

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/APELLEE

Appeal From The Mississippi Workers Compensation Commission

REPLY BRIEF OF APPELLANTS

Oral Argument Requested

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TABLE OF CONTENTS

	<u>Page #</u>
TABLE OF AUTHORITIES	iii
I. ARGUMENT AND AUTHORITIES	1
A. Stephenson's injuries from shooting incident were not incurred within course and scope of employment with ISM	1
1. Compensability Issue Properly Before This Court	1
2. Compensability Ruling by Commission, Which Affirmed Administrative Judge's Order Dated September 17, 2002, Was Not Supported By Substantial Evidence.....	5
3. Kerr McGee Decision Not Applicable To This Case	11
B. The MWCC findings concerning the nature and extent of Stephenson's permanent disability attributable to her gunshot wound are not supported by substantial evidence and are based upon an erroneous application of law	12
CONCLUSION.....	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page No.</u>
<i>Bullock v. AIU Insurance Co.</i> , 995 So.2d 717 (Miss. 2008).....	2, 3, 4
<i>Flexible Flyer, Inc. v. Harris</i> , 755 So. 2d 50, 51-2 (Miss. Ct. App. 2000)	2
<i>Brookhaven Steam Laundry v. Watts</i> , 214 Miss. 569, 600, 55 So. 2d 381, 391 (1951).....	6, 10
<i>Green v. Glen Oaks Nursing Center</i> , 722 So. 2d 147 (Miss. Ct. 1999)	6
<i>Hardaway Co. v. Bradley</i> , 887 So. 2d 793, 795 (Miss. 2004).....	10
<i>Hawkins v. Treasure Bay Hotel & Casino</i> , 2001 WL 1407211.....	5
<i>John Hancock Trucking Co. v. Walker</i> , 243 Miss. 487, 494 138 So. 2d 478, 480 (1962).....	6
<i>Kerr-McGee v. Hutto</i> , 403 So. 2d 1277, 1281 (Miss. 1981).....	11
<i>Miller v. McRae's</i> , 444 So. 2d 368, 371 (Miss. 1984).....	5
<i>Smith v. Commercial Trucking Co.</i> , 742 So. 2d 1082, 1085-1087 (Miss. 1999).....	12, 13, 14, 15
 <u>Statutes:</u>	
Miss. Code Ann. § 71-3-3(b) (Supp. 1981)	5
Miss. Code Ann. § 71-3-7 (1972).....	5
 <u>Other:</u>	
John R. Bradley & Linda A. Thompson, <i>Mississippi Workers' Compensation</i> , 8:8 (Thomson/West 2007)	3

ARGUMENT

There are two issues before this Court. The first involves whether the shooting incident that gives rise to this claim is compensable. The second issue is dependant upon the first issue being decided in favor of the Claimant/Appellee Takisha Stephenson. The basics of the Appellants arguments with regard to these two issues are covered within the Employer and Carrier/Appellants' Brief, previously filed with this Court. Through this Reply Brief, the Appellants, International Staff Management and Legion Insurance Company (hereinafter collectively referred to as "ISM"), in this appeal, will address particular issues raised by Stephenson within her Response Brief.

A. STEPHENSON'S INJURIES FROM SHOOTING INCIDENT WERE NOT INCURRED WITHIN COURSE AND SCOPE OF EMPLOYMENT WITH ISM

1. Compensability Issue Properly Before This Court

Takisha Stephenson was shot by a former employee of ISM at the work facility, shortly after she had finished her work day and clocked out at the facility. Before addressing the merits of the compensability claim, ISM will first address an argument that Stephenson presents on various occasions within her Response Brief, that being the argument that the compensability issue is not properly before this Court. Stephenson notes within the Statement of Issues that ISM did not mention the compensability issue as one before the Commission when the hearing was held before Administrative Judge Wilson when dealing with the issue of disability. Stephenson even goes so far as to state that ISM admitted the compensability of the incident, Later, within the Summary of the Argument portion of her brief, she notes that there is a question as to whether compensability is in fact an issue before this Court since ISM "agreed at the hearing before Judge Wilson it was not an issue, and had been decided previously in favor [of Stephenson]." Brief of Appellee, p. 7.

