

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2008-WC-01641

INTERNATIONAL STAFF MANAGEMENT
EMPLOYER/APPELLANT

AND

LEGION INSURANCE COMPANY
CARRIER/APPELLANT

VS

TAKISHA STEPHENSON
CLAIMANT/APPELLEE

Appeal from the Circuit Court of Desoto County, Mississippi

BRIEF OF APPELLEE

Oral Argument Requested

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TAKISHA STEPHENSON

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APPELLEE

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 the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Briggs Smith, Smith Phillips Mitchell Scott & Nowak, LLP, Counsel for Appellee;
2. Takisha Stephenson, Appellee;
3. F. Hall Bailey, Watkins Ludlan Winter & Stennis, P.A., Counsel for Appellants;
4. International Staff Management, Appellant;
5. Legion Insurance Company, Appellant; and
6. Mississippi Insurance Guaranty Association.



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ATTORNEY OF RECORD FOR
APPELLEE, TAKISHA STEPHENSON

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STATEMENT OF ISSUES

Although the appellee is rarely required to question the appellant's "statement of issues", International's "statement of issues" in the present appeal omits a primary issue, and as such is so misleading as to require a comment. For instance, appellant's issue 1. reads as follows:

1. Did the Full Commission err in finding that Takisha Stephenson was injured in the course and scope of her employment with IMS? (Appellant's brief p. iv)

This issue would be true, but for the fact that it omits the position of the employer at the second hearing before Administrative Judge Wilson wherein the employer agreed that the only issue was one of permanent disability, the employer/carrier having admitted the occurrence and compensability of the incident (Vol. 4 p. 345). Thus IMS' first issue is not an issue before this Court.

STATEMENT OF THE CASE

On June 28, 2000, after leaving work, though while on the company parking lot, Takisha Stephenson was told to return to the office. Thinking she was complying with a request from her superior, she did as told. Upon entering the office, she was shot in the back of the head by Reginald Davis, a former employee who had been fired just eight days earlier. While the employer/carrier would have this Court believe that the shooting is totally unrelated to the work environment and is the result of a personal affair, the proof is to the contrary. The record is completely void of any proof whatsoever to the effect that there was any dispute between Takisha Stephenson and Reginald Davis, the former employee assailant, prior to the date he was fired. However, on the date he was fired, the record is uncontradicted that Takisha's car was keyed and mutilated while on the company parking lot. In the ensuing days, two or three instances occurred where Reginald Davis sought contact with Takisha Stephenson, and in fact told her husband that he was having an affair with Takisha. The proof will show that Davis believed Takisha to have played a part in his being fired. On the date of the shooting, Davis showed animosity toward Mildred Mack, his then immediate supervisor, and held her, along with others, hostage until Takisha arrived.

The employer/carrier denied compensability of the injury as well as the extent of loss of wage earning capacity or total permanent disability. A hearing was held before Administrative Judge Henry, who found that the injury was compensable that Takisha was entitled to temporary total benefits as well as medical coverage, but requested additional medical proof before ruling on total permanent disability. The case was appealed to the Workers' Compensation Commission on the issue of compensability by the employer/carrier, and submission of additional medical evidence by the claimant. The Full Commission approved the finding of

compensability and remanded for additional medical proof. At the subsequent hearing before Judge Wilson, the employer/carrier admitted that compensability was not an issue and that the only issue was the extent of disability. Administrative Judge Wilson denied permanent impairment and loss of wage earning capacity. This decision was appealed by the claimant to the Full Commission where the administrative judge's order was reversed and permanent total disability was approved. The proof before Judge Wilson on the medical issues involved the testimony of Dr. Nan Hawkes a neuropsychologist who administered tests to Takisha Stephens and found her to be totally and permanently disabled. Dr. Keith Atkins stated that the tests he ran was inconclusive since she failed to properly apply herself, and further found that Dr. Hawkes' tests were unreliable. His opinion was that Takisha Stephenson was not permanently and totally disabled.

The circuit court affirmed the Full Commission order which had approved the finding of compensability and awarding full, permanent impairment and loss of wage earning capacity. It is from this affirmance of the Full Commission order by the Circuit Court of Desoto County, that this appeal is taken.

STATEMENT OF FACTS

Investigation and discovery produced a multitude of documents and several depositions and not one witness or document establishes that Reginald Davis was having an affair and that his actions were personal and not work related. The evidence in the record from at least two witnesses establishes that the motive for his actions stemmed from his termination at work and is supported by his threats against other employees that day. Takisha Stephenson denies ever having any sort of relationship with Reginald Davis and further the continued allegations of

infidelity have placed a large strain on her and her family. Takisha's husband, Terry Stephenson, also denies that there was ever any relationship between Davis and Stephenson.

The employees who worked at One Source with Takisha all deny having any personal knowledge of the alleged "affair" ((Mildred Mack (Ex. Vol. 2, Ex. 2, p. 19), Jackie Cook (Ex. Vol. 2, Ex. 1, p. 18), Deborah Bogan (Ex. Vol. 2, Ex. 3, p. 25)). In fact Jackie Cook believed that Davis' actions were motivated by his anger over being terminated (Ex. Vol. 2, Ex. 1, p. 12). Jackie Cook never heard any rumors of an affair and knew of no relationship nor any personal problems between Stephenson and Davis. Mildred Mack, the other supervisor involved in the termination of Davis, testified that on the day of the shooting, Davis advised her that she had "bought it too" (Ex. Vol. 2, Ex. 2, p. 7). Ms. Mack had no personal knowledge of any alleged affair and had not even heard any rumors to that effect. Deborah Bogan also testified that Davis threatened not only Mrs. Stephenson, but Mildred Mack as well (Ex. Vol. 2, Ex. 3, p. 13). Ms. Bogan had no personal knowledge of any affair but did hear rumors about an affair after the shooting.

