbation of her pain and it is unrelenting." It is worth noting that before the injury Ms. Fair's shoulder pain had waxed and waned over time.

Considering all of the evidence, the Administrative Judge finds that the work-related injury of February 21, 2004, exacerbated Ms. Fair's pre-existing condition by increasing both the intensity and frequency of her right shoulder pain to such an extent that the injury cannot be regarded as merely a temporary aggravation. For that reason the Administrative Judge further finds that the surgery recommended by Dr. Salloum is reasonable and necessary treatment for Ms. Fair's work-related shoulder injury.

As to the issue of temporary disability, the Employer argues that it is not required to pay benefits for the period when Ms. Fair was temporarily disabled due to her cancer treatment. The Employer's assertion is correct only if the cancer treatment was the intervening and superseding cause of the temporary disability. In other words, although the cancer treatment was an intervening event, the real issue is whether the treatment superseded the shoulder injury in causing a period of temporary disability; and, the Employer bears the burden of persuasion on that point.

In this regard, Ms. Fair testified without contradiction that after the injury she could not perform her pre-injury job duties for the Employer and that the Employer had no light duty available for her. She added that she also did not work for some time because of her cancer treatment.

The record does not indicate that Ms. Fair's oncologist, Dr. Harris, ever explicitly took her off work, but based on common sense, it is obvious that Ms. Fair could not work for some period after her surgery while she was receiving chemotherapy. In addition, the record does not indicate when Dr. Harris allowed Ms. Fair to return to work. The record indicates only that Dr. Harris instructed Ms. Fair to avoid heavy lifting and that the Claimant began working at Wal-Mart on February 10, 2005.

Faced with the dearth of facts, the Administrative Judge cannot conclude that the Employer met its burden of proving that the cancer treatment was an intervening superseding cause so as to deny Ms. Fair temporary disability benefits for some indefinite period. At best, the Employer has proven that the cancer treatment was a concurrent cause along with the shoulder. For Ms. Fair to qualify for temporary benefits, the shoulder injury does not have to be the sole cause of her temporary disability. Instead, the shoulder has to be only an efficient cause, which it was.

Because Ms. Fair began working for Wal-Mart on February 9, 2005, the Administrative Judge finds that for each week from the stipulated date of injury,

February 21, 2004, until Ms. Fair reaches maximum medical improvement, the Claimant is entitled to receive temporary disability benefits of two-thirds of the difference between Ms. Fair's stipulated average weekly wage of $364.47 and her earnings for that week. Of course, the Employer is entitled to credit for benefits previously paid.

Because Ms. Fair is not at maximum improvement, the issue of permanent disability is not ripe for decision at this time.

Order

It is, therefore, ordered and adjudged that the Employer shall pay workers' compensation benefits to the Claimant as follows:

1. Temporary disability benefits at the appropriate rate for each week, beginning on February 21, 2004, and continuing until the Claimant shall reach maximum medical improvement;

2. Penalties and interest on any due and unpaid workers' compensation benefits from the due date of each installment of such benefits.

It is further ordered and adjudged that the Employer shall provide reasonable and necessary medical supplies and services, including the surgery recommended by Dr. Salloum, as required by the nature of the Claimant's injury and the process of recovery therefrom, pursuant to Miss. Code Ann. Section 71-3-15 and the Medical Fee Schedule. (R.E.4).

The Employer filed an appeal from the administrative law judge's decision directly to the Workers' Compensation Commission. The thrust of the argument made by the Employer before the Full Commission was that the administrative law judge erred in awarding (1) disability and medical benefits for a disability caused by medical problems that were unrelated to the alleged industrial accident; and (2) that the award of temporary total disability since February 21, 2004, the date of the accident until the date of the workers' compensation hearing, was manifestly wrong and not supported by substantial evidence.

The Full Workers' Compensation Commission in reversing the administrative law judge which was affirmed by the Circuit Court held as follows:

> By the clear and persuasive statements from Dr. Salloum, it is established that Ms. Fair's accident on February 21, 2004, was, at worst, a temporary aggravation of her pre-existing conditions and that by September 1, 2004, this accident had ceased to be disabling and Ms. Fair had returned to the same condition she was in prior to February 21, 2004. Dr. Salloum's notes also clearly established that Ms. Fair's need for shoulder surgery is not related to her February 21, 2004, accident but is instead attributable to pre-existing right shoulder problems dating back more than seven years prior.

Ms. Fair would submit to this Honorable Supreme Court that the Circuit Court and Workers' Compensation Commission erred as a matter of law in disregarding the testimony produced by medical records of Dr. George Salloum and by failing to recognize his later report of December 2, 2004, wherein Dr. Salloum states that "Ms. Fair has had a 'severe exacerbation of pain and is unrelenting'." (R.E.10). It is this last report from Dr. Salloum, orthopedic surgeon, that the administrative law judge felt the February 21, 2004, work related injury exacerbated Ms. Fair's pre-existing pathology in her shoulder by increasing both the intensity and frequency of her right shoulder pain to such an extent that the injury could not be regarded as merely a temporary aggravation.

