IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-WC-01428

MCKINLEY MOSBY — APPELLANT/CLAIMANT

FARM FRESH CATFISH COMPANY AND LIBERTY MUTUAL INSURANCE COMPANY — APPELLEES/ EMPLOYER/CARRIER

APPEAL FROM THE
CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI
CAUSE NO.: 2008-0040-CI

BRIEF OF APPELLEES/EMPLOYER/CARRIER

ORAL ARGUMENT NOT REQUESTED

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I. CERTIFICATE OF INTERESTED PERSONS

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

1. Farm Fresh Catfish Company, Appellee
2. R. Brittain Virden, Attorney for Appellee
3. Renetha L. Frieson, Attorney for Appellee
4. McKinley Mosby, Appellant
5. Gregory W. Harbsion, Attorney for Appellant

RESPECTFULLY SUBMITTED, this the 9 day of January, 2009.

By: _____

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IV. STATEMENT OF THE ISSUE

1. Whether there was substantial evidence to support the decision of the Circuit Court of Sunflower County which affirmed the decision of the Mississippi Workers' Compensation Commission that denied Claimant any additional disability benefits and also held that the Employer/Carrier was not responsible for payment of Claimant's subsequent medical treatment rendered outside the chain of referral?

V. STATEMENT OF THE CASE

The Claimant filed his Petition to Controvert on April 5, 1999 in connection with an incident whereby Claimant's truck slid into a catfish pond at work on January 14, 1999. Though the Claimant filed his Petition to Controvert soon after the accident, the claim endured a change of Claimant's counsel and numerous other delays. The First Hearing on the Merits before Administrative Judge Tammy Harthcock eventually took place on February 23, 2005. Judge Harthcock issued her first Order on April 7, 2005, with two erroneous findings which were later overruled by the Full Commission.

Following the first hearing on the merits, the Employer/Carrier filed a timely Petition for Review. However, before the matter was considered by the Commission, Judge Harthcock reopened the case and conducted a second evidentiary hearing on March 1, 2006. Judge Harthcock admitted testimony in regard to Claimant's additional post-incident employment and more personnel and wage records from such employers. Approximately one year later, on March 21, 2007, Judge Harthcock entered her second order, which refused to reconsider her initial errors and summarily affirmed her prior order. Judge Harthcock's second order was reversed by the Full Commission on December 19, 2007. Claimant filed his Notice of Appeal in the Circuit Court of Sunflower County,

Mississippi on January 4, 2008 and the Employer/Carrier filed a Cross Notice of Appeal on January 8, 2008 on the issue of payment for Claimant's subsequent medical treatment.

The Circuit Court of Sunflower County affirmed the Commission's decision denying Claimant permanent disability benefits. It also reversed the Commission's order affirming the Administrative Judge's decision which held the Employer/Carrier financially responsible for the Claimant's subsequent medical treatments received from Dr. Dukes, Dr. Chiou, and Dr. Hammitt. On August 4, 2008, the Claimant filed his Notice of Appeal to this Honorable Court.

VI. STATEMENT OF THE FACTS

Claimant McKinley Mosby began working for Farm Fresh Catfish Company in 1991 as a truck driver hauling catfish from local farms to the Farm Fresh processing facility in Belzoni, Mississippi. T.1 at 16.[1] On January 14, 1999, while picking up a load of live catfish, Claimant incorrectly drove the truck and trailer he was operating on a small levee between two catfish ponds. Claimant then attempted to turn the truck around and allowed the trailer to slide into a catfish pond, turning the cab of the truck on its side. T. 1 at 19. Even though Claimant was traveling at a very low speed, he stated he injured his low back when the truck slid into the pond.

A. Claimant's Extensive and Perpetual Post-Accident Employment History

Despite an unsupported allegation that Claimant was terminated due to his injuries from the subject accident, Claimant himself admitted he was actually terminated for destruction of company property. T. 1 at 58. The Claimant was not out of work for long, however. Almost immediately after he left Farm Fresh, Claimant was hired by Toler Trucking in Greenville, Mississippi where he worked for approximately three months in the first half of 1999 driving a long haul truck route. T.1

[1] As there were two hearings on the merits in this claim the transcript for the first hearing is identified as "T.1." and the second transcript is identified as "T. 2."

at 64. By May 27, 1999, Claimant left Toler Trucking to take a job as a bus driver for Delta Bus Lines where he drove a passenger bus around the state with emphasis on Delta destinations. T. 1 at 69. Personnel records from Delta Bus Lines reveal Claimant was terminated from this job on September 20, 1999 for job abandonment. Gen. Ex. "14." As it turns out, the reason Claimant abandoned his job with Delta Bus Lines is because he took another job as a truck driver, this time with Deaton, Inc. of Greenville. T. 1 at 72. He worked at Deaton, Inc. from September 24, 1999 until June 23, 2000 earning on average $786.77 per week, which is approximately a $185.00 increase from his average wages with Farm Fresh. Gen. Ex. "15." Then, he worked as a long haul driver for ROCOR International, through February 19, 2001, which is the date he applied for a job as a truck driver with Morgan Van Lines located in Booneville, Mississippi. T.1 at 75; Gen. Ex. "16." Personnel records from Morgan Van Lines show he was hired by Morgan Van Lines two weeks later on March 9, 2001, and he worked for Morgan for the rest of 2001 as well as the entire years of 2002 and 2003. Gen. Ex. "17." He was fired from Morgan Van Lines for "Safety Issues" on January 9, 2004 but not before he was paid an average of $719.80 per week, another substantial increase from his wages at Farm Fresh. *Id.*