The first mention of the source of this rumor comes from a conversation between the Olive Branch Police Department and Dwayne Pitts (Ex. Vol. 2, Ex. 6). Mr. Pitts advised the police that Davis had stated he was having an affair, that Mrs. Stephenson was pregnant and planned to have an abortion and that if she did, he (Davis) would kill her (Takisha Stephenson) (Ex. Vol. 2, Ex. 6). However, Dwayne Pitts had no personal knowledge whether this was true or not and went on to repeatedly ask the police for money to secure this testimony (Ex. Vol. 2, Ex. 6). Mr. Pitts was never found and never testified (this testimony is hearsay).

Aurelia Kimble, mother of Reginald Davis, also reported this rumor to the police and mentioned other rumors that Mrs. Stephenson had given Davis a birthday party at work (Ex. Vol.

2, Ex. 6). Shawn Malouie, a supervisor at One Source, also said that Davis mentioned an affair to him. However, he had no personal knowledge to say one did occur and could only say that Davis told him this (Ex. Vol. 2, Ex. 6) (this is pure hearsay). None of the detectives who investigated the case could find any evidence of an affair between Davis and Stephenson ((Aubrey Broadway, Ex. Vol. 3, Ex. 7, p. 23) (Cletus Oliver, Ex. Vol. 3, Ex. 9, p. 47-50)) . What the detectives did find however was that the land-lady of Reginald Davis was murdered around the same time as Davis' shooting at One Source. The Memphis Police suspected Reginald Davis murdered Ms. Nanny Crutchfield (the land-lady) and no one was ever arrested for this crime.

Aurelia Kimble, mother of Reginald Davis, testified by deposition that she had met Takisha Stephenson once after Reginald Davis began working at One Source (Ex. Vol. 3, Ex. 8, p. 8). She could not recall when this meeting occurred nor how she knew it was Takisha Stephenson. She also states that Takisha Stephenson called her home two or three times, a fact that Takisha Stephenson denies. Ms. Kimble states that Davis told her Takisha was pregnant with his child but denies telling the police that Davis said he would kill Takisha if she aborted his child (Ex. Vol. 3, Ex. 8, p. 40) (continuing hearsay). More importantly, Ms. Kimble admitted that Reginald Davis served twenty years in prison for two counts of aggravated assault and rape and that he had been out of prison six months before beginning to work at One Source. Ms. Kimble could not say that her son had an affair with Takisha Stephenson and had no personal knowledge of any such affair. The best she could do is say she found a picture of Takisha in a negligee in Reginald Davis' apartment, but she did not keep the picture. Ms. Kimble's daughter, Pamela Peete, likewise could not say that Davis ever had an affair with Takisha and all she had heard were rumors to that effect (additional hearsay).

Accordingly, there is no evidence beyond hearsay and speculation about any "affair". There is however direct evidence of a termination, and threats made during the shooting towards employees who were involved in the termination process.

Case law requires that to deny coverage and compensability, the attack must be by a third party for personal reasons only. Davis should not be considered a third party since he was a recently fired co-employee. Even if considered a third party, the attack was related to work, if not totally, certainly to a greater degree than any personal reason. All the law requires is that the attack be related to work to some degree. The law further requires that if in doubt, doubts should be resolved in favor of compensation. The administrative judge so found, and his decision has been affirmed through the entire appeal process.

Takisha Stephenson was left with devastating, psychological and mental injuries. Even though examined by two neuropsychologists, only one neuropsychologist, Dr. Nan Hawkes, has given a full and complete report. The other neuropsychologist, Dr. Keith Atkins could render no opinion as a result of the test he administered, since it was his opinion that Takisha had not given full effort in the testing process. Dr. Atkins also attacked the testing procedure employed by Dr. Hawkes.

Under this conflicting testimony, and taking into consideration the testimony of before and after witnesses, the Full Commission found that Takisha Stephenson suffered permanent, total loss of wage earning capacity, and ordered payment accordingly.

The order of the Full Commission finding the assault compensable, and Takisha Stephenson suffering a permanent, total loss of wage earning capacity, should be affirmed.

SUMMARY OF THE ARGUMENT

The claimant, Takisha Stephenson, was shot at work by a former employee who had been fired only eight days earlier. The bullet went through the back of her skull and lodged in the roof of her mouth. Miraculously and with excellent medical care by the neurosurgeon, Dr. Brophy, she survived. The employer/carrier will argue the shooting was a result of a totally 100% purely personal matter. Likewise, the employer/carrier will argue that Takisha does not have a total, permanent loss of wage earning capacity although employer/carrier has no neuropsychological evaluation to support this position.

Takisha's argument as to compensability centers around two topics. First, is compensability in fact an issue before this Court. The employer/carrier agreed at the hearing before Judge Wilson it was not an issue, and had been decided previously in favor of Takisha. Secondly, Takisha's argument will support the proposition that most, if not all of the cause for the shooting was job related, not personal. The employer/carrier cannot sustain its burden of totally excluding work related influences, since immediately after being fired, the shooter, Davis' actions turned hostile. The day he was fired, Takisha's car was keyed in the company parking lot. He addressed Takisha's husband claiming he and Takisha were having an affair. He made a threatening phone call to Takisha at work. There is testimony to reflect that Davis believed Takisha was involved in the firing process. Takisha had reported the keying of her car to her supervisor. When Davis took hostages in the company office, he included Mildred Mack, the supervisor who actually fired him. Were he only interested in shooting Takisha, he could have done so on several occasions during the eight days after he was fired and before the shooting. He did not do this. He waited until he could get Takisha and Mildred Mack together at the offices of the company. Under these circumstances, it cannot be said that a personal matter was the sole

and only cause of the shooting. The loss of his job was a major, if not the only precipitating factor that led to the shooting of Takisha Stephenson. The employer/carrier cannot meet its burden of excluding all relationships to the job environment.