In addressing this subtle argument, one that is not broken out by Stephenson and for which she offers no legal authorities, ISM would direct this Court to review the Timeline set forth on pages 1 and 2 of the Appellants' Brief, which noted that when compensability of this claim was challenged by ISM at the beginning of the case, the Commission heard that issue first since there was no need to litigate the disability issue if claim was not compensable. After the Administrative Judge ruled that claim was compensable within order dated April 3, 2002, ISM appealed the ruling to the Full Commission. The Administrative Judge's ruling of compensability was affirmed on September 17, 2002 and the matter was remanded back to the Administrative Judge for a hearing on the disability issue¹. Within the Order, the Commission stated as follows: ISM paid benefits consistent with the Commission's ruling and went back before the Administrative Judge to litigate the disability issue.

Stephenson silently argues that by doing so, ISM has waived its right to contest the compensability issue on appeal. Presumably, Stephenson would argue that ISM was required to appeal the compensability issue in August, 2002 or waive it. This position has no legal support, which is probably why Stephenson chose not to cite any authorities for the proposition and to soft pedal the argument through passing comments within her brief. This Court has previously held that for an order from the Mississippi Workers' Compensation Commission to be appealable, it must be final. *Flexible Flyer, Inc. v. Harris*, 755 So. 2d 50, 51-2 (Miss. Ct. App. 2000). Most recently, the Mississippi Supreme Court addressed the issue in *Bullock v. AIU Insurance Co.*, 995 So.2d 717 (Miss. 2008), reaffirming the general rule that

administrative orders that determine liability but do not decide damages are not considered final for the purpose of judicial review. [citations omitted]. In determining the finality of

¹ Specifically, the Commission Order dated September 7, 2002 stated that "[t]he case is remanded to the administrative judge for further proceedings consistent with his order of April 3, 2002."

administrative decisionmaking for the purposes of judicial review, "the relevant considerations . . . are whether the process of administration decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." [citations omitted].

995 So.2d at 722.

Within the *Bullock* decision, the Mississippi Supreme Court cited with approval the following passage from the recently published treatise on Mississippi Workers' Compensation law by Professor John R. Bradley and Administrative Judge Linda Thompson, two noted experts in that field:

In the administration of workers' compensation claims, disputes arise at different stages of the administration process and parties resort to the quasi-judicial functions of the commission at different times. [For example,] [t]here may be a hearing on the compensability of a claim Piecemeal appeals, if granted routinely, could become a strategic ploy for employers to starve out impecunious workers.

John R. Bradley & Linda A. Thompson, *Mississippi Workers' Compensation*, 8:8 (Thomson/West 2007).

These legal authorities clearly support ISM's position in proceeding forward with their active defense of the disability portion of the claim while awaiting their opportunity to appeal the compensability order handed down by the Commission on September 17, 2002. Moreover, Stephenson's repeated references to ISM's position statement made to Administrative Judge Wilson prior to the last disability hearing held in this matter provides no smoking gun in support of a waiver argument. Prior to the hearing of that matter, Judge Wilson was clarifying the issues before her on that date and she stated as follows: "There is only one issue for consideration today, which is, the existence and extent of permanent disability attributable to the work-related injury." V.6, p.126. Within the March 31, 2006 order handed down by Administrative Judge

Wilson, which found that Stephenson “reached maximum medical improvement on November 27, 2000 [and had] no permanent impairment or loss of wage earning capacity as a result of her work injury,” she again stated that “the sole issue for decision by this Administrative Judge is the existence and extent of permanent disability attributable to the injury.” V.4, p.345, 352. This statement by the Administrative Judge does not represent a waiver by ISM of appealing the Commission’s September 17, 2002 ruling on compensability. It simply represents a statement that that issue has been resolved for purposes of the claim’s status before the Commission and the Administrative Judge was hearing the disability issue consistent with remand directions set forth within the Commission’s order dated September 17, 2002. ISM properly included its right to challenge the September 17, 2002 order when it filed its Notice of Appeal to the Circuit Court of Desoto County, Mississippi².