Claimant quickly found another job as a truck driver for MST Express, Inc. Claimant was paid his first paycheck with MST Express on January 30, 2004 (only two and one-half weeks after he left Morgan) and worked there until he voluntarily abandoned this job on March 23, 2004. Ex. "23." It is strongly suspected Claimant abandoned this job because he found another one with better pay as personnel records reveal a week later Claimant was hired as a truck driver for D&A Transportation, Inc. on April 4, 2004. Ex. "22." Claimant only worked for D&A Transportation for five months, because he got a sizeable increase in pay from his next employer, Nationwide Logistics.

Starting on August 27, 2004 with Nationwide, Claimant earned an average wage of $848.25, which is $247.00 more per week than he earned at Farm Fresh. Ex. "21." He stayed with Nationwide through March 4, 2005.

On or about May 20, 2005, the Plaintiff began his brief employment as a truck driver with Gillespie Transportation, where he worked for just under a month, through approximately June 10, 2005. Ex. "26." A few days later Claimant began his employment as a truck driver for Trans Power, Inc. d/b/a Riverside Dedicated Logistics, where he received his first paycheck for work beginning the week of June 19, 2005. Ex. "24." His employment with Riverside Logistics continued through the second hearing on the merits.

The following chart summarizes the Claimant's post-incident employment history by date:

EMPLOYER	DATES OF EMPLOYMENT	OCCUPATION
1. Toler Trucking	02/1999- 05/1999	Truck Driver
2. Delta Bus Lines	05/1999-09/1999	Bus Driver
3. Deaton, Inc.	09/1999-06/2000	Truck Driver
4. ROCOR International	06/2000-02/ 2001	Truck Driver
5. Morgan Van Lines	03/2001-01/2004	Truck Driver
6. MST Express, Inc.	01/2004-03/2004	Truck Driver
7. D&A Transportation, Inc.	04/2004-08/2004	Truck Driver
8. Nationwide Logistics	08/2004-03/2005	Truck Driver
9. Gillespie Transportation	05/2005-06/2005	Truck Driver
10. Riverside Dedicated Logistics	06/2005 to present	Truck Driver

This nine (9) year employment history of no less than ten (10) separate employers in the same

position as a truck driver proves that the subject accident had no effect whatsoever on the Claimant's ability to maintain continuous employment in his prior employment. Accordingly, the Circuit Court's Order affirming the Commission's denial of permanent disability benefits should be affirmed as there is substantial evidence to support such finding and the lower court did not act arbitrarily or capriciously.

B. Claimant's Medical Treatments Rendered Four to Five Years Post Incident

As stated above, Claimant's accident whereby his trailer and truck cab slid into a catfish pond from a small levee occurred on January 14, 1999. On that same date, Claimant saw Dr. Joe Pulliam with Family Medical Center located in Greenville, Mississippi for his initial medical treatment for his complaints of low back pain. T.1 at 21. Roughly two weeks after the accident, Claimant was seen at the Delta Regional Medical Center with similar complaints. T.1 at 22. Later, Claimant was referred to Dr. Frank Tilton, a neurologist in Greenville, who referred Claimant to Dr. Rodney Frothingham, a neurosurgeon located in Greenville. T. 1 at 24. Dr. Frothingham then referred Claimant to another neurosurgeon, Dr. Lon Alexander in Jackson, who then referred him to Dr. Michael Steuer for pain management treatments. The Employer/Carrier paid for these medical expenses for each of the referrals back to the original treating physician of Dr Pulliam. T.1 at 25.

Several years later Claimant moved to Baldwin, Mississippi and then later to Booneville, Mississippi. T.1 26-27. It was at this time and approximately four years after the subject incident that Claimant went outside of the chain of referral, visiting a family doctor in Booneville named Dr. Erik Dukes. T.1 at 27. Dr. Dukes then referred Claimant to Dr. George Hammitt. T.1 at 27. Dr. Hammitt referred Claimant to Dr. Andrew Chiou, a neurosurgeon located in Tupelo, who made the same diagnosis as Dr. Frothingham and Dr. Alexander. The Employer/Carrier did not pay for these

medical treatments beginning with Dr. Dukes. T.1 at. 31.

The record revealed Claimant never requested the Employer/Carrier to pay for treatments by Dr. Dukes, Dr. Hammitt or Dr. Chiou. T.1 at 99. Indeed, one of these subsequent treating physicians admitted Claimant did not inform him the treatment was for injuries arising out of a workers' compensation injury.