The argument concerning permanent, total loss of wage earning capacity centers around Dr. Atkins and Dr. Hawkes, both neuropsychologists. Dr. Brophy, the neurosurgeon who saved Takisha's life, acknowledged from a neurological standpoint Takisha could return to work. He could not comment from a mental neuropsychological standpoint, and acknowledged he was not the proper person to do that. Dr. Atkins admitted his test results were not valid, claiming that Takisha failed to give full effort, however, he stepped aside to attack the testing procedures of Dr. Nan Hawkes who ran the necessary neuropsychological tests, found that they were valid and further found that Takisha had in fact a permanent, total loss of wage earning capacity. The credible evidence before the Court sustains a Full Commission decision, which should be affirmed by this Court. The claimant's argument is supported by the standard of review; substantial evidence, and doubts resolved in favor of compensability.

POINT I.

CLAIMANT, TAKISHA STEPHENSON, PROVED A COMPENSABLE INJURY WHEN SHOT AT HER PLACE OF EMPLOYMENT, EIGHT DAYS AFTER THE ASSAILANT/CO-EMPLOYEE WAS FIRED. THE ADMINISTRATIVE JUDGE SO FOUND AND THIS FINDING HAS BEEN PROPERLY AFFIRMED ON EACH STEP OF THE APPELLATE PROCESS

- A. Whether Takisha's injury is compensable is moot. That issue was decided without appeal and is not before the court.

On only one occasion was the compensability of the injury at issue; that was at the initial hearing before Administrative Judge Mark Henry on April 3, 2002. The administrative judge found for Takisha ordering that the injury was work related. Thereafter, the only issue addressed by the Workers' Compensation Commission on two appeals, the hearing examiner, Judge Cindy Wilson on remand, and the circuit court, was the extent of disability and whether Takisha was entitled to permanent total benefits. In all stages of the trial and appeal, compensability has remained in favor of Takisha. The Workers' Compensation Commission's order on the first appeal, the hearing examiner's order on remand, and the Workers' Compensation Commission's order on the second appeal, and most recently, the Circuit Court of Desoto County's order left the initial finding of compensability in tact. This was clearly proper, since a careful reading of the pleadings indicate that compensability was not an issue before Judge Cindy Wilson (Vol. 4 p. 345).

- B. Claimant, Takisha Stephenson, proved the assault was job related. The Full Commission responded to this proof and returned a proper decision.

When viewing the testimony of the various workers, as well as Takisha, her husband, Terry Stephenson, and her immediate supervisor, Mildred Mack, there is substantial proof to relate the assault by a recently fired employee to the job. Likewise, the employer/carrier, IMS, failed to prove that the assault was solely, totally and completely a personal vendetta. The

employer/carrier having pled personal vendetta is under a duty to prove it to the exclusion of work related conditions that contributed to the injury. The Supreme Court has stated:

It is well settled that where a claimant's employment contributes to his condition, the injury is compensable. *Sharpe v. Choctaw Electronic Enterprises*, 767 So.2d 1002 (2000) at page 1005; *Hedge v. Leggett & Platt, Inc.*, 641 So.2d 9, 14 (Miss. 1994) (citing *Jenkins v. Ogletree Farm Supply*, 291 So.2d 560, 563 (Miss. 1974)).

The employment need not be the sole source of the injury. The injury only need be partially work related. This arises from the Supreme Court's interpretation of Mississippi Code §71-3-7 (1972) wherein the Supreme Court stated in the case of *Sharpe v. Choctaw Electronics Enterprises*, 767 So.2d 1002 (2000) at page 1005, as follows:

The work connection test arises from Miss. Code Ann. § 71-3-7 (1972). The workers' Employment, however, 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.

The testimony reflects that there was no ill will between Reginald Davis, the ex-employee attacker and other members of the workforce at One Source, including Takisha, prior to his termination. The beginning point of this controversy starts the day he is fired. Several instances of his combative attitude was brought forward through various witnesses until the climax occurred in the office of the employer, IMS. This is easy to understand since he recently served twenty years in jail and was released only six months before he began work at One Source. Hostility obviously remained in his character flaws. He loses his job and seeks revenge. Several witnesses testified that the retaliation to both Mildred Mack and Takisha Stephenson was job related as a result of his recent termination. Case law requires that the workers' compensation provisions be literally construed in favor or benefits.

It is well established that the provisions of Mississippi's Workers' Compensation Statute are to be construed liberally in favor the claimant and in favor of paying benefits for a compensable injury. *Sharpe v. Choctaw Electronic Enterprises*, 767 So.2d 1002 (2000) at page 1006; *Emerson Elec. Co. v. McLarty*, 487 So.2d 228, 230 (Miss. 1986) (collecting citations).

This is not a doubtful case for compensation purposes, but even if it were, doubtful cases are resolved in favor of compensation. *Miller Transporters, Inc., v. Guthrie*, 554 So.2d 917 (1986), *Sharpe v. Choctaw Electronic Enterprises*, 767 So.2d 1002 (2000). With this understanding of the law, the administrative judges, the Full Commission and the circuit court have properly applied the law to the facts of the case subjudice.

All administrative judges, the Workers' Compensation Commission on two occasions, and the Circuit Court found compensability. This has been true since the first hearing and findings of fact. Administrative Judge Henry, after weighing all the facts, found "that Mrs. Stephenson sustained a work-related injury on June 28, 2000, and is entitled to temporary total disability benefits of \$224.39 a week from that date until Dr. Brophy released her to return to work on November 27, 2000. In addition, the Employer/Carrier is obligated to pay for Mrs. Stephenson's medical treatment." (Vol. 2. P. 139). Judge Henry made no findings of fact relative to additional benefits such as temporary total benefits after that hearing, but requested additional medical information and a neuropsychological evaluation to assist in making the decision relative to permanent total benefits (Vol. 2 p. 136). After receiving additional medical testimony an order was entered finding Takisha Stephenson entitled to permanent total disability benefits and future medical. Judge Henry issued his findings of fact relative to compensability which has not been contested. All other court tribunals have accepted, adopted and affirmed the findings of fact

on compensability. After the first hearing, compensability was not an issue then, and is not an issue now.