Accordingly, the issue of compensability is properly before this Court for review. If Stephenson’s argument holds true, then every decision on compensability would have to be appealed via interlocutory appeal before the parties could safely proceed with a hearing on the disability issue. This not only defies legal precedent³, but would unnecessarily delay administration of workers’ compensation claims and consequently put an undue burden on injured employees.

² Within the Notice of Appeal, ISM stated that it was appealing from “any and all orders antecedent and ancillary thereto, including any and all underlying orders, decisions, rulings and opinions entered by the Mississippi Workers Compensation Commission and/or its administrative judges, that are related to and/or upon which said Order is based.” V.4, p.394. This would obviously include the Commission’s previous order of September 17, 2002.

³ See *Bullock v. AIU Insurance Co.*, 995 So.2d 717, 722 (Miss. 2008)(citing numerous legal authorities in support of general rule that administrative orders that decide liability issues but leave damage issue open are not considered final for purposes of judicial review).

2. Compensability Ruling by Commission, Which Affirmed Administrative Judge's Order Dated September 17, 2002, Was Not Supported By Substantial Evidence

Stephenson's brief is insightful if you look for her argument as to why the Commission decision is based upon substantial evidence and should be affirmed. When you cut through her argument, all she can offer of substance is a reference to the calendar, arguing that the shooting had to be job-related since there was no evidence of any hostility between Reginald Davis and Stephenson before the date he was terminated. Accordingly, Stephenson then argues that since ISM has not proved otherwise, the claim is compensable. Unfortunately for ISM, the Commission agreed with this argument despite the fact that Stephenson was the one who had the burden of proof to prove that the shooting was work related. However, because the Commission's decision is based upon a supposition as to Davis' motive for the shooting and not upon substantial evidence, this Court should reverse the decision finding this claim compensable.

Before addressing Stephenson's argument as to the compensability issue, it is first worth revisiting the applicable law regarding when a third party assault is compensable, something not found within Stephenson's brief. As previously noted by this Court:

An employee is entitled to workers' compensation benefits for injuries "arising out of and in the course of employment." Miss. Code Ann. § 71-3-7 (Rev. 2000). Compensable injuries include "an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job" Miss. Code Ann. § 71-3-3 (b) (Rev. 2000). The term "third person" has been interpreted to signify wither a stranger to the employer-employee relationship or a co-employee acting outside the scope and course of his employment. *Miller v. McRae's*, 444 So. 2d 368, 371 (Miss. 1984). This Court has held that an intentional assault by a co-worker is an act committed outside the scope and course of employment. *Hawkins v. Treasure Bay Hotel & Casino*, 813 So. 2d 757, 759 (¶8) (Miss. Ct. App. 2001). Therefore, Allen's assault upon Jackson constituted a "willful act of a third person."

An employee's injury caused by the willful act of a third person arises out of the employment and is compensable only if the willful act was "directed against [the] employee because of his employment." *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 634, 59 So. 2d 294, 299 (1952). This requirement is met if there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Green v. Glen Oaks Nursing Ctr.*, 722 So. 2d 147, 149 (¶10) (Miss. Ct. App. 1998). It has been stated that "the focus in such a situation should be on whether the injury resulted from 'a risk created by employment conditions.'" *Hawkins*, 813 So. 2d at 759 (¶9) (quoting *Green*, 722 So. 2d at 149 (¶11)).