> Q: And when was the first time that you saw Mr. Mosby?
> A: October 28th, 2003.
> Q: Okay. And what problem was he suffering from upon presentation on October 28th of 2003?
> A: He was referred by Dr. Hammitt, and he did not relay that this was a work-related injury to me, either on his intake form or to me verbally.

Chiou Depo, p. 8.

Moreover, the Employer/Carrier presented uncontradicted evidence that Claimant never applied to the Worker's Compensation Commission for approval of treatment outside of the chain of referral, as required by MISS. CODE ANN. § 71-3-15. Further, Claimant never offered any proof whatsoever that Claimant's medical treatments from Dr. Dukes, Dr. Hammitt or Dr. Chiou had any causal relationship or connection with the motor vehicle accident that occurred in 1999, nearly four years before Claimant was treated by these physicians. Such an excessive gap in treatment suggests there is no causal relationship, but Claimant bears the burden of proof to prove his claims by a preponderance of the evidence with supporting expert testimony, which he failed to do. Claimant never deposed Dr. Dukea or Dr Hammitt or otherwise established these physicians and their treatments were somehow within the chain of referral.

VII. SUMMARY OF THE ARGUMENT

There is substantial evidence which supports the Order of the Circuit Court denying additional workers' compensation benefits to Claimant for alleged permanent disability or subsequent medical treatments. Most notably, the Claimant's nine year (9) employment history of no less than ten separate employers in the same position as a truck driver proves that the subject accident had no effect whatsoever on the Claimant's ability to maintain continuous employment in the same position he held with the Employer and the Claimant is therefore not entitled to permanent partial disability payments. Additionally, the post incident wage records from these Employers confirmed Claimant actually enjoyed substantial pay increases ranging from $150.00 to $250.00 per week from his earnings when compared to Farm Fresh.

Despite claims to the contrary, Claimant never "struggled" to find or sustain employment in the same occupation of truck driving and frequently left one truck company and was rehired the same week or in the following week for the last nine to ten years. Moreover, Claimant has shown the ability to sustain such employment for substantial periods of time even though he testified to subjective complaints of low back pain. The record reveals the primary reason Claimant left one truck driving job for another was higher pay or he moved to a new town. He also informed his subsequent employers he did not suffer low back pain in his applications for employment. Finally and most significant, the Claimant has been paid at a consistently higher average weekly wage, primarily driving long hauls rather than the short distances to and from the catfish ponds to the Farm Fresh processing facility.

Likewise, the decision of the Circuit Court denying Claimant any additional medical expense benefits should be affirmed as there was substantial evidence Claimant sought the medical treatment

of Dr. Dukes, Dr. Chiou, and Dr. Hammitt without referral from any of his approved physicians and without the permission of the Employer/Carrier or the Commission in violation of the Act. Therefore, the treatment received from these physicians was outside the chain of referral and the Employer/Carrier is not responsible for medical bills incurred outside such chain of referral.

Finally, the Claimant's new argument that Section 71-3-15 of the Mississippi Code Annotated applied to his visits to Dr. Dukes, Dr. Chiou, and Dr. Hammitt as an "emergency" should be barred as Claimant failed to present this argument to the lower court. Even if the argument is not barred, Claimant's only basis that his ongoing low back condition was an emergency is a new claim that it was unreasonable for him to drive in excess of two hours to see his approved physicians. Claimant's reasoning is flawed because Claimant's situation does not satisfy the definition of an emergency. An emergency within the purview of the medical expenses provision of the workers' compensation statute must permit of no reasonable alternative consistent with the preservation of life or irreparable injury from the delay. Claimant has not shown that he was experiencing such an urgent condition that delayed preservation of life or irreparable injury and, in fact, was seeking medical treatments for ongoing conditions of pain to his back caused by normal spine degeneration. Indeed, Claimant frequently traveled long distances to see his authorized treating physicians from Greenville to Jackson and back without problems. Thus, Claimant's subsequent visits were not an emergency because they lacked the urgency of the preservation of life or irreparable injury from delay.

The Employer/Carrier submits the Commission and the Circuit Court relied on substantial evidence, and did not act arbitrarily or capriciously, when they found Claimant was not entitled to additional disability benefits and his subsequent treating physicians were outside the chain of

referral. Accordingly, the Order and Opinion of the Circuit Court of Sunflower County should be affirmed by this Court under this well known standard of review

VIII. ARGUMENT

A. Standard of Review

On appeals of a workers' compensation claim it is well settled that the Commission is the ultimate decision-maker and trier of fact rather than the Administrative Law Judge. The Circuit Court and the Court of Appeals should consider the substantial evidence test and only reverse the lower court order if it finds such order is "clearly erroneous and contrary to the overwhelming weight of the evidence." *Fought v. Stewart C. Irby Company*, 523 So.2d, 314 (Miss. 1988).

The scope of the Appellate Court's review in workers' compensation cases is "quite limited." *KLLM, Inc. v. Filer*, 589 So.2d, 670, 675 (Miss. 1991).

> In a claim for workers' compensation, the Commission is the trier of fact, and we know we will reverse only if we find the order of the Commission to be "clearly erroneous and contrary to the overwhelming weight of the evidence." *Smith v. City of Jackson*, 792 So.2d, 335, 337 (Miss. Ct. App. 2001). . .If the findings of the Commission are supported by substantial evidence, we must affirm, absent in error of law.