Ms. Fair would also submit the Circuit Court and the Workers' Compensation Commission erred as a matter of law in its failure to apply certain statutory principles in its decision making process when it reversed its administrative law judge as follows: (1) the workers' compensation law should be construed liberally in favor of the claimant in order to carry out the purpose of the remedial legislation; (2) that doubtful questions should be resolved in favor of the claimant; and (3)

the decision of the Workers' Compensation Commission is not supported by substantial evidence (lay and medical) and the Workers' Compensation Commission did not require the Employer to provide the degree of proof to rebut the Claimant's *prima facie* case that her injury and resulting surgery was not causally related to her industrial accident.

FACTS OF THE CASE

At the time this matter was heard before the administrative law judge, Ms. Fair was sixty-seven (67) years old and had begun working for the Employer in 1999. At the time of her accident on the job on February 21, 2004, she was employed full-time in a Beau Rivage retail shop. Ms. Fair testified that she had problems with her right shoulder prior to her industrial accident at Beau Rivage. She testified that when she would try to raise her arm, it would pop and crack and she would go to Dr. Motakhaveri. He would give her a cortisone shot which made it feel better. According to the medical records of Dr. Reza Motakhaveri (R.E.8), Ms. Fair first saw Dr. Motakhaveri on January 17, 2000, and his records do not mention right shoulder pain until October 24, 2001. On that date Ms. Fair reported she had been experiencing pain in her right shoulder for a month. Noting that the pain was exacerbated by palpation and abduction, Dr. Motakhaveri concluded that Ms. Fair had "rotator cuff syndrome/tendonitis," which he treated with an injection that produced immediate improvement.

Dr. Motakhaveri's records do not mention shoulder pain again until December 20, 2002, although in the meantime, Ms. Fair had seen Dr. Motakhaveri five times. On December 20, 2002, Ms. Fair stated that she had right shoulder pain for three months. Dr. Motakhaveri noted pain during flexion and abduction and gave Ms. Fair an injection that again produced immediate improvement.

Ms. Fair next saw Dr. Motakhaveri on March 7, 2003, when she complained of right shoulder pain for two weeks. She added that she had had a fall and a motor vehicle accident years

ago. Dr. Motakhaveri noted pain on palpation and during most range of motion, and gave Ms. Fair another injection. An x-ray, however, on March 20, 2003, was normal.

On October 27, 2003, Ms. Fair complained about "persistent right shoulder pain." Suspecting a right rotator cuff tear, Dr. Motakhaveri referred her to Dr. George Salloum, orthopedic surgeon.

A review of an x-ray of February 22, 2004, was normal, and on March 3, 2004, Ms. Fair told Dr. Motakhaveri that she had not had any pain in her right shoulder for a long time until February 21, 2004, when she fell against a wall at the Beau Rivage and her right shoulder had been in significant pain since. Dr. Motakhaveri's records found that Ms. Fair "clearly has significant change and pain today," and he referred her again to Dr. Salloum. A MRI on March 8, 2004, following the accident of February 21, 2004, revealed "a full thickness tear of the supraspinatus portion of the rotator cuff tendon and relatively advanced degenerative disease in the AC joint."

Dr. George Salloum also testified by medical records (R.E.9). The administrative law judge reviewed the medical records and outlined the findings of Dr. Salloum as follows.

Dr. George Salloum, orthopedic surgeon, testified through his medical records that he saw Ms. Fair on December 17, 2003. Dr. Salloum ordered an MRI of her right shoulder. On December 24, 2003, the MRI technician noted that Ms. Fair had fallen seven years earlier and had experienced right should pain for six months. That day the MRI showed: "Severe acromiocalavicular joint degenerative change with pannus and spurring, chronic tear of the supraspinatus and atrophy of the infraspinatus tendons."

Dr. Salloum next saw Ms. Fair on April 6, 2004. During that visit she reported that she had fallen and injured her right shoulder at work in February 2004. After examining Ms. Fair and reviewing the MRI of March 8, 2004, Dr. Salloum recommended surgery, which was scheduled for May 5, 2004; however, that operation was postponed upon the advice of Ms. Fair's oncologist.

In response to a letter from the Employer's attorney, Dr. Salloum, on September 1, 2004, opined that Ms. Fair's complaints of December 17, 2003, were the same as her complaints of April 6, 2004; that his findings of December 17, 2003, were the same as his findings of April 6, 2004; that the injury of February 21, 2004, had caused only a temporary and now resolved aggravation of her chronic pre-existing condition; and, that the type of surgery he had recommended on December 17, 2003, was the same he recommended on April 6, 2004.