Accordingly, for the purposes of workers' compensation, an assault upon an employee by a third person is work-connected if it "grows out of a quarrel whose subject matter is related to the work," such as an argument over the possession of tools used in the work or over the performance of the work. *John Hancock Trucking Co. v. Walker*, 243 Miss. 487, 494, 138 So. 2d 478, 480 (1962).

Sanderson Farms v. Jackson, 911 So.2d 985, 989 (Miss. App. Ct. 2005).

Claims arising out of instances where the third party assault is due to a purely personal vendetta or disagreement do not arise out of employment and are not compensable. Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 891 (Miss. 1980). As this Court restated the rule in *Hawkins*: "If an intentional tort is committed as the result of a personal disagreement not arising from the workplace, there is no causal connection between the employment and the injuries." *Hawkins*, 813 So. 2d at 761.

In the instant case, Stephenson was shot by Reginald Davis, a former ISM employee who had been terminated 8 days before the shooting. It is significant to note that Stephenson was not in a position of authority to have had Davis terminated⁴. Nor does Stephenson offer any proof,

⁴ Davis was terminated by his supervisor Mildred Mack on June 20, 2000 following an altercation between Davis and Mack about Davis leaving his work station on the assembly line. (V.2,p.108). Stephenson was not involved in the altercation between Mack and Davis which led to Davis' termination. (V.2,p.113). When Mack reported the altercation incident to her supervisor, Shawn Mullulay, Davis interjected into the conversation and began cursing Mullulay as well. He was terminated at that time. Stephenson did not sign Davis's termination papers. (V.2,p.113). Stephenson did not report Davis's absence from the work station to Mildred Mack.

claim, theory or supposition as to how she was involved in having Davis terminated, information that you can rest assured would be before this Court if it was available since Stephenson has every motivation to do so here. Instead, all we have is the theoretical argument that the shooting must have been related to Davis' termination because "[t]he loss of [Davis'] job was a major, if not the only precipitating factor that led to the shooting of Takisha Stephenson" and that ISM "cannot meet its burden of excluding all relationships to the job environment." Brief of Appellee, p. 8. If Davis wanted to physically harm someone because he was fired, one would think he would want to find the person responsible for his termination. Instead, he didn't attempt to harm Mildred Mack, the one person who he identified as being the party responsible for his getting fired.

The closest we come to getting a confession from Davis as to his motive was a statement he uttered while holding several former co-workers hostage while he was trying to have Terry Crane lure Stephenson into the room for him. At that time, Davis stated: "I want Kisha [Stephenson], because she f***ed me, and I want you Mildred [Mack]—because you the one that stuck a knife in my back." (V.2, p.121). Although the Administrative Law Judge determined that Davis' stated motivations for the attack "resembled a riddle more than a revelation," these statements indicate that Davis recognized different reasons for his resentments against these individuals. Mack's transgression, obviously, was Davis' termination. If Stephenson's transgression was identical, as she claims, why make a distinction, as Davis did? Why distinguish between the two if, as Stephenson maintains, they are guilty of the same transgression? And as previously noted, Davis did not assault Mildred Mack.

(V.2,p.113;V.6,p.49). Stephenson never even spoke to Davis during the altercation which led to his termination. (V.6,p.49).

While Stephenson has the burden of proof, her claim for compensability should have failed before the Commission because it was based upon supposition. For purposes of this appeal, this Court should reverse the Commission's finding of compensability since it is not based upon substantial evidence. The total lack of substantial evidence is sufficient to warrant such reversal, but it is also helpful to look at the facts that are known which support finding reversal of the compensability decision. While these facts are fully stated in the Brief of Appellant, they will be summarized here as follows:

- Davis, who began working with Stephenson in late 1999, often flirted with Stephenson on the job. (V.6, p.50);
- Davis stole personal photographs of Stephenson. (V.6, p.50);
- Stephenson admitted that she thought Davis liked her "like a lover or mistress." (V.6, p.510);
- Stephenson admitted that Davis had a crush on her, and had had one for months. (V.2, p.114, V.6, p.51);
- Following his termination, Davis approached Shawn Mullulay, a management official with One Source⁵, and asked if he could file a sexual harassment claim against One Source based upon fact that he and Stephenson had been having sexual relations for several months. Mullulay advises Davis that he had no sexual harassment claim since Stephenson had nothing to do with his termination. (Ex.V.2, Ex.6 [Mullulay Statement, Olive Branch P.D. Records]);
- On June 26, 2000, six days after Davis was terminated, Davis called Stephenson at the offices of One Source and, when she picked up the phone, threatened to kill her if she didn't call him back by 9 p.m. that evening. (V.2, p.109, 111; V.6, p.50; Ex.Vol.2, Ex.6 [June 26, 2000 Offense Report, Olive Branch P.D. Records]) During this conversation, Davis did *not* mention anything to Stephenson about his termination. (V.2, p.114; V.6, p.51);
- Later on June 26, 2000, Stephenson and her husband swore out a complaint concerning Davis' threats to kill Stephenson. Stipulation, (V.2, p.109). Following up on that complaint, Aubrey Broadway, a detective with the Olive Branch Police

⁵ As noted within the Brief of Appellant, ISM is a personnel outsourcing company that technically employed the individuals working at One Source.

Department, telephoned Stephenson about her complaint. Stephenson told the police officer that she wanted to talk to Davis before proceeding with the complaint. (V.2, p.129);

- On June 27, 2000, Stephenson and her husband visited the Byhalia Police Department to complain about Davis, who they alleged had been harassing Stephenson. (V.2, p.127). When Byhalia Policy Officer Hughley went to a bus stop in Byhalia to confront Davis, Davis stated he wanted to speak to Stephenson's husband. (V.2, p.128). Disregarding his orders not to interfere, Stephenson and her husband followed Hughley to the bus stop. (V.2, p.132; V.6, p. 70). When Officer Hughley instructed them to leave, a "verbal altercation" ensued between Stephenson and her husband and Davis. (V.2, p.132). During this altercation, Davis told Stephenson and her husband that he had provocative pictures of Stephenson and that he was going to kill her. (V.6, p. 71-72);
- On the morning of shooting incident, Davis confronted Stephenson's husband at Ables Daycare in Byhalia, Mississippi. Stipulation, (V.2, p.109). Davis told Stephenson's husband that he wanted to talk, but Stephenson's husband said, "I don't want to talk to you, you already threatened my wife's life." (V.6, p.64);
- Davis did not want to speak to Stephenson's husband about his working relationship with Stephenson. (V.6, p.73). During this conversation, Davis never mentioned his termination from One Source or anything else about One Source. (V.6, p.78). Davis wanted to speak with Stephenson's husband about personal matters. Namely, ***Davis told Stephenson's husband that he had a crush on Stephenson and that they were having an affair.*** (V.6, p.75). Upon witnessing this confrontation, a daycare employee became so concerned that the Byhalia Police Department was contacted. (V.2, p.114-15; V.6, p. 65);
- Davis was also suspected in the murder of his landlord (V.2, p.131);
- Both James Pitts, a friend of Davis, and Aurelia Kimble, Davis' mother, separately reported to the investigating officer with the Olive Branch Police Department that Davis claimed to be the father of a child Stephenson was carrying and that he had threatened to kill Stephenson if she aborted the child. (V.1, p.131);
- Stephenson was in the early months of a pregnancy at the time of the shooting. (Ex.Vol.2, Ex.5 [Medical Records attached as Ex.2 to Dr. Brophy deposition]);
- Kimble reported that she had seen Davis and Stephenson together in her home, had spoken to Stephenson a number of times on the telephone and had seen a picture of Stephenson in a revealing negligee in Davis' apartment. (V.2, p.127, 130-1);