McElveen v. Croft Metals, Inc., 915 So.2d 14, 19 (Miss. App. 2005).

Similarly, other case law has discussed the substantial evidence test and the limited review available to Appellate Courts from decisions of the Mississippi Workers' Compensation Commission.

> Under our standard of review, it is difficult to overturn the decision of the Full Commission. "The standard of review in worker's compensation cases is limited. The substantial evidence test is used. . . .the workers' compensation commission is the trier and finder of facts in a compensation claim. This court will reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence."

Levy v. Mississippi Uniforms, Inc., 909 So.2d 1260, 1263 (Miss. App. 2005); citing *Miss. Baptist Med. Ctr. v. Mullett*, 856 So.2d 612 (Miss. App. 2003).

B. Claimant's Failure to Experience Any Loss of Earning Capacity Supported by Substantial Evidence.

The post-accident wage statements admitted in this claim confirm Claimant did not suffer any wage loss whatsoever. Ex. "25."[2] MISS. CODE ANN. § 71-3-17(c)(25) (rev. 2000). In fact, Clamant enjoyed substantial pay increases ranging from $150.00 to $250.00 per week from his earnings as a local haul driver for Farm Fresh to his frequent employment as a long haul operator.

The ALJ's original error and bases for the permanent disability award stems from her misinterpretation of the law concerning loss of wage earning capacity and a mathematical error which the Commission corrected. Following the original hearing on the merits, the ALJ calculated that the Claimant was permanently disabled because only one of his post-accident employers reportedly paid a lower waged than Farm Fresh. To reach this figure, the ALJ made the following calculation:

Stipulated Average Weekly Wage	$601.25
Less Weekly Wages from Nationwide Logistic	$500.35
Lost wage-earning capacity calculated by ALJ	$100.90
2/3 calculation of loss	$67.30

While the first Order from the ALJ finds the Claimant's average weekly wage with his post-incident employer Nationwide was $500.35, the actual average weekly wage he earned with

[2] Employer/Carrier compiled post-accident average weekly wage statements on an annualized basis by compiling weekly wages earned by Claimant from his numerous post-accident employers. Ex. "25." These post-accident wage statements showed Claimant earned an average wage of $722.69 in 2004; $785.87 in 2005; and $744.16 for the first half of 2006.

Nationwide was $848.25. The Claimant worked for Nationwide for 28 total weekly pay periods between August 27, 2004 and March 4, 2005, and earned wages totaling $23,751.15. This figure, divided by 28 weeks, is $848.25 per week. Therefore, the Claimant actually enjoyed another substantial increase in his average weekly wage of $247.00 and the ALJ simply miscalculated his earnings.

The second error arises out of the ALJ's complete disregard for the numerous other post-accident jobs held by Claimant showing that he earned substantial increases in wages from each of his post-accident employers. Rather than consider all of the post-accident employment of Claimant as a whole, the ALJ narrowly focused on his employment with Nationwide. It is unknown why Judge Harthcock only considered this short duration employment with Nationwide when Claimant had shown the full and complete ability to work in the same occupation (albeit with more strenuous long haul driving) and earning higher wages for years. Such counter-intuitive logic and selective evidence review by the ALJ is not the intent, purpose, or status of Mississippi's Workers' Compensation laws and the Commission was justified in its reversal.

The overwhelming facts prove there is a documented and distinct trend when considering all post-accident employers and wages of Claimant which reveals Claimant has enjoyed a substantial increase in his wages after the accident. Ex. E/C-25 shows the combined average weekly wages for the years 2004 and 2005 and part of 2006.

ANNUAL WEEKLY WAGE	AMOUNT	DIFFERENCE FROM FARM FRESH
Average Weekly Wage	$601.25	
2004 Average Weekly Wage	$722.69	+ $121.44
2005 Average Weekly Wage	$785.87	+ $184.62

Partial 2006 Average Weekly Wage	$744.16	+ $142.91

This chart shows the Claimant did not merely sustain an increase in wage-earning capacity post-injury for just one employer; rather, the Claimant's *overall* wage-earning capacity has increased in spite of the 1999 accident which he alleged caused permanent disability of low back pain.[3] Moreover, Claimant's earnings in 2003, 2001 and 2000 likewise show a substantial increase in wages as shown by his wage and personnel records. Exs. "14", "15" and "16":

As noted above, the Claimant's true average weekly wage with Nationwide -the employer the ALJ used to calculate benefits - was actually $848.25, a figure well in excess of his pre-accident average weekly wage. If one looks to other individual post-accident employers, we discover the same pattern - the Claimant sustained an *increase*, not a decrease, in his average weekly wage post-accident. The following chart itemizes his average weekly wage for each of his subsequent employers:

EMPLOYER	**APP. DATES OF EMPLOYMENT**	**POST-ACCIDENT AWW**	**DIFFERENCE WITH AWW**
1. Toler Trucking	02/1999-05/1999	unknown	n/a
2. Delta Bus Lines	05/1999-09/1999	$619.31	+$18.06
3. Deaton, Inc.	09/1999-06/2000	$786.77	+$185.52
4. ROCOR	06/2000-02/2001	Gross earnings totaled $45,124.00 or $867.77 per week	+$266.52

[3] Based on Claimant's record from his March 2008 claim for workers' compensation benefits from Nationwide Trucking it also appears Claimant continued his employment with benefits from Nationwide through 2007 and presently earned the same, or higher, wages in 2007, the last date for which records for this claim are available.