In Judge Henry's order of April 3, 2002, (Vol. 2, p. 135), he finds that Mrs. Stephenson was actually working or at least on the work site when Mr. Davis assaulted her. She thought she had been summonsed to the manager's office.

Judge Henry, in reviewing the Mississippi law regarding "personal vendetta exception", acknowledged that where this doctrine has been applied "there has been no doubt that a love triangle existed and that the love triangle clearly motivated the non-employee to commit the tort against the employee. Dicta in *Brookhaven Steam Laundry* 214 Miss. 569, 626, 59 So.2d 294 (1952). In Judge Henry's order he places little credibility in Mr. Davis' statements that he had an affair with Takisha, since he was a convicted rapist and armed robber. This testimony is contradicted by Mrs. Stephenson's flat denial that she had a romantic relationship with Mr. Davis. None of the other employees at One Source stated that Mr. Davis and Mrs. Stephenson were romantically involved (Vol. 2 p. 137). Finally Judge Henry reasoned that at best, it is doubtful as to whether an affair existed, thus the well-known rule requires that doubtful cases be resolved in favor of the claimant (Vol. 2 p. 139).

The brief of employer/carrier to the Workers' Compensation Commission dated June 26, 2006, states that the March 31, 2006, order of Judge Cindy Wilson should be affirmed. That order found compensability. This brief addresses only the medical issues of total impairment, contrasting the deposition testimony of Dr. Hawkes and Dr. Atkins. Nowhere in the brief is the issue of compensable injury addressed by the employer/carrier.

There is only one brief by the parties on the issue of compensability after Judge Henry's order of April 3, 2002. That is the claimant's brief to the Full Commission dated July 22, 2002, and the employer/carrier's brief to the Full Commission.

While holding employees hostage, Davis said there were only two people he wanted: Takisha Stephenson and Mildred Mack because he felt betrayed by both of them (Ex. Vol. 2 Ex. 3 p. 13) "I want Tisha because she f'd me. And I want you, Mildred . . . because you the one stuck the knife in my back". At no place in the record is it contended that Mildred Mack also had an affair with Davis, therefore, the only thing Mack and Stephenson had in common was that Davis thought he had been betrayed by them-meaning they had been part of the reason he was fired. (Ex. Vol. 2 Ex. 3 p. 13).

On the date of the shooting Davis said he wanted two people, Mildred Mack and Takisha Stephenson. Mildred Mack was involved in his termination. Had he wanted to kill Stephenson only, he could have shot Takisha at the bus station in Byhalia where he confronted her days prior to the assault.

The employer argues that Davis could have killed Mildred Mack earlier if he wanted to assault her while he had the others in the room (Appellant's brief p. 15). This is true, however, he wanted two people, Mildred Mack and Takisha because he thought both were involved in his firing.

It is a stretch to think that the day Davis got fired Takisha's car somehow happened to get keyed. The obvious conclusion is that Davis did it, mad because he had gotten fired and mad at Takisha because he thought she was involved. Appellant argues Davis and Stephenson were having an affair or a flirtatious relationship, and that Davis harassed, stalked and ultimately assaulted Stephenson for personal reasons unrelated to the employment. If so, why did these

actions occur only after he was fired? He never stalked, assaulted or harassed Takisha until after he was fired. It is more than coincidental that he began harassment the day he was fired. It is more than coincidental that her car was scratched or keyed the day he was fired. It is more than coincidental that he started harassing Takisha the day he was fired and eight days later killed her at work where he knew he could find Mildred Mack as well. Davis had other opportunities to kill Takisha between June 20 and June 28, but passed them by waiting until he could get Mildred Mack and Takisha together.

Under *Kerr-McGee Corporation v. Hutto*, 401 So.2d 1277 (Miss. 1981), a third person attack is compensable if claimant was responding to directions from her employer and was thus injured. In the case subjudice, Takisha was responding to her employer's direction as stated to her and known by her at the time she was shot. She was following the orders of her employer to come back to the office.

In fact, it is not necessary that the Kerr-McGee doctrine apply to the case subjudice, since the proof shows that Takisha was shot because she and Mildred Mack were blamed by Davis because Davis felt betrayed by them.

POINT II.

WHERE ONE NEUROPSYCHOLOGICAL TEST WAS INSUFFICIENT, THE ADMINISTRATIVE JUDGE AND FULL COMMISSION WAS JUSTIFIED IN RELYING ON THE COMPLETED PSYCHOLOGICAL EXAMINATION OF DR. NAN HAWKES, FINDING TAKISHA STEPHENSON TO HAVE A TOTAL PERMANENT LOSS OF WAGE EARNING CAPACITY

- A. The issue of total loss of wage earning capacity is addressed by two neuropsychologists, Dr. Keith Atkins who rendered an incomplete report, and Dr. Nan Hawkes who rendered a complete test result supporting total loss of wage earning capacity.

Takisha Stephenson, suffered a loss of wage earning capacity, as a result of the gunshot wound to the head which caused permanent brain damage. The claimant, Takisha Stephenson, contends she suffered a total loss of wage earning capacity, while the employer/carrier contends she suffered none.