- Davis' sister also represented to the investigating officer with the Olive Branch Police Department that Stephenson and Davis had been involved in a romantic relationship (V.2, p.131);
- Stephenson refused to make a statement about the incident to the police. (V.2, p.127; Ex.Vol.3, Ex.9, p.15)⁶;
- Lt. Cleatus Oliver, the investigating officer for the Olive Branch Police Department, concluded after completion of his investigation, which included interviewing up to ten employees of One Source, that personal motivations fueled the shooting of Stephenson and that he "could not find any other possible motivation for Davis' behavior." (V.2, p.131)

As the Mississippi Supreme Court noted in *Brookhaven Steam Laundry*:

[W]hen the assault is unconnected to the employment, or is for reasons personal to the assailant and the one assaulted, or is not because the relation of the employer and employee exists, and employment is not the cause, though it may be the occasion of the wrongful act, and may give a convenient opportunity for its wrongful act, it is ordinarily held that the injury does not arise out of the employment.

59 So. 2d at 300.

When reviewing the record before this Court in this action, it is clear that the suppositions as to Davis' motivation are insufficient to support the Commission's finding, especially when viewed in light of the facts contained within the record and the existing case law in Mississippi. As the Mississippi Supreme Court has previously held, a court will reverse the Commission's order "if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence." *Hardaway Co. v. Bradley*, 887 So. 2d 793, 795 (Miss. 2004). Such is the case here with regard to the Commission's Order dated September 17, 2002 affirming the Administrative Judge's decision finding the shooting incident to be work related and therefore compensable.

⁶While the undersigned counsel does not want to engage in the same type of supposition that is promoted by Stephenson and which resulted in the Commission's decision, one can only wonder why Stephenson would decline to give a statement to the police if she had nothing to hide.

3. Kerr McGee Decision Not Applicable To This Case

Stephenson makes a passing comment about the application of the *Kerr-McGee Corporation v. Hutto*, 401 So.2d 1277 (Miss. 1981), stating with little explanation that the Kerr McGee doctrine applies to this case because Stephenson was "following the orders of her employer to come back to the office." Brief of Appellee, p. 14. Stephenson's reliance upon the Kerr-McGee decision is misguided and represents another red herring argument for which ISM is required to respond.

Under *Kerr-McGee*, a third-person attack motivated purely by personal reasons is only compensable if the claimant can show that the injury occurred while she was responding to explicit direction from her employer or superior and, by thus responding, was injured⁷. Only then can a personally motivated third-person attack be so "strongly connected to the directive of [her] superior that it cannot be completely disassociated from [the] employment" that compensation will be allowed. *Kerr-McGee v. Hutto*, 403 So. 2d at 1281.

Kerr-McGee makes clear that the only third-person attacks which are compensable are those which occur *as a result* of the employee following a specific directive of the employer. That is not the case here. Stephenson was told to return to One Source by Terry Crane, who was not an employee, but instead the son of an employee who was at the facility to pick up his mother, who was a co-worker, not supervisor, of Stephenson. (V.2, p.122).

⁷ In *Kerr-McGee*, the employee Hutto was directed by his superior, with whom he was having an affair, to go to the rear of a service station where Hutto worked. *Kerr-McGee*, 401 So. 2d at 1278. Unbeknownst to Hutto, his superior's husband, who was also Hutto's superior, was lying in wait behind the service station. *Id.* When Hutto obeyed his superior's instructions, the husband shot Hutto. *Id.* The Mississippi Supreme Court found the injury compensable. *Id.* at 1281-82.