Then three months later on December 2, 2004, Dr. Salloum wrote:

"Ms. Aremenia Fair has a right shoulder rotator cuff tear. I had originally seen her in December 2003. She had a relief of her symptoms with a cortisone injection. Subsequently she had a work related injury and she has had a severe exacerbation of her pain and it has been unrelenting. I feel that she would benefit from a shoulder arthroscopy with a subacromial decompression, distal clavicle resection, and rotator cuff debridement vs. repair if possible. (R.E.10). We would like to do this when she is cleared for surgery by her oncologist."

Dr. William Harris, oncologist, also testified through his records (R.E.11) and the administrative law judge reviewed and outlined his records as follows: After a mammogram on December 15, 2003, and an ultrasound on December 22, 2003, revealed a suspicious module in Ms. Fair's right breast, a biopsy on January 12, 2004, indicated cancer. On February 16, 2004, Dr. Harris examined Ms. Fair and recommended radiotherapy or surgery.

Ms. Fair chose surgery, which was performed on March 11, 2004. A period of chemotherapy followed, and Ms. Fair saw Dr. Harris for the recorded last time on June 14, 2005.

Ms. Fair testified as the only live witness at the workers' compensation hearing. Ms. Fair testified as follows:

BY MR. WETZEL:

Q. When you saw Dr. Salloum on December the 20th, 2003, did he make any recommendations at that time in terms of treatment or how – what he would recommend?

A. Only thing that he told me that he could go in my shoulder, clean out the arthritis and that was it. That's all he said.

Q. Did he set you up for surgery or anything?

A. He set me up for the surgery, but I had to call and tell him that I couldn't have the surgery done because I had to have the cancer removed, and later on, you, I would have the surgery.

Q. Okay. What happened on February the 21st 2004, you had went back to work?

A. Yes.

Q. How long had you been back to work prior to this incident on the job? Did you miss any work during your cancer treatment?

A. No. This happened after I had went back to work.

Q. Okay. I understand. What I'm trying to find out, between December 20th when you first saw Dr. Burwell –

BY ADMINISTRATIVE JUDGE HENRY: Dr. Salloum.

BY MR. WETZEL: I apologize.

BY ADMINISTRATIVE JUDGE HENRY: If you say Burwell in the future, we're still talking about Salloum, right?

BY MR. WETZEL: That's right. (Continuing)

Q. From the first time you saw Dr. Salloum on December 20th until the date of your accident on February 21st, '04, did you miss any time from work due to your –

A. No.

Q. So you had your cancer treatment and continued to work?

A. Yes.

Q. How was your shoulder between the first time you saw Dr. Salloum up until the date of your accident on February 21st?

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 should would bother me.

Q. Tell me how it would bother you.

A. What?

Q. How would it bother you?

A. It would hurt.

Q. Just dull ache?

A. Just a dull ache. I can be sitting up some times and it would just start hurting. It would wake me up at night, you know, hurting?

Q. Were you still able to do your job though?

A. Yeah, because I wasn't doing anything that was really pulling or pushing or raising my arms or anything like that.

Q. Okay. Now what happened on February 21st?

A. I came into work around 3:20, okay. We have to go down the hallway, the satellite way, and pick up our money to take to work, okay. What they done, they had changed our money. We had two bags, one was $600.00 the other one was for $200.00.

Q. All change?

A. Yes – well, it was some dollars but mostly change.

Q. How much did the bags weigh, just best estimate?

A. Probably about 10, 15 pounds.

Q. Each bag?

A. No, just together –

Q. Okay.

A. – you know, okay. Because the one bag had $50.00 in quarters and so many rolls of dimes, so many rolls of nickels and just a few dollars. I think it was about $50.00 in bills.

Q. You have a bag in each hand?

A. Yeah.

Q. Okay.

A. The other bag had the $600.00 in it. It was, like $400.00 in dollar bills, you know, currency and the rest of it in change, okay. So we had to carry these plastic bags and I had to put the $200.00 in my purse and the other one, I was carrying in my hand. So walking, we come down this long hallway, go down through double doors, walk down this hallway to get to work, okay. So on the way to work, I don't know what kind of floor they have there at the Beau Rivage, the tile or whatever, but everybody stumbles on this floor. It, like it catches your shoes or whatever, okay. I stumbled and in order to catch my balance, I fell up against the wall. So when I fell up against the wall, I felt the pain go through my shoulder and all the way down to my wrist.

Q. What part of your body impacted the wall?

A. The whole side, my right side fell up against the wall.

Q. Were you able to catch yourself on an out stretched right hand or just because –

A. I did just because I had the money in this hand –

Q. When you say, "this hand", you have to tell me right or left because –

A. Right.

Q. Listen. Let me finish my questions. Let me get my questions out first. Explain for the Judge, again, what you had in your right hand at the time the fall occurred?