Three medical experts testified. The first, Dr. John Brophy, neurosurgeon, who did repair work to save Takisha's life, testified from a neurosurgical standpoint. He testified that although claimant had permanent brain loss and damage, she was able to return to work. The second, Dr. Keith Atkins, was appointed by the Court to run an neuropsychological evaluation. Although his test results indicate a problem, he nevertheless discounted the results, stating that Takisha did not give full effort in taking the test. The third, Dr. Nan Hawkes provided a neuropsychological evaluation which indicated that Takisha had mental disorders as a result of the gunshot wound which left her with a total loss of wage earning capacity. Even though we have two sets of test results (Dr. Atkins and Dr. Hawkes) that indicate Takisha is mentally impaired, Dr. Atkins states that both his test results and Dr. Hawkes' test results are not reliable and should be disregarded. Dr. Hawkes testified that her test results are valid and Dr. Atkins' test results appear to be valid as well. The lay testimony indicates a change in Takisha's personality as well as her mental

function and ability, both to perform the type of work she was doing when she was shot, as well as her ability to perform routine daily activities. No neuropsychological evaluation indicates that Takisha is not mentally impaired.

Takisha has proven her case through the testimony of Dr. Hawkes, the lay witnesses, and her own testimony. The decision of the Full Commission should be affirmed and Takisha Stephenson should be found to suffer permanent, total loss of wage earning capacity. An order to that effect should be entered, and this case affirmed.

UNCONTESTED FACTS

The following are uncontradicted facts:

1. While on the premises of One Source working as a quality control supervisor on an assembly line, Takisha was shot in the head with a bullet traveling through the base of the occupational lobe of her brain fracturing the transverse temporal lobe and lodging in the base of her mouth ((Ex. Vol.1, Ex.1, p. 11)(Ex. Vol.2, Ex.5, p.8)).
2. A portion of Takisha's brain is permanently destroyed by the destructive forces of the velocity of the bullet (Ex.Vol.2, Ex.5, p. 16).
3. Takisha suffered from part of her brain dying as a result of the gunshot wound (Ex.Vol.1, Ex.3, p. 184).
4. Dr. Hawkes has stated that upon doing twenty (20) tests on Takisha over a two day period, she is not competent to be employed due to her memory problems as well as other cognitive deficits (Ex. Vol.1, Ex.1, Ex.2).

5. Dr. Atkins cannot form an opinion as to whether Takisha can return to work due to the fact that he does not know her true deficits and cognitive functioning (Ex. Vol.1, Ex.3, p.148).
6. Dr. Atkins believes something is truly wrong with Takisha (id. p.152).
7. Due to the fact that Dr. Atkins cannot form an opinion as to Takisha's ability to work, Dr. Hawkes' finding that Takisha is totally permanently impaired with the inability to be gainfully employed is the only valid medical testimony in this case.
8. The effects of the bullet have caused Takisha to have a "blunted effect", monotone speech, problems with her hearing and pain in her neck and shoulder. Takisha still has many of these problems today and is often confused and cannot find the proper words to express herself. She has not returned to work since the shooting as she is justifiably afraid to do so.

PROCEDURAL HISTORY OF THE MEDICAL PROOF

This case was originally heard before Honorable Mark Henry on December 19, 2001. At that time, Judge Henry found that the gunshot wound that Takisha suffered was a work-related injury and ordered the employer/carrier to pay temporary total disability benefits from June 28, 2000 through November 27, 2000. Due to the severity of the injury, Judge Henry further ordered that Takisha undergo a neuropsychological evaluation by Dr. Keith Atkins in order to determine whether she is entitled to any further benefits (Vol.2, p. 138). Per the request of Judge Henry, Dr. Atkins was instructed to include in his report the following (id. p.140);

- a. the nature and extent of the claimant's injury, if any, resulting from the work injury;

- b. whether the claimant has reached maximum medical improvement and, if so, the permanent impairment rating, if any, resulting from the injury;
- c. whether the claimant suffers from any restrictions, limitations, or other inability to perform work activities as a result of the injury, and;
- d. the recommended course of treatment, if any, required by the nature of the injury and the claimant's recovery therefrom.

B. Comparison of the doctors evaluations

1. Dr. Keith Atkins neuropsychological evaluation is inconclusive

Pursuant to the Order issued by Judge Henry, Takisha was seen by Dr. Keith Atkins on June 5, 2002, and June 19, 2002, in order to undergo a neuropsychological evaluation. After the testing, Dr. Atkins responded to each request of Judge Henry as follows (Ex. Vol.1, Ex.3, Ex.2):

- a. I cannot determine the extent, if any, of injury related to her gunshot wound because of her poor effort and symptom exaggeration;
- b. Since I do not have any way of determining if she had any actual residual deficits, I cannot opine as to whether or not she has reached maximum medical improvement from a neuropsychological standpoint;
- c. Similarly, I am unable to comment on whether she has any restrictions or limitations to perform work-related activities;
- d. Due to her poor effort and symptom exaggeration, I do not know if there is anything actually wrong with her, neuropsychologically, requiring treatment.

Due to the fact that Dr. Atkins' test results were invalid and inconclusive, this Honorable Court ordered Takisha to undergo an additional neuropsychological examination by Dr. Atkins. In an effort to fully comply with the Order and seek answers to her problems, Takisha agreed to undergo additional testing by Dr. Atkins. Dr. Atkins, however, declined to perform the neuropsychological examination as ordered by the Court.

2. Dr. Nan Hawkes neuropsychological evaluation demonstrates a total loss of wage earning capacity

Due to the fact that Dr. Atkins refused to re-evaluate Takisha, and in an effort to comply with the order of the Court, Takisha underwent a neuropsychological evaluation by Dr. Nan Hawkes on January 13 and 14, 2003. This evaluation consisted of twenty tests (20). These tests constituted normal, recognized procedures in making a neuropsychological evaluation (Ex. Vol.1, Ex.1, p. 6). In responding to the question of whether these tests are accepted in this field as being routine, normal, standard and accepted, Dr. Hawkes responded:

Some doctors use a few different tests than others. There are some selections within the field, but they're all accepted as standard testing. (id. p. 6)

Upon evaluation, Dr. Hawkes concluded that Takisha gave good effort on testing procedures, performing at a level consistent with well-motivated controls and well-motivated individuals with verified brain damage (id. Ex. 10). Dr. Hawkes based these finding on Takisha's performance on the word memory test (WMT) and computerized assessment of response bias (CARB) (id. p. 10).