The Court noted that the controlling factor in finding compensability was that the employee was following direct instruction from his employer. "Tommy Hutto was injured while responding to a directive from his immediate superior, that her husband, also his superior, wanted to speak to him. Hutto responded to a directive, and was shot and killed as a result." *Kerr-McGee*, 401 So. 2d at 1281

B. THE MWCC FINDINGS CONCERNING THE NATURE AND EXTENT OF STEPHENSON'S PERMANENT DISABILITY ATTRIBUTABLE TO HER GUNSHOT WOUND ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE BASED UPON AN ERRONEOUS APPLICATION OF LAW

ISM does not have the necessary allotment of pages to address all of what this writer perceives as mischaracterizations and half-truths related to the medical testimony records contained within the Brief of Appellee. That being said, ISM will cut to the chase as to its central argument here, which is the fallacy of the testing performed by Dr. Nan Hawkes. The strength of ISM's position on this point can be summarily stated by quoting a portion of the Mississippi Supreme Court's decision in *Smith v. Commercial Trucking Co.*, 742 So.2d 1082 (Miss. 1999), which stated:

When an expert's opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight and has little or no probative value when compared to the opinion of an expert that has made a thorough and adequate examination.

Smith v. Commercial Trucking Co., 742 So. 2d at 1085-1087.

In view of this holding, ISM asks this Court to consider the fact that Dr. Hawkes, the neuropsychologist selected by Stephenson's counsel to perform neuropsychological testing and evaluation and ultimately relied upon by the Commission as the sole support for the award of permanent total disability, ***performed an incomplete, non-standardized battery of neuropsychological testing*** which has been relied upon by the Commission as the sole authority for that award of permanent total disability benefits, an award that is contrary to the opinion testimony offered by Stephenson's treating physician and a Commission-appointed neuropsychologist. And if the mere fact that the neuropsychologist selected by Stephenson's counsel, Dr. Nan Hawkes, did not give Stephenson the complete, standardized battery of the tests she selected to administer was not bad enough, the effort-related tests that she chose to administer, those intended to measure whether the patient was giving full effort, were

administered in incomplete form. Moreover, Dr. Hawkes choose to administer incomplete, non-standardized effort-related tests *after* she was made aware of the fact that Stephenson was determined to have failed to give full effort during neuropsychological testing administered by Dr. Keith Atkins, the neuropsychologist selected by the Commission to perform an Independent Medical Examination of Stephenson. As to the incomplete, non-standardized testing administered by Dr. Hawkes, Dr. Atkins noted⁸ that it goes against applicable industry standards to administer bits and pieces of the various tests since each test is normed and standardized for accurate testing results.

In view of the incomplete testing by Dr. Hawkes, it is worth repeating the Smith finding once again:

This rule of law bears repeating:

When an expert's opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight and has little or no

⁸ Dr. Atkins pointed out that the test data from Hawkes' examination was flawed due to her non-standardized methods in administering the various tests. Clear examples of this were found within the two stand-alone tests designed to look like memory tests but to actually measure the patient's effort. The first such test is the Word Memory Test ("WMT"), which consists of seven subpart tests. Dr. Atkins gave the complete test during his examination of Stephenson and was able to determine from the results of this test that Stephenson was giving a poor and inconsistent effort on the examination. (Ex.Vol.1, Ex.3, p.94-5). When Hawkes gave the WMT, she only gave the first of seven subparts, choosing not to give the last six subparts. (Ex.Vol.1, Ex.3, p.156-57). When Stephenson scored a "passing grade" on subpart 1, Dr. Hawkes took that result alone and stated that Stephenson passed the effort examination and therefore gave full effort on the entire neuropsychological examination that she administered. Dr. Atkins testified that Stephenson also passed subtest 1 of the WMT when he administered the test. However, it wasn't until he gave the remaining six subtests that he was able to compare her scores in determining a consistency calculation between the various subtests to determine her effort. (Ex.Vol.1, Ex.3, p.91-2).