5. Lines Morgan Van	03/2110-01/2004	$769.80	+$168.55
6. MST Express, Inc.	01/2004-03/2004	$788.87	+$187.62
7. D&A Trans., Inc.	04/2004-08/2004	$676.48	+75.23
8. Nationwide Logistics	08/2004-03/2005	$848.25	+$247.00
9. Gillespie Transportation	05/2005-06/2005	$834.18	+$232.93
10. Riverside Dedicated Logistics	06/2005-current	$771.84	+$170.59

Thus, with the exception of his brief employment with Toler - from whom records are not available - immediately after the subject accident the Claimant was paid a higher average weekly wage than he earned with Farm Fresh for every subsequent employer. This evidence overwhelmingly demonstrates that the Claimant has not suffered a loss of wage earning capacity and such substantial evidence supports the decision of the Circuit Court and Commission denying any further disability payments to Claimant.

Even though the courts have expanded the definition of "disability" to consider other factors besides an individual's ability to work and earn wages, the Workers' Compensation Commission Act clearly mandates the most important consideration is the post-accident ability of a Claimant to "earn the wages which the employee was receiving at the time of injury in the same or other employment. . . ." MISS. ANN. CODE § 71-3-3(i) (rev. 2000). The Commission and Circuit Court were correct to overrule ALJ's initial finding that Claimant was entitled to disability benefits as the overwhelming proof established Claimant earned a much higher wage after the subject incident in the same or similar employment over an almost decades long period. The Commission correctly held that Judge Harthcock's award of permanent partial disability in the sum of $67.30 per week for 450 weeks, was

based on an erroneous calculation that his employment with one of his ten (10) post-incident employers, Nationwide, reflected a loss in wage-earning capacity of $100.90 per week compared to his average weekly wage with Farm Fresh. The true facts revealed Claimant has consistently worked driving a truck at a much higher rate of pay than his local haul work with Farm Fresh. Claimant has demonstrated the full and complete ability to find permanent work even beyond any restrictions he believed were placed on him. Despite claims in his brief, Claimant never "struggled" to find or sustain employment in the same occupation of truck driving and frequently left one truck company and was rehired the same week or in the following week for almost a decade. Moreover, Claimant has shown the ability to sustain such employment for years at a time. Morever, the Claimant has been paid at a consistently higher average weekly wage.

Further, the Commissions order was not clearly erroneous nor contrary to the law or evidence.

Case law examining this issue are in agreement.

> This statute [§ 71-3-17(c)(25)] has been construed . . . to mean that post-injury earnings equal to or in excess of pre-injury earnings are strong evidence of non-impairment of earning capacity, but that the presumption arising therefrom may be rebutted by evidence on the part of the Claimant that the post-injury earnings are unreliable . . .

Wilcher v. D.D. Ballard Const. Co., 187 So.2d 308, 310-11 (Miss. 1966).

The law logically presumes that the Claimant is not entitled to permanent partial disability payments when the alleged disability has not impaired the Claimant's ability to earn an equal or greater wage post-accident. In this claim the Claimant has maintained continuous work in the same occupation as a truck driver at a higher wage than he earned while employed by Farm Fresh for nearly a decade and, therefore, is not entitled to disability benefits under the Act.

> [The statute] has been construed by the Mississippi Supreme Court to mean that post-injury earnings equal to or in excess of pre-injury earnings are *strong evidence* of non-impairment of earning capacity, but that the presumption arising therefrom may be rebutted by evidence on the part of the Claimant that the post-injury earnings are unreliable due to the temporary and unpredictable character of post-injury earnings.

Bailey v. Bryant, 734 So.2d 301 (Miss. App. 1999) (emphasis added).

In this claim, Claimant failed to offer any credible proof to rebut the presumption, which in was established by overwhelming evidence. For nearly ten years since the accident, the Claimant has continued to work as a truck driver for multiple employers at an average weekly wage higher than what he earned while employed by Farm Fresh. Moreover, he held one job - - with Morgan Van Lines - - for almost three full years between 2001 and 2004. Indeed, Claimant never left any of his employers because he could not perform the job due to an alleged injury, a fact Claimant confirmed every time he completed a new job application. There is nothing temporary or unpredictable about the Claimant's post-accident earnings. Furthermore, records of his most recent employer, Riverside Logistics, indicate he has worked there for over two years and presumably continues in that employment. The Claimant's extensive track record of employment, often with extended periods with the same employer, is not the type of employment so "temporary or unpredictable" as to justify an award of permanent partial disability. Therefore, the Commission's findings were supported by substantial evidence and the Circuit Court's Order upholding the Commission's findings should be affirmed by this Court.