In responding to the question of why Takisha failed the test administered by Dr. Atkins, she responded:

I have every reason to believe that Takisha failed the test administered by Dr. Atkins. She could fail them for a number of reasons. For somebody who fails them, it means they're faking. But if they fail them once and pass them another time, it could be discomfort with the examiner or nervousness. (id. p. 37)

Due to the fact that Takisha gave good effort during the testing, Dr. Hawkes was able to reach the following conclusion regarding Takisha. She is estimated to have functioned in the low range of intelligence premorbidly. It is noteworthy that on both test of validity and motivation, she gave a good effort, performing at a level consistent with well motivated normal controls and well motivated persons with brain injuries. Deficits of Takisha include constructional dyspraxia of complex figures, slowing in visual tracking and search skills, impaired recent visual-spatial memory, problems dealing with visual-spatial interference in the environment, poor hypothesis testing, problems with abstract pattern perception, left upper extremity motor slowing, impaired attention and concentration, poor perceptual problem solving and visual motor slowing. Working memory was mentally deficient as well as her visual delayed recall, immediate memory and auditory immediate memory (id. p. 24-26).

In making a final conclusion , Dr. Hawkes states:

This patient is not competent to be employed due to her memory problems as well as other cognitive deficits. (id. p. 28)

During Dr. Hawkes' deposition on February 17, 2005, she went into great detail concerning the reasons why Takisha is not competent to be employed. The first area addressed by Dr. Hawkes was Takisha's working memory. An example of how this is used in everyday life

is a person's ability to be shown a shape and then that person being able to draw that shape. Dr. Hawkes found Takisha's working memory to be mentally deficient (id. p. 17). The next area Dr. Hawkes addressed was Takisha's auditory immediate and visual delayed memory. A real world example of this would be an individual's ability to remember to take their medication and where the medication is located. Takisha was seriously impaired in these categories (id. p. 18).

In order to test Takisha's visual-spatial functions, Dr. Hawkes showed her a shape and Takisha took as long as she wanted to copy it (id. p. 20). After 30-40 minutes, Takisha was asked to draw the shape that she was originally shown. Takisha performed very poorly on this test (id. p. 20).

As you will note from Dr. Hawkes' deposition, (id. p. 20-24). Takisha continued to show impairment throughout the battery of tests administered. Of key importance is that Takisha simply cannot understand or process information. For example, if a child was getting near a knife, Takisha would not be able to understand the situation due to the fact it deals with shapes and is not verbal (id. p. 21).

Dr. Hawkes' test revealed that Takisha is impaired in many areas due to the damage to her brain. However, of great importance in the ability to work, is the fact that Takisha simply cannot reason well or figure things out (id. p. 22). For example, if an individual needed to go to the grocery store and Wal-Mart and the grocery store is closer, you would want to go to the grocery store first. Due to the injury, Takisha would not be able to understand the reasoning of going to the grocery store before going to Wal-Mart.

In conclusion, Dr. Hawkes stated that due to her memory problems as well as other cognitive problems, Takisha is not competent to be employed (id. p. 28).

3. Dr. Keith Atkins maintains Takisha failed to try, while criticizing Dr. Hawkes' tests

As previously mentioned, Dr. Atkins evaluated Takisha on June 5, 2002, and June 19, 2002, at which time he was unable to determine (1) the extent of the injury related to the gunshot, (2) maximum medical improvement from a neuropsychological standpoint, (3) her restrictions regarding work-related activities and (4) what if anything was wrong with her (Ex. Vol.1, Ex.2, p. 2-6). Dr. Atkins came to these conclusions because he believed Takisha was not putting forth the necessary effort during the testing.

Dr. Atkins addressed the above mentioned issues as follows:

- a. While both test results show exaggeration, they do not rule out the possibility that something is wrong with Takisha (Ex. Vol. 1, Ex. 3, p. 142);
- b. Dr. Atkins cannot say what is exactly wrong with Takisha and how bad she really is or in what areas she may be having difficulty (id. p. 142);
- c. Dr. Atkins cannot form an opinion as to whether Takisha can return to work due to the fact that he does not know her true deficits and cognitive functioning (id. p. 148);
- d. While both sets of tests represent poor and inadequate effort, they do not rule out the possibility that Takisha has some cognitive or psychological problems (id. p. 149);
- e. There is a real possibility that Takisha is suffering from Post-traumatic Stress Disorder (id. p. 165);

- f. There is something that could be keeping Takisha from working (id. p. 169);
- g. While Dr. Atkins puts no validity in the test scores from the tests he administered, he admits the majority were in the impaired range (id. p.183);
- h. Takisha suffered from part of her brain dying as a result of the gunshot wound (id. p.184).

Nevertheless, Dr. Atkins still cannot make a determination as to the extent of Takisha's injuries or her ability to work. However, as he stated:

I think for all intents and purposes there's probably something wrong with this woman. You know, I would not be surprised at all for anybody who has had this same kind of injury to have trouble with visual spatial processing or maybe even visual learning and memory. (id. p. 152)

- 4. These are the same areas where Dr. Hawkes found impairment

Dr. Hawkes has testified that she performed a neuropsychological evaluation which resulted in valid test results indicating that Takisha is not competent to be employed (Ex. Vol.1, Ex.1, p. 28). Dr. Atkins performed a neuropsychological evaluation, that in his opinion resulted in invalid test results (Ex. Vol.1, Ex.3, Ex.2). However, while indicating that the test results were invalid, Dr. Atkins nevertheless believes that there is something wrong with Takisha and she could be having trouble with visual spatial processing or visual learning and memory (id. p.152).