A. Well, the $600.00 bag of money.

Q. How much, approximately, did it weigh?

A. It probably weighed about seven pounds.

Q. Okay. In your left hand was your purse?

A. Yes, on my left shoulder.

Q. So your left hand was free. There wasn't actually nothing in your left hand?

A. No.

Q. And you're going down the hall and the wall is to your immediate right side?

A. Yes.

Q. You're on the right side of the hallway?

A. Yes.

Q. Did you trip or slip?

A. I, like, tripped.

Q. Okay. Take me through the motions of what occurred with your body at that point. Did you fall into the wall? Did you fall up against the wall? Explain to us exactly what happened.

A. I fell up against the wall.

Q. How would you describe the impact of your body with the wall?

A. Very hard.

Q. Did you strike your head?

A. No.

Q. You struck your, you said, the right side of your body?

A. Yes.

Q. Did you body go to the floor after you hit the wall?

A. No.

Q. You were able to get your composure?

A. Yes.

Q. So you didn't fall on any out reached hands or out stretched hands to the floor?

A. No.

Q. Take me through after you fell against the wall, after you got your composure, what happened at that point?

A. I went on down to work. And from my shoulder to my wrist – my right shoulder to my wrist was hurting. When I got down to work, I told the assistant manager what had happened. She had one of the other assistant managers take me back upstairs to the security part, okay. They – I told them what had happened. They took down all the information and then they sent me over to the Biloxi Regional Hospital.

Q. Did the nurse treat you at all or anybody at the Beau Rivage?

A. No. The only thing when I come back from the hospital, they gave me a drug test.

Q. I didn't ask you after you came back from the hospital, I'm asking before you went to the hospital?

A. No. No. No.

Q. Did you go back to work at all or did they immediately send you to the emergency room?

A. They immediately sent me to the emergency room.

Q. If I understand, the emergency room is one block north of Beau Rivage?

A. Yes.

Q. How did you get over there?

A. One of the security guards took me over there.

Q. They took you in a vehicle?

A. Yes.

Q. What was your shoulder feeling like from the time you left the Beau Rivage to the time you got to the hospital, what was going on with your body then?

A. It was hurting. I had to hold my arm up like this.

Q. When you said it was hurting, would you be more descriptive for the Judge, please. Can you describe the pain? What sensations were you having?

A. The pain was very bad.

Q. When you say, "the pain", where was it radiating out of one part of the body –

A. From here all the way down to my wrist, like I said before.

Q. From here, what is here?

A. From my shoulder to my wrist.

Q. When you got in to the emergency room, how long were you in the emergency room before you were examined by a doctor, approximately?

A. Maybe about 45 minutes.

Q. Okay. What did you tell the doctor when you saw him as to what type of sensations you were having, discomforts, what'd you tell him?

A. I told him about my shoulder was hurting me real bad down into my wrist. The pain was all through my arm.

Q. Had you ever had that kind of pain before February 21st 2004?

A. No. No, I hadn't.

Q. What did they do for you at Biloxi Regional?

A. They gave me an x-ray and gave me a sling to put my arm in.

Q. What did they recommend when you left?

A. They just gave me some pain pills and told me to, you know, not to use my arm for a while.

Q. Did they recommend another doctor?

A. Yeah, he told me to go back to Dr. Motakhaveri.

Q. All right. Did you go back over to the Beau Rivage?

A. Yes, I went over there and told them that I couldn't work with my arm in a sling and they wouldn't let me work because they didn't have nothing for me to do.

Q. Was it discussed about you returning back to Dr. Motakhaveri?

A. No.

Q. Okay. Did workman's comp send you to Dr. Motakhaveri or did you go on your on? How did you get –

A. I went on my own.

Q. And after he saw you, what did he recommend?

A. He recommended that I go see Dr. Salloum.

Q. How many days after the emergency room did you see Dr. Motakhaveri?

A. Must have been about two days.

Q. What were your symptoms when you got to Dr. Motakhaveri two days later?

A. My arm was still bothering me.

Q. In which respect?

A. The pain.

Q. Okay. Describe it, again, for me. What was going on?

A. It was still hurting real bad.

Q. Was it still from the shoulder –

A. From my shoulder to my wrist.

Q. Was that different in what you were suffering with in December of '03?

A. Yes.

Q. How was it different?

A.. Well, for one thing, I 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.