1. ***Other Factors for Consideration Further Prove Claimant is Not Entitled to Permanent Disability Benefits.***

In addition to Claimant's consistent ability to earn wages greater than those earned with Farm Fresh in the same employment, the Commission and appellate courts typically examine other factors

to determine whether a Claimant has suffered a loss of wage earning capacity and is "disabled" pursuant to definition of the Act. MISS. CODE ANN. §71-3-3 (i)(rev. 2000). "In determining whether there has been a loss of wage earning capacity, the Commission is to evaluate training, education, ability to work, failure to be hired elsewhere, pain and other medical circumstance." *Sherwin Williams v. Brown*, 877 So. 2d 556, 558 (Miss. App. 2004). Upon examining each of these additional factors, the Employer/Carrier submit the Commission's order denying benefits was again supported by substantial evidence. For instance, Claimant's training and education[4] permitted him to maintain constant and consistent employment as a commercial truck driver performing long and short hauls. Claimant admitted he maintains a valid Class A commercial driver's license and has successfully completed the tests and renewals necessary to renew that commercial license. T.1 at 48. The next factors of "ability to work" or the "failure to be hired elsewhere" were extensively discussed before as Claimant has demonstrated the absolute ability to work as a truck driver and has been hired by no less that ten (10) subsequent employers.

The final additional factors of pain and other medical circumstances likewise confirm Claimant has not suffered a loss of wage earning capacity. Even though Claimant testified that he experiences subjective back pain, such alleged low back pain has not prevent ed him from

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[4] Despite the admission in Claimant's deposition that he was a high school graduate, Claimant denied he graduated high school at the first Hearing on the Merits and further alleged that the court reporter recorded the testimony incorrectly. T.1 at 46-47; Ex. "19." Nevertheless, Claimant has informed all of his subsequent employers that he was a high school graduate as shown by the personnel files obtained from Claimant's subsequent employers indicating a high school education or greater on each of his applications. Thus, it appears the weight of the evidence proves Claimant possesses at least a high school education and it is unknown why Claimant chose to deny this fact at the first Hearing on the Merits under oath. Thus, it appears the weight of the evidence proves Claimant possesses at least a high school education and it is unknown why Claimant chose to deny this fact at the first Hearing on the Merits under oath.

maintaining constant and consistent employment as a long haul truck driver with the ability to lift greater than fifty (50) pounds according to the Dictionary of Occupational Titles. Indeed, Claimant's subjective complaints of pain were cast in serious doubts at the second Hearing on the Merits during cross examination. Even though Claimant testified he was in great pain and this affected his ability to drive a truck, upon examination of many of his applications for employment to his subsequent employers, he repeatedly indicated that there were "no injuries" or "no medical conditions" which would hinder his ability to work as a truck driver. T. 2 at 18. Indeed, on the application for employment Claimant completed for Nationwide on August 24, 2004 he was asked various questions about his health history and whether he suffered from "chronic low back pain." On that application and *under penalty of perjury*, Claimant told Nationwide he did *not* suffer from chronic low back pain. Ex. E/C "18"; T. 2 at 18.

Claimant then attempted to explain away these inconsistencies by testifying that while he was filling out the application and during that particular "hour or so I didn't have no back pain." T. 2 at 19. Of course, this further attempt to cover his story was called into question when Claimant completed a renewal application for Nationwide a few months later on November 29, 2004 where he *again* confirmed to his employer, under oath, that he does not suffer from low back pain. Claimant again attempted to explain away his actions by testifying at the second hearing that "I guess I wasn't having no back pain then." T.2 at 20. Not surprisingly, Claimant was later terminated from Nationwide for falsifying documents to the company. *Id.* at 21.[5] The documentary evidence clearly

[5] Indeed, Claimant confirmed to other subsequent employers such as D & A Transportation that he could perform long hauls which required "sitting continuously" and that he did not have any health restrictions or previous injuries that would prevent him from performing these duties. T. 2 at 26.

establishes that Claimant consistently informed his subsequent employers under oath and under penalty of perjury, that he did not suffer from any pain or medical condition that would prevent him from driving his truck, loading and all other job requirements required of him. Perhaps the best evidence that Claimant has not suffered "disabling" pain is his ability to maintain such employment for nine (9) years after the subject incident.

The final consideration of "medical circumstances" also shows Claimant has not suffered any loss of wage earning capacity. Even though Claimant was seen by numerous physicians, none of Claimant's medical treatments or conditions restricted him from returning to the same type employment of truck driving. Claimant's medical treatments were generally conservative in nature consisting of pain medications and physical therapy rather than invasive surgery. *See generally Richards v. Harrah's Entertainment, Inc.*, 881 So.2d 329 (Miss. App. 2004) (examining additional factors for loss of wage earning capacity and reversing award of permanent disability).

Accordingly, in regard to the issue of permanent disability benefits, the Full Commission order denying further payments was supported by substantial evidence that Claimant has not suffered any permanent disability. The Commission's decision to overrule the unsupported and illogical findings of the ALJ was correct and consistent with the law and the facts. The Employer/Carrier submit this Court should affirm the Circuit Court's decision upholding the Commission's finding that Claimant is not entitled to any permanent disability benefits from the subject incident of January, 1999.