As indicated, the areas Dr. Atkins believes may be causing Takisha problems, visual spatial processing and visual learning and memory, are the exact areas that Dr. Hawkes' test indicated prevented Takisha from working. Based on Dr. Hawkes' test, Takisha did very poor on

the visual-spatial functions test (Ex. Vol.1, Ex.1, p. 20), tests concerning visual-spatial tracking (id. p. 20) and visual spatial interference (id. p.20).

In conclusion, the only valid test results are from Dr. Hawkes indicating that Takisha is not competent to be employed. While Dr. Atkins may not agree with Dr. Hawkes' findings, he cannot give an opinion as to whether Takisha can work. Thus, Dr. Hawkes' finding that Takisha is not competent to be employed due to her memory problems, as well as other cognitive deficits, is the only valid opinion concerning Takisha's medical condition that can be offered to this Court.

5. The only valid neuropsychological evaluation supports a finding of permanent total impairment

In order to fulfill the court order seeking an evaluation first by Dr. Keith Atkins, which was reported by him to be unreliable, counsel for the claimant sought and obtained a neuropsychological examination from Dr. Nan Hawkes, a clinical neuropsychologist (id. p. 4). She described her speciality as the study of brain behavior relationships for people with cognitive problems or memory problems or thinking problems. The cognitive problems include problems with memory, reasoning, abstract reason and figuring out things (id. p. 4). She obtained a major from Vanderbilt University in psychology, a masters from Marquette University, and a PhD in clinical psychology from University of Tennessee in Knoxville (id. p. 5).

In performing the neuropsychological evaluation, Dr. Hawkes used the normal recognized procedures within her field of expertise. She explained that some doctors used a few different tests than others, but they are all accepted as standard testing (id. p. 6). When questioned about prior work in the legal field, it became clear that she typically does it more for the defense, in performing evaluations.

The evaluation of Takisha took two full days. Dr. Atkins administered twenty tests of Takisha, personally. Two tests, the word memory test and the computerized assessment of response bias, were run to determine whether Takisha was exaggerating, malingering, or faking. The results of these tests indicated she was not (id. p. 10).

Dr. Hawkes reviewed the medical records of Dr. John Brophy, although recognizing him to be a neurosurgeon, or specialist in the field separate from her specialty. Dr. Brophy did not run a neuropsychological evaluation although, if a full expiration of Takisha's problems were to be assessed, he agreed a neuropsychological test should in fact be run.

In determining how a person is functioning mentally after an injury, you must know the functioning capacity before the injury. Dr. Hawkes obtained this information, including the fact that Takisha was retained or failed the fourth, fifth and seventh grades. She did not graduate. She was in special education classes in the seventh and eighth grades (id. p 14). With this information, and after performing what Dr. Hawkes considers to be an extensive and thorough evaluation, Dr. Hawkes found Takisha to be deficient in the following areas: (1) working memory for immediate material (id. p. 17); (2) visual-spatial tracking (id. p. 20); (3) visual-spatial interference in the environment (id. p. 20); (4) visual-spatial information (id. p. 21); and (5) hypothesis testing (the ability to figure things out) (id. p. 21). It is important to recognize these are some of the same areas about which Dr. Atkins expressed concern. These deficiencies are consistent with brain injury (id. p. 24). In conclusion, Dr. Hawkes stated:

Her deficits or problems were suggestive of a moderate brain damage, moderate cognitive problems consistent with head injury; not mild, but moderate; not severe, but moderate.

In addition, Takisha was found to have a depressive disorder (id. p. 28). Dr. Hawkes then reasoned, when these test results and findings, are translated to the work force, Takisha is not

competent to be employed.

The employer/carrier counters this professional evaluation and opinion with the testimony of Dr. Atkins who simply challenges the testing procedure employed by Dr. Hawkes. Dr. Atkins refused to perform a second evaluation of Takisha, as requested or ordered by the Commission. Dr. Atkins doubted that he could establish a relationship with Takisha sufficient to obtain meaningful results. Since there is no other neuropsychological evaluation before the Court, the employer/carrier must carry the day in proving Dr. Hawkes' test results carry no weight, and ought to be disregarded. Although challenged, Dr. Hawkes' evaluation is unrefuted. There is no neuropsychological test result before the Court indicating that Takisha is employable. On balance, and with the interpretation of the Workers' Compensation statutes, Takisha has successfully brought forth credible medical proof that she is totally, permanently disabled as a result of the catastrophic gunshot wound to her head resulting in permanent damage to the brain. She should be compensated accordingly.

C. Lay witness testimony supports a total loss of earning capacity.

1. Takisha's trial testimony indicates her mental incapacity

It was clear from Takisha's testimony at trial that she is mentally deficient. Each response to the question presented took a substantial amount of time to answer, if she could even understand what was being asked. Based simply on her demeanor in the courtroom and the way she responded to questions, it was obvious that Takisha is suffering from extensive brain damage.

Takisha has a very limited education. In fact, she was unable to graduate from high school (Vol.6, p. 128). Simply put, Takisha does not understand what is going on. She had very limited mental ability before the shooting, and what ability she did have, has been greatly

impaired by a bullet to the brain. All Takisha knows is what she said on the stand: her head hurts; she has problems with her back and shoulders; her ability to turn is impaired; she has hearing problems; she walks slow; does not like to be around people; remains depressed; and is in a confused state of mind (Vol. 6, p. 131-132).

Upon being asked why she has not returned to work, Takisha responded, "Because I'm afraid to go to the factory" (Vol.6, p. 133). Due to her limited ability to reason, Takisha truly believes she will be shot again if she returns to work. There is no doubt Takisha wants to work, after all she testified that her family is currently relying on her mother to provide financial support due to the loss of income arising from her inability to work (Vol. 6, p. 135).

Takisha's fear of returning to work is also supported by the statement from Dr. Hawkes indicating, "on occasion Takisha hears her name being called and sees the shooter" (Ex. Vol.1, Ex.1, p.13).