Q. Are you right-handed?

A. Yes.

Q. Were you able to lift, like, a gallon of milk out of the refrigerator?

A. Oh, no. I would have to use my left hand.

Q. Were you able to pick up a coffee cup?

A. I could pick up a coffee cup, but nothing any heavier than that.

Q. Before this accident, could you pick up a gallon of milk with your right arm?

A. Yeah.

Q. Dr. Motakhaveri sees you, he recommends Dr. Salloum?

A. Yes.

Q. Did you contact the Beau Rivage about authorization to be seen by Dr. Salloum?

A. Yes.

Q. What did your employer tell you?

A. Well, they sent me to Dr. Salloum.

Q. Okay. Approximately how many days after your accident did you see Dr. Salloum?

A. Might have been a week.

Q. Okay. What did you tell Dr. Salloum when you saw him?

A. The same thing, that I had fell at work and that my shoulder was bothering me and I – you know, I just wanted to find out what was wrong with it.

Q. Were you still having pains all the way to your wrist when you saw Dr. Salloum?

A. Yes.

Q. What did he recommend?

A. Well, he recommended that I get an MRI.

Q. Was that carried out at Cedar Lake MRI North over –

A. In Biloxi, yes.

Q. And did you return to Dr. Salloum?

A. No.

Q. Why not?

A. Because then I went and took a mammogram.

Q. I'm talking about after the accident, dear.

A. Did I return to –

Q. Let's go back. After the accident, you saw Dr. Motakhaveri and then you saw Dr. Salloum?

A. Yes.

Q. He recommended an MRI?

A. Yes.

Q. Did you go back to him after the MRI?

A. Yes.

Q. What did he recommend?

A. He recommended that I have surgery in my shoulder.

Q. Okay. Did you contact your employer about the shoulder and the authorization to go forward with that?

A. No.

Q. Why not?

A. I really don't – I just didn't go back to them that's all.

Q. Were you ready to have the surgery?

A. Yes.

Q. Did you have to employ me? Were you having a problem getting authorization to get the surgery done?

A. Yes.

Q. Is that when you employed me?

A. Yes.

Q. Okay. Have you had the surgery?

A. No.

Q. Do you still wish to have the surgery?

A. Yes.

Q. Workman's comp or the employer paid you workman's comp according to the records that they had produced through September 25th, '04, you remember that?

A. No. I have the papers at home where they stopped –

Q. Paying you?

A. They sent me a letter saying they would no longer pay.

Q. Did they tell you why they would not continue to pay you?

A. Well, because, they said that Dr. Salloum said that this was a new injury stemming from an old injury.

Q. And that they were not going to pay?

A. Yes.

Q. Okay. When did you return back to other work, other than the Beau Rivage after September? Did you return to work after September '04?

A. No. No.

Q. Okay. Are you working now?

A. Yes.

Q. Who was the first employer you worked for after the Beau Rivage?

A. Wal-Mart.

(MWCC Tr. pp. 14-24).

With the live testimony of Ms. Fair, the medical records from Dr. Salloum, Dr. Motakhaveri and Dr. Harris, her oncologist, the administrative law judge concluded as follows:

> On the other hand, Ms. Fair testified that her post-injury pain was new and different from any she had experienced previously. In addition, Dr. Motakhaveri agreed with Ms. Fair's assessment when he wrote on March 3, 2004, that Ms. Fair "clearly has significant change and pain today." Finally, with the advantage of having treated Ms. Fair for three more months after his September 1, 2004, statement, Dr. Salloum apparently changed his mind when he opined on December 2, 2004, that Ms. Fair "has had a severe exacerbation of her pain and it is unrelenting." It is worth noting that before the injury Ms. Fair's shoulder pain had waxed and waned over time.
>
> Considering all of the evidence, the Administrative Judge finds that the work-related injury of February 21, 2004, exacerbated Ms. Fair's pre-existing condition by increasing both the intensity and frequency of her right shoulder pain to such an extent that the injury cannot be regarded as merely a temporary aggravation. For that reason the Administrative Judge further finds that the surgery recommended by Dr. Salloum is reasonable and necessary treatment for Ms. Fair's work-related shoulder injury. (R.E.4).

The Full Commission in reversing the administrative law judge outlined the medical testimony of Dr. Salloum but failed to mention his last medical report dated December 2, 2004, that was part of the medical records marked Exhibit 2 to the workers' compensation hearing which was as follows:

12/2/2004

Aremenia Fair
13081 Miles Drive
APTB
Gulfport, MS 39503

To Whom It May Concern:

Ms. Aremenia Fair has a right shoulder rotator cuff tear. I had originally seen her in December 2003. She had a relief of her symptoms with a cortisone injection. Subsequently she had a work related injury and she has had a severe exacerbation of her pain and it has been unrelenting. I feel that she would benefit from a shoulder arthroscopy with a subacromial decompression, distal clavicle resection, and rotator cuff debridement vs. repair if possible. We would like to do this when she is cleared for surgery by her oncologist. If there are any further questions, I would be happy to answer those.

Sincerely,

George Salloum, M.D.