C. <u>Claimant Is Not Entitled to Payment for Subsequent Medical Treatments</u>.

There was substantial evidence that the cost of Claimant's medical treatments rendered by Dr. Erik Dukes, Dr. George Hammitt and Dr. Andrew Chiou was non-compensable medical

expenses under the Act since Claimant went to see these physicians on his own and outside of the chain of referral of treating physicians for injuries incurred from the subject incident in 1999. Thus, the decision of the Circuit Court on this issue should likewise be affirmed.

Again, Claimant's accident occurred on January 14, 1999. On that same date, Claimant saw Dr. Joe Pulliam with Family Medical Center located in Greenville, Mississippi. T.1 at 21. Later, Claimant was referred to Dr. Frank Tilton, a neurologist, who referred Claimant to Dr. Rodney Frothingham, a neurosurgeon. Dr. Frothingham then referred Claimant to Dr. Lon Alexander in Jackson, who then referred him to Dr. Michael Steuer for pain management treatments. The Employer/Carrier paid for these medical expenses for each of the referrals back to the original treating physician. T.1 at 25.

Several years later Claimant moved to Baldwin, Mississippi and then later to Booneville, Mississippi. T.1 26-27. It was at this time that Claimant went outside of the chain of referral to see a general practician/family doctor in Booneville, Dr. Erik Dukes. T.1 at 27. Dr. Dukes did not seek preapproval of such visits with the Employer/Carrier and claimant did not initially request payment for his treatments be made under this claim. Dr. Dukes then referred Claimant to Dr. George Hammitt. T.1 at 27. Dr. Hammitt referred Claimant to Dr. Andrew Chiou, another neurosurgeon who made the same diagnosis as Dr. Frothingham and Dr. Alexander nearly four years earlier, which was that Claimant has degenerative back pain and no surgery is not indicated.

The Employer/Carrier did not pay for these subsequent treatments and the record reflects Claimant never requested the Employer/Carrier to pay for treatments by Dr. Dukes, Dr. Hammitt or Dr. Chiou. T.1 at 99. Dr. Chiou even confirmed that Claimant did not inform him the treatment was for injuries arising out of a workers' compensation injury. Chiou Depo, p. 8.

Moreover, the Employer/Carrier presented uncontradicted evidence that Claimant never applied to the Worker's Compensation Commission for approval of treatment outside of the chain of referral as required by MISS. CODE ANN. § 71-3-15. Claimant never offered any proof whatsoever that Claimant's medical treatments from Dr. Dukes, Dr. Hammitt or Dr. Chiou had any causal relationship or connection with the motor vehicle accident that occurred in 1999, four to five years before Claimant was treated by these physicians. Such an excessive gap in treatment suggests there is no causal relationship, but Claimant bears the burden of proof to prove his claims by a preponderance of the evidence with supporting expert testimony, which he failed to do.

The case of *Wesson v. Fred's Inc.*, is similar to the issues presented here. In that case, the Claimant sustained a work-related injury to her arm and initially Claimant sought medical treatment within her chain of referral. *Wesson v. Fred's Inc.*, 811 So.2d 464 (Miss. App. 2002). However, the Claimant then sought treatment for her arm from multiple doctors outside of the chain of referral, including one doctor referred to Claimant by her attorney. *Wesson*, 811 So.2d at 468. The Court of Appeals found that the employer was not responsible for the Claimant's medical visits outside of the chain of referral. *Id.* at 468. In so deciding, the Court spoke to the purpose of the statutory procedure for seeking medical treatment:

> permitting referrals from those initial physicians must in part be to systematize the means by which medical costs are to be imposed on an employer. When one party is responsible for another party's expenses, it is critical that some controls exist. The legislature has permitted an initial referral and required that additional referrals be first authorized by the employer and carrier. (internal citation omitted). [Claimant] sought medical treatments from Dr. Lindley and Dr. Fillingame without such approval. Therefore, their expenses are not the responsibility of the employer and carrier.

Id.

Just as in *Wesson*, Claimant here did not seek approval of his treatments outside of the chain

of referral. Claimant confirmed he did not personally request approval for these treatments outside the chain of referral. Claimant alleged that someone other than himself sought approval of the medical treatments from "worker's comp" over the phone. T. 1 at 101-102. However, as shown above, Dr. Chiou testified that he was never informed that the Claimant's medical treatments were caused by an injury related to a worker's compensation claim. Chiou depo. at 8. Claimant did not offer any document to re-establish the chain of referral or that their medical treatment referral four to five years post-accident was reasonable, necessary or caused by the subject incident. Claimant did not take the deposition of Dr Dukes or Dr. Hammitt and the deposition of Dr Chiou confirmed claimant did not inform him his treatment should be considered as a workers' compensation claim. Claimant's allegations and actions are not consistent with those prescribed by statute and his claims for payment of these medical expenses by Employer/Carrier. Again, the Employer/Carrier submits there is substantial evidence to support the decision of the Circuit Court denying payment for these subsequent medical treatments and this Court should affirm that aspect of the order as well.