2. Takisha cannot perform daily activities

Similar to Takisha, Terry Stephenson, her husband, has limited mental ability as was indicated by his lack of responsiveness to the questions presented to him at trial. However, when asked in simple terms of how sharp your wife is, Terry responded, "she ain't sharp as she was" (Vol.6, p. 148).

Mr. Stephenson's testimony also supported Takisha's contention that she is afraid to return to work for fear of being shot. Terry indicated that while Takisha desires to return to work, her mental capacity simply will not allow it (Vol.7, p. 160).

Perhaps the most insight into Takisha's life was provided to us through the testimony of her mother, Susie Maxwell. Ms. Maxwell described Takisha before the shooting as active, happy, hanging out with friends and overall having a good relationship with people (Vol.7, p.

168). Since the shooting, Takisha likes to stay inside and not get around people. In describing Takisha's mental condition, Ms. Maxwell indicated that it takes her a long time to figure things out, she has lost her quickness, she gets confused and has to ask questions (Vol.7, p. 169).

As indicated by her testimony, Ms. Maxwell does fast paced factory work similar to the type of work Takisha did before the shooting (Vol 7, p. 170). Ms. Maxwell stated that Takisha would not be able to do this type of work because she could not keep up with the fast pace, has trouble turning, and using her body to lift objects. Equally important, Ms. Maxwell testified that this is the type of work Takisha has experience performing (Vol. 7, p. 170).

When asked to sum up how the shooting has changed Takisha's life, Ms. Maxwell responded:

It changed her life from me being her mother. I can't understand how she so to herself all the time. She don't do entertainment stuff like she used to. She just a different person. She just not the same Takisha that was born. She not a totally different person, but she's not the same Takisha as to the things she used to do and could do and I just don't want to pressure her too hard in asking her what's the problem all the time because she just and cry and get emotional. All the time I know what it is, she just can't do the things that she used to could do when she was working. (Vol.7, p. 171).

3. The visual perceptual problem renders Takisha unemployable

Encephalomalacia is an area of destroyed brain (Ex. Vol.2, Ex.5, p.16). When asked if the damaged portion of Takisha's brain will regenerate or is it permanently gone, Dr. Brophy responded:

A portion of the brain is permanently destroyed by the destructive forces of the velocity of the bullet. A portion of the brain around the destroyed area had the potential to recover. (id. p. 16).

Dr. Atkins also acknowledged that the part of Takisha's brain that has died might impact her ability to return to work. As previously stated:

I don't see any problems preventing her from performing the types of jobs she was doing before. But maybe there's something visual or visual perceptual problem, you know, from the right occipital damage and encephalomalacia that might impact her ability to do these sort of jobs that I just can't comment on because I don't know if there's a problem there or not (Ex. Vol.1, Ex.3, p. 149-150).

Dr. Brophy and Dr. Atkins believe unequivocally that Takisha, after being shot in the head and near death, is able to return to work. However, a careful examination of all the evidence presented and the findings of the aforementioned doctors, as well as Dr. Nan Hawkes, offers an explanation as to why Takisha Stevenson is impaired to the point of being unable to return to work.

a. Dr. Brophy

Dr. Brophy has acknowledged that part of Takisha's brain is permanently dead, and while he released her to return to work from a neurosurgical standpoint, he is not qualified to provide an opinion on Takisha regarding neuropsychological functioning.

b. Dr. Atkins

Dr. Atkins believes Takisha may be suffering from a visual or visual perceptual problem that might impact her ability to do the type of jobs she previously did before the shooting.

c. Dr. Nan Hawkes

As indicated, the areas Dr. Atkins believes may be causing Takisha's problems, visual spatial processing and visual learning and memory, are the exact areas that Dr. Hawkes' tests indicated conclusively prevent Takisha from working. Based on Dr. Hawkes' tests, Takisha

did very poorly on the visual-spatial functions test, along with tests concerning visual-spatial tracking and visual spatial interference (Ex. Vol.1, Ex.1, p. 20).

CONCLUSION

Although IMS contends that the issue of compensability is before the Court, this issue was resolved in favor of Takisha at the first hearing before Administrative Judge Henry. At the second hearing before Administrative Judge Wilson, IMS agreed compensability was not an issue. Nevertheless, in an abundance of caution, Takisha has shown through the proof and the applicable law that this shooting was related to job relationships. IMS failed to prove that this shooting was totally a personal vendetta.

The Court has before it the question of whether Takisha Stephenson received a permanent injury, and resulting loss of wage earning capacity, caused by the gunshot wound to her head, destroying portions of her brain. The only credible psychological evaluation before the Court is that of Dr. Nan Hawkes. Although the employer/carrier takes issue with the manner in which the neuropsychological evaluation was conducted, the employer/carrier nevertheless, brings forth no counter psychological evaluation indicating that Takisha is employable.

In requesting that Dr. Keith Atkins reevaluate Takisha, the Court was seeking a medical opinion for purposes of rendering its decision. This opinion, as a result of test results was not forthcoming, inasmuch as Dr. Atkins did not perform a second evaluation. Be that as it may, the claimant, through counsel, sought a psychological evaluation from Dr. Nan Hawkes in an effort to assist the Court in this decision. This psychological evaluation provides an opinion of total permanent loss of wage earning capacity. The lay testimony likewise supports this opinion.

The claimant has proved her case through medical and lay testimony. A decision should be rendered in her favor.

Respectfully submitted, this the 14th day of July, 2009.

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CERTIFICATE OF SERVICE

I, Briggs Smith, one of the attorneys the Appellee, do hereby certify that I have this day mailed, postage prepaid by United States mail, a true and correct copy of the above and foregoing to:

Hon. Hall Bailey
Watkins, Ludlam, Winter & Stennis
P.O. Box 427
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Hon. Robert Chamberlin, Jr.
Desoto County Circuit Court Judge
P.O. Box 280
Hernando, MS 38632

This the 14th day of July, 2009.



BRIGGS SMITH, #7481