(R.E.10).

ARGUMENT

I. **THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND FACT IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION REVERSING THE DECISION OF THEIR ADMINISTRATIVE LAW JUDGE DATED JUNE 8, 2006, AND ONLY ORDERING THAT THE EMPLOYER AND CARRIER PAY TO CLAIMANT MEDICAL AND TEMPORARY DISABILITY BENEFITS FOR A PERIOD OF FEBRUARY 21, 2004 TO SEPTEMBER 1, 2004, AS RELATED TO CLAIMANT'S RIGHT SHOULDER INJURY.**

II. **THE CIRCUIT COURT ERRED IN AFFIMING THE WORKERS' COMPENSATION COMMISSION'S DECISION TO REVERSE THE ADMINISTRATIVE LAW JUDGE AS SAME IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND TOTALLY DISREGARDED CERTAIN MEDICAL TESTIMONY SUPPORTING MEDICAL CAUSATION.**

Ms. Fair is aware that decisions of the Mississippi Workers' Compensation Commission on "issues of fact" will not be overturned if they are supported by substantial evidence. *See, Myles v. Rockwell International*, 445 So. 2d 528, 536 (Miss. 1983). The Commission is the trier of facts as well as the judges of the credibility of the witnesses. *Roberts v. Jr. Food Mart,* 308 So. 2d 232, 234-35 (Miss. 1975). However, doubtful cases should be resolved in favor of compensation, so as to fulfill the beneficial purposes of the workers' compensation statutes. *Reichold Chemical, Inc. v. Sprankle,* 503 So. 2d 799, 802 (Miss. 1987); *Barham v. Klumb Forest Products Center, Inc.,* 453 So. 2d 1300, 1304 (Miss. 1984).

Ms. Fair would submit to this Honorable Court that the decision of the Full Workers' Compensation Commission in this case is not supported by substantial evidence. The undisputed facts were that:

(1) Dr. Salloum when he first saw Ms. Fair on December 17, 2003, on referral from Dr. Motakhaveri, requested an MRI which was performed on December 24, 2003, which indicated that the claimant suffered from severe degenerative joint disease, and a chronic rotator cuff tear and tendon atrophy;

(2) that prior to her industrial accident of February 21, 2004, the date of her industrial accident, she suffered no loss of wage earning capacity and performed all the duties of her employment at Beau Rivage;

(3) Dr. Salloum testified by medical record dated December 2, 2004, that after having treated Ms. Fair on December 24, 2003, he treated her with a cortisone injection and she had relief of her symptoms;

(4) Dr. Salloum also testified through medical records dated December 2, 2004, that when he examined her after the industrial accident in April 2004, the work related injury caused a severe exacerbation of her pain and it has been unrelenting; and

(5) Ms. Fair testified without contradiction that when she fell on February 21, 2004, the impact of the right side of her body with the wall was very hard and that she began to experience severe pain from her shoulder all the way to her right wrist. She described the pain as very bad and it was a radiating type pain. She further testified that she had never had that kind of pain before February 21, 2004, and that when she saw Dr. Salloum the first time after February 21, 2004, the pain was so severe that she could hardly move her arm and it felt like a cracking sensation and would ache all the time. She couldn't push on anything. She couldn't pull on anything and was not even able to lift a gallon of milk out of the refrigerator with her right arm. The most that she could

pick up was a cup of coffee but nothing heavier than that. She further testified that after the industrial accident of February 21, 2004, she was ready to have surgery to correct the problem.

As this Honorable Court is aware, the "work connection test" arises from Miss. Code Ann. Section 71-3-7 (1972). The worker's employment, need not have been the sole source of the injury. The claim is compensable if the injury or death is in part work connected. Injury or death arises out of and in the course of employment even when the employment merely aggravates, accelerates, or contributes to the injury. *See, Dunn,* Mississippi Workers' Compensation Section 164 (3rd Ed. 1982); *Also see, Hedge v. Leggett & Platt, Inc.,* 641 So. 2d, at 9 (Miss. 1994). In *Chapman v. Dependents of Hanson Scale Co.,* 495 So. 2d 1357, 1360 (Miss. 1986), this Honorable Supreme Court outlined the following:

> Confirming the compensability of aggravation of pre-existing conditions, in a recent case we have said that: "This Court has stated with respect to the effect of pre-existing conditions in the determination of disability benefits following a work-related injury; the rule in this state is 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 a disease or infirmity produced disability, the resulting disability is compensable." *McNeese v. Cooper Tire & Rubber Co.,* 627 So. 2d 321, 324 (Miss. 1993), quoting *Rathborne, Hair & Ridgeway Box Co. v. Green,* 115 So. 2d 674, 676 (Miss. 1959).