A second stand-alone test to determine Stephenson's measure of effort is the CARB test, which consists of three parts, blocks 1, 2 and 3. Dr. Atkins gave the entire CARB test, which is the only standardized way of administering this test. Dr. Atkins testified that Stephenson's level of performance on the CARB test was very low indicating that she was giving poor effort. (Ex.Vol.1, Ex.3, p.108-12). Dr. Atkins testified that this was consistent with Stephenson's scores on the WMT and the other embedded measures of effort related in other tests. He testified that all of these were pointing toward the same conclusion, being that Stephenson was giving poor effort. (Ex.Vol.1, Ex.3, p.110). When Dr. Hawkes administered the CARB test, she only gave the first part of the test and did not administer the last two parts, blocks 2 and 3. (Ex.Vol.1, Ex.3, p.11).

probative value when compared to the opinion of an expert that has made a thorough and adequate examination.

Smith v. Commercial Trucking Co., 742 So. 2d at 1085-1087.

Finally, ISM wishes to briefly address Stephenson's ill fated attempt to argue that Dr. Atkin's testimony is in some form supportive of Stephenson's claim of permanent total disability. For the sake of completeness, ISM would refer the Court to pages 27 through 30 of the Appellant's Brief for a more detailed discussion of Dr. Atkin's conclusions after having an opportunity to study both the results of the neuropsychological testing he administered to Stephenson and the testing administered by Dr. Hawkes. As has been noted, Dr. Atkins has found that Stephenson failed to give full effort during both sets of tests. However, Dr. Atkins explained that while someone can fake that they are worse than they really are, they cannot fake that they are better. With that in mind, he was able to reach certain basic conclusions from studying the test results and those opinions are contained within the Brief of Appellant. Without intending to minimize other opinions offered by Dr. Atkins, which are addressed within the Brief of Appellant, ISM would note here that Dr. Atkins testified that the one test used to assess executive skills reflected that Stephenson was working on an average level, which was higher than Atkins would have expected given Stephenson's academic background, which was poor. (Ex.Vo.1, Ex.3, p.60-1). Moreover, Dr. Atkins testified that Stephenson's test results from the Tactual Performance Test ("TPT"), a test that indicates how the global brain works together in solving a complex problem that takes into consideration or demands a number of different cognitive skills to successfully complete, revealed that even with Stephenson giving less than full effort, her brain was working well. (Ex.Vol.1, Ex.3, p.72). Dr. Atkins concluded that based upon his reading of these test results during which he was able to determine that Stephenson was giving less than full effort, he was still of the opinion that the results with a less than full effort

indicated that Stephenson's brain was working efficiently and he did not see any reason based upon the TPT results that she could not return to work. (Ex.Vol.1, Ex.3, p.74).

In closing, because the Commission decision is based upon flawed testimony of Dr. Hawkes, which is by definition, not credible, this Court should reverse the decision of the Commission on the strength of the *Smith* case, finding that the award of permanent total disability is not supported by sufficient evidence, and reinstate the order of the Administrative Judge, who found followed the testimony of Dr. Brophy and Dr. Atkins in concluding that Stephenson reached maximum medical improvement on November 27, 2000 and suffered no loss of wage earning capacity.

CONCLUSION

For the reasons stated herein and within the Brief of Appellant, ISM urges this Court to reverse the Commission's finding of compensability in this matter. Alternatively, ISM urges this Court to reverse the finding of permanent total disability and find that Stephenson reached maximum medical improvement on November 27, 2000 and suffered no loss of wage earning capacity based upon the only credible medical evidence before this Court.

This the 31st day of August, 2009.

Respectfully submitted,

INTERNATIONAL STAFF MANAGEMENT
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By: 

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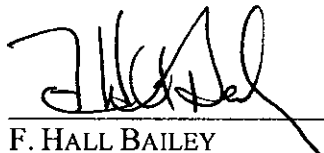
CERTIFICATE OF SERVICE

I, F. Hall Bailey, hereby certify that I have this day mailed, via United States mail,
postage pre-paid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

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Hon. Robert Chamberlin, Jr.
Desoto County Circuit Court Judge
P.O. Box 280
Hernando, MS 38632

This the 31st day of August, 2009.



F. HALL BAILEY