1. Claimant's Treatments by Doctors Outside the Chain of Referral Were Not Due to An Emergency.

In his brief to this Court Claimant makes a new argument not seen before which states that his subsequent medical bills should be paid because it was unreasonable to expect him to drive in excess of two hours one way for medical treatment. Claimant implies that the inconvenience of distance constituted an "emergency" as to allow him to seek outside medical treatment pursuant to Section 71-3-15. Section 71-3-15 reads as follows in its pertinent part:

> ...[*E]xcept in an emergency* requiring immediate medical attention, any additional selection of physicians by the injured employee or further referrals must be approved by the employer, if self-insured, or the carrier prior to obtaining the services of the physician at the expense of the employer or carrier. If denied, the injured employee may apply to the commission for

> approval of the additional selection or referral, and if the commission determines that such request is reasonable, the employee may be authorized to obtain such treatment at the expense of the employer or carrier. (emphasis added).

MISS. CODE ANN. § 71-3-15 (emphasis added)

The emergency exception does not apply to the Claimant herein because the Claimant's condition was not an emergency as contemplated by the statute. In *Ingalls Shipbuilding Corp. v. Holcomb*, this Court held that an emergency within the purview of the medical expenses provision of the workmen's compensation statute must allow of no reasonable alternative consistent with the preservation of life or irreparable injury from delay. *Ingalls Shipbuilding Corp. v. Holcomb*, 217 So. 2d 18, 21 (Miss. 1968). The Court noted the adoption of the meaning of emergency by the Court in *Bigham v. Lee County*. *See Bigham v. Lee County*, 185 So. 818 (Miss. 1939). In *Bigham* this Court adopted the definition of emergency as meaning a sudden or unexpected necessity, requiring immediate or at least quick action. *Holcomb*, 217 So. 2d 18, 21 (Miss. 1968) (citing *Bigham*, 185 So. 818 (Miss. 1939)). The Court used terms such as 'exigency' and 'pressing necessity' to define an emergency as contemplated by the statute. *Id.* In *Holcomb* this Court found that the employee had not experienced an 'emergency' when the employee visited his family physician, who was outside the chain of referral, for an injury that had occurred two weeks earlier. *Holcomb*, 217 So. 2d 18 (Miss. 1968). The Court held that the employer was not responsible for the employee's medical expenses. *Id.*

Similarly, Claimant's visit to Dr. Duke's, Dr. Chiou, and Dr. Hammitt without the Employer/Carrier/employer's approval was not an 'emergency' as contemplated by the statute. Moreover, Claimant's lack of urgency was even more prevalent than the employee in *Holcomb* because the Claimant waited in four years after the incident which caused the injury to see these

physicians. The Claimant's extreme delay does not contemplate an emergency as contemplated by the statute. The Claimant was outside the chain of referral when he visited the physicians and the Employer/Carrier is not liable for the medical bills of such unapproved visits.

IX. CONCLUSION

There is substantial evidence in the record, and the Circuit Court nor the Commission acted arbitrarily or capriciously, when it denied any additional workers' compensation benefits to Claimant for alleged permanent disability or his subsequent medical treatments. The Claimant's nine year post-incident employment history of no less than ten separate employers in the same position as a truck driver proves that the subject accident had no effect whatsoever on the Claimant's ability to maintain continuous employment. The substantial evidence also proves Claimant enjoyed significant wage increases ranging from $150.00 to $250.00 per week when compared to his earnings as a local haul driver for Farm Fresh. Claimant never struggled to find or sustain employment in the same occupation of truck driving.

Likewise, the decision of the Circuit Court denying Claimant any additional medical expense benefits should be affirmed as there was substantial evidence Claimant sought subsequent medical treatment with Dr. Dukes, Dr. Chiou, and Dr. Hammitt without referral from any of his approved physicians and without the permission of the Employer/Carrier or the Commission. Therefore, the treatment received from these physicians was outside the chain of referral and the Employer/Carrier is not responsible for medical bills incurred outside such chain of referral. Finally, the Claimant's new argument that Section 71-3-15 of the Mississippi Code Annotated applied to his visits to Dr. Dukes, Dr. Chiou, and Dr. Hammitt as an "emergency" should be barred as Claimant failed to present this argument to the trial court. Claimant has not shown that he was experiencing such an

urgent condition that delayed the preservation of life or irreparable injury but was actually seeking medical treatments for his degenerative conditions of low back pain.

Thus, the Employer/Carrier submits the Order of the Circuit Court should be fully affirmed under the well known standard of review that satisfies the substantial evidence test.

RESPECTFULLY SUBMITTED, this the 9 day of January, 2009.

FARM FRESH CATFISH and LIBERTY MUTUAL INSURANCE COMPANY

BY: _____

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CERTIFICATE OF SERVICE

I, R. Brittain Virden, Attorney for Appellee and Employer/Carrier certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

Gregory W. Harbison
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Judge Ashley Hines
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SIGNED, this the 9 of January, 2009.

R. BRITTAIN VIRDEN