The "causal connection" element is closely related to the "arising out of and in the course of employment" element. With reference to causation, this Honorable Court has said: "An injury arises out of the employment when there is a casual connection between it and the job." *Jenkins v. Ogletree Farm Supply,* 291 So. 2d 560, 563 (Miss. 1974), quoting *Ernest v. Interstate Life & Accident Ins. Co.,* 119 So. 2d 782, 783 (Miss. 1960).

In *Hedge v. Leggett & Platt, Inc., supra.,* this Honorable Supreme Court stated the following:

> Irritants in the work environment which aggravated Betty's asthma need not have been the primary cause of the factor in order to be compensable. It is only necessary

that the work place irritants did, in fact, aggravate Betty's asthma. *Ingalls Shipbuilding v. Howell,* 221 Miss. 824, 74 So. 2d 863 (1954). In the case *sub judice,* the fact that Betty's work place environment exacerbated her respiratory problems and contributed to her resulting disability was affirmatively established by the medical testimony of Dr. Moore. Therefore, Betty made out her *prima facie* case, establishing that an injury arising out of and in the course of her employment occurred, and that a casual connection existed, between the injury and her claimed disability. *Hardin's Bakeries v. Dependents of Harrell,* 566 So. 2d 1221 (Miss. 1990). As mentioned, *supra.*, at that point the burden of proof shifted from the employee/claimant to the employer. *Pontotoc Wire Products v. Ferguson,* 384 So. 2d 601 (Miss. 1980); *Thompson v. Wells-Lamont,* 362 So. 2d 638 (Miss. 1978).

The employer, Leggett & Platt, did not adduce evidence which rebutted Betty's *prima facie* case. Their medical expert, Dr. Jones, stated it was possible that Betty's asthma was aggravated by her work environment at Leggett & Platt. However, he would not commit to a firm position on the issue, therefore, he did not contradict the testimony of Dr. Moore.

A claimant's proof on the issue of casual connection must rise above mere speculation or possibility, as "where the medical testimony is that it could have been one way just as well as the other." *Dunn,* Mississippi Workers' Compensation Section 273 (2nd Ed. 1978). *See also, Southern Brick & Tile v. Clark,* 247 So. 2d 692 (Miss. 1971). Likewise, once the burden of proof shifts to the employer, the same degree of proof is required in order to rebut the claimant's *prima facie* case. It is not enough to merely state that causation is possible, but that there is insufficient evidence available upon which a medical conclusion could be based. That is exactly what Dr. Jones did in the case *sub judice,* and that simply does not rise to required level of proof.

Substantial evidence does not support the finding that Betty did not suffer a compensable work-place injury while at Leggett & Platt. It was uncontraverted that Betty suffered respiratory attacks while at Leggett & Platt. Betty made out a *prima facie* case demonstrating exacerbation of her respiratory problems occurred at work, arose out of and in the course of her employment, and was casually connected to her disability. The employer failed to offer any affirmative testimony contradicting those elements. Therefore, the circuit court erred in affirming the Commission's denial of workers' compensation benefits to Betty. Accordingly, the judgment of the circuit court is reversed and the case is remanded to the Mississippi Workers' Commission for further action consistent with this opinion.

In *Miller Transporters, Ltd. v. Dean,* 179 So. 2d 552 (Miss. 1965), this Honorable Court was faced with a similar case where the Worker's Compensation Commission affirmed the findings

of an administrative law judge and held that there was only a temporary aggravation of a shoulder injury. This Honorable Court in reversing the Commission and administrative law judge held the following:

> The error assigned here by the appellants (employer/carrier) is simply that the circuit court erred in holding that there was no substantial evidence to support the Commission's findings in this case. The circuit court judgment provides: "Our court has held that the employer and carrier assumes the burden when they plead a pre-existing physical handicap, disease or lesion. This must be proved by a preponderance of the evidence. The burden never shifts." The Commission found that all disability of the claimant subsequent to August 10, 1962, was due to a prior existing physical handicap, disease or lesion. The amendment to the Workers' Compensation Act that provides that the award to a claimant may be deduced because of pre-existing condition that has contributed to the claimant's inability to perform his work is Chapter 277, Laws of 1960. Our court has set out the factors that must be shown and proven in such case in the case of *Cuevas v. Sutter Well Works,* 150 So. 2d 524. After a careful study of this record, this court holds that the employer and carrier have not met the burden of proof to establish by a preponderance of the evidence that the disability of the claimant, since August 10, 1962, is due to s pre-existing condition. In fact, there is no substantial evidence to support such finding. It follows that said cause must be reversed.

In the case of *McNeese v. Cooper Tire & Rubber Co.* , 627 So. 2d 321 (Miss. 1993), this Honorable Court in a very similar case reversed the Workers' Compensation Commission. The Commission found that the permanent disability from a back injury was entirely attributable to a pre-existing condition, and this Court reversed the decision of the Commission finding that the holding was not supported by substantial evidence. In *McNeese, supra.*, this Honorable Court stated the following:

> This Court has stated with respect to the effect that pre-existing conditions in the determination of disability benefits following a work-related injury: "The rule in this state is 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 corollorary to the rule just stated 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. *See Rathborne, Hair & Ridgeway Box Co. v. Green,* 115 So. 2d 674, 676 (Miss. 1959).

Cooper Tire contends that the corollorary to the *Rathborne* rule was correctly applied in McNeese's case to deny permanent disability benefits. As support, the company cites the opinion of Dr. Buchanan that McNeese reached maximum recovery on or before July 29, 1988, and that any remaining disability was attributable solely to the pre-existing spondylolisthesis.

This Court in reversing stated the following: "We simply cannot say that the finding that McNeese sustained no permanent disability or loss of wage earning capacity as a result of his accidental injury was supported by substantial evidence. Conflicting medical evidence from two physicians, both seemingly reliable since the qualifications of neither one as an expert witness were challenged, made the decision a very close one. It is most significant that the medical experts could not determine, one way or the other, how and when the slippage actually occurred. In *Stuart's, Inc. v. Brown,* 543 So. 2d 649, 652 (Miss. 1989), this court stated: "We have often held that (1) close questions of compensability should be resolved in favor of the worker and (2) the Act should be liberally construed to carry out its beneficent remedial purpose." The decision of the Workers' Compensation Commission is reversed and remanded for a determination of allowable benefits.

In this case the administrative law judge found that the work-related injury of February 21, 2004, exacerbated Ms. Fair's pre-existing condition by increasing both the intensity and frequency of her right should pain to such an extent that the injury could not be regarded as merely a "temporary aggravation." Further, the administrative law judge found that after the work-related injury of February 21, 2004, Ms. Fair testified that her post-injury pain was new and different from any she had experienced previously. In addition, Dr. Motakhaveri agreed with Ms. Fair's assessment when he wrote on March 2, 2004, that Ms. Fair "clearly has significant change in pain today." Finally, with the advantage of having seen Ms. Fair for three more months after September 1, 2004, Dr. Salloum in his medical report apparently changed his mind when he opined on December 2, 2004, "that Ms. Fair has had a severe exacerbation of her pain and it is unrelenting."

Further, as the administrative law judge observed, "It is worth noting that before the injury, Ms. Fair's shoulder pain had waxed and waned over time."

It is quite clear that the Workers' Compensation Commission in a 2 to 1 decision failed to even mention the burden of proof that shifted from the employee to the employer. The employer in this case did not produce in any evidence other than the first medical report from Dr. Salloum regarding the pre-existing injury which required surgery. As stated by this Honorable Court in *Hedge v. Leggett & Platt, supra.*, "once the burden of proof shifts to the employer, the same degree of proof is required in order to rebut the claimant's *prima facie* case." There was no finding by the Full Workers' Compensation Commission that the employer and carrier had met its burden of proof by a preponderance of the evidence that Ms. Fair's accident on February 21, 2004, was, at worse, a temporary aggravation of a pre-existing condition and that by September 1, 2004, this accident had ceased to be disabling, and Ms. Fair had returned to the same condition she was in prior to February 21, 2004.

The Workers' Compensation Commission also failed to provide the Claimant with those statutory presumptions that (1) close questions of compensation should be resolved in favor of the worker and (2) that the Act should be liberally construed to carry out its beneficent remedial purpose to find compensability.

Substantial evidence does not support the Commission's decision that the employer and carrier had met its burden of proof by a preponderance of the evidence that Ms. Fair's industrial accident on February 21, 2004, was, at worse, a temporary aggravation of a pre-existing condition.

CONCLUSION

Therefore, the decision Circuit Court and the Full Workers' Compensation Commission should be reversed and the matter remanded back to the Workers' Compensation Commission for a determination of allowable medical and compensation benefits.

Respectfully submitted, this the 10th day of November, 2008.

ARMENIA FAIR (Claimant/Appellant)

BY: _____
JAMES K. WETZEL, Her Attorney

CERTIFICATE OF SERVICE

I, JAMES K. WETZEL, attorney of record for the Claimant/Appellee, do hereby certify that I this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to Karl R. Steinberger, Esquire, and Tristan Russell Armer, Esquire, with the law firm of Williams, Heidelberg, Steinberger & McElhaney, at their usual mailing address of P. O. Box 1407, Pascagoula, MS 39568-1407; to the Honorable Mark Henry, Administrative Law Judge, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39296-5300; and to the Honorable Lisa Dodson, Harrison County Circuit Court Judge, P. O. Box 1461, Gulfport, MS 39502.

DATED this the 10th day of November, 2008.

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