

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 Circuit Court of Desoto County, Mississippi

BRIEF OF APPELLANTS

Oral Argument Requested

F. Hall Bailey
WATKINS LUDLAM, WINTER &
STENNIS, P.A.
633 North State Street
P. O. Box 427
Jackson, MS 39205-0427
(601) 949-4900

ATTORNEYS FOR APPELLANTS
INTERNATIONAL STAFF
MANAGEMENT, AND
LEGION INSURANCE COMPANY

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VS.

TAKISHA STEPHENSON

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 Judges of this Court may evaluate possible disqualification or recusal.

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

F. HALL BAILEY
ATTORNEY OF RECORD FOR APPELLANTS
INTERNATIONAL STAFF MANAGEMENT
AND LEGION INSURANCE COMPANY

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STATEMENT OF THE ISSUES

1. Did the Full Commission err in finding that Takisha Stephenson was injured in the course and scope of her employment with ISM?
2. Did the Full Commission err in finding that Takisha Stephenson was permanently and totally disabled and suffered a loss of wage earning capacity as a result of her gunshot injury?

I. STATEMENT OF THE CASE

A. Timeline as to Course of Proceedings and Disposition in Commission Below

June 28, 2000	Claimant, Takisha Stephenson, ("Stephenson" or "Claimant") was shot by Reginald Davis, a former co-worker, while at the One Source plant facility where she worked in Olive Branch, Mississippi.
August 8, 2000	Stephenson filed the Petition to Controvert alleging that she had a suffered a work related injury when shot on June 28, 2000 and as a result was permanently, totally disabled.
September 5, 2000	International Staff Management ("ISM"), a personnel outsourcing company that technically employed Stephenson, and its workers' compensation carrier (hereinafter referred to collectively as "Appellant ISM" or "ISM") filed an Answer, admitting that the incident occurred, but denying the injuries were work related and further denying that Stephenson was permanently disability as a result of the incident or that she suffered a loss of wage earning capacity as a result of her injury.
November 27, 2000	Stephenson was released to return to work by Dr. John Brophy, a neurosurgeon who was Stephenson's treating physician for her gunshot injuries.
April 3, 2002	Administrative Judge entered an Order finding that the Stephenson's injuries suffered when shot by Reginald Davis on June 28, 2000 were suffered in the course and scope of her employment. As part of the Order, the Administrative Judge ordered that Stephenson be paid temporary total disability benefits beginning November 27, 2000 and ending on November 27, 2000. Moreover, the Administrative Judge ordered that Stephenson undergo an Independent Medical Examination by Dr. Keith Adkins, a clinical neuropsychologist with Semmes-Murphy Neurologic & Spine Institute in Memphis, Tennessee.
September 17, 2002	Full Commission entered an Order affirming the Administrative Judge's decision finding that the shooting incident involving Stephenson was work related.
June, 2002	Stephenson underwent an IME with Dr. Keith Adkins as ordered by the Administrative Judge.
January, 2003	Stephenson underwent an examination by Dr. Nan Hawkes, a neuropsychologist, to whom Stephenson was referred by her attorney.
March 31, 2006	Administrative Judge entered Order consistent with the testimony of Dr. Keith Adkins and Dr. John Brophy, which concluded that Stephenson had reached maximum medical improvement on

	November 27, 2000 and suffered no permanent impairment or loss of wage earning capacity as a result of her work injury.
April 18, 2007	Full Commission reversed the Order of Administrative Judge, finding that Stephenson was permanently totally disabled as a result of the work injury.
May 18, 2007	Appellant ISM filed a Motion to Reconsider.
July 24, 2007	Full Commission entered an Order denying Motion to Reconsider.
August 21, 2007	Appellant ISM filed a timely appeal to Circuit Court of Desoto County, Mississippi
August 26, 2008	Circuit Court of Desoto County, Mississippi affirmed Full Commission Order
September 25, 2008	Appellant ISM filed timely appeal to this Court

II. SUMMARY OF ARGUMENT

The April 3, 2002 Order of the Administrative Judge, summarily affirmed by the Full Commission, erred in finding that Stephenson suffered a compensable work related injury since the overwhelming weight of the evidence clearly established that the third party assault by a non-employee was motivated and precipitated by non-employment issues. Moreover, even if the Full Commission was correct in its finding that Stephenson's injury was work related, the Full Commission erred when it reversed the March 31, 2006 Order of the Administrative Judge and found Stephenson to be permanently totally disabled as a result of the injury was against the overwhelming weight of the evidence. The Full Commission also erred with its decision by ignoring the fact that Stephenson did not meet her burden of proving a loss of wage earning capacity, which is essential to an award of permanent disability benefits, when she failed to offer proof of a reasonable effort to find other employment. Accordingly, the award of the Full Commission is contrary to the law and not supported by substantial evidence.

III. STANDARD OF REVIEW

The Appellant ISM recognizes that under the familiar standard of review, this Court is bound by the decision of the Mississippi Workers' Compensation Commission so long as the Commission's findings of fact and order are supported by substantial evidence and do not contain an error of law. *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988). That is not the case here.

Moreover, under the flip side of that substantial evidence standard, 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). As the Mississippi Supreme Court has noted

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

Hardaway Co. v. Bradley, 887 So. 2d 793, 795 (Miss. 2004).

IV. ARGUMENT AND AUTHORITIES

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

1. Introduction

Appellant ISM appeals the Order entered April 3, 2002, by the Administrative Judge, finding that the Claimant suffered a compensable work-related injury. (V.2, p.108).¹ The

¹ Reference is either to page within the 7 volume portion of record containing pleadings and hearing transcripts (V. __, p. __), or to page within 3 volume Exhibit portion of the record containing various exhibits and deposition transcripts offered into evidence during the hearing (Ex.Vol. __, Ex. __, p. __).

Appellant ISM asserts that the Administrative Judge erred in finding that the attack on Stephenson by Reginald Davis on June 28, 2000, was a work related and, therefore, compensable incident. The overwhelming weight of the evidence clearly establishes that the attack was motivated and precipitated by non-employment factors. The only evidence that there was any work-related connection to the attack was the Stephenson's own self-serving testimony. The Administrative Judge erroneously found that the injury was work-related.

2. Overview of relevant facts related to whether shooting injury was work related²

On June 28, 2000, Stephenson was employed by International Staff Management ("ISM") as a Quality Assurance technician at One Source³ in Olive Branch, Mississippi. (V.2, p.110). After Stephenson clocked out from her shift and was preparing to leave, she was approached by Terry Crane. (V.2, p.112). Crane, who was *not* an employee of One Source⁴, told Stephenson that she was wanted inside. (V.2, p.122). Stephenson followed Crane inside to the One Source office. Upon entering an office within the facility, Stephenson confronted Reginald Davis, who was armed with a handgun and was holding 6 or 7 of her co-workers hostage. Within moments after Stephenson entered the room, Davis began shooting at her. Stephenson was shot in the back of the head. Crane was hit in the shoulder while he attempted to push Stephenson out of

² The Appellant ISM's arguments concerning the compensability issue related to Stephenson's assault by a former co-employee and their subsequent arguments concerning the nature and extent of her injury involve two separate set of facts – one involving the details of the shooting and the other involving the medical testimony. In an effort to provide these facts in a manageable format, I will include two separate factual summaries within this brief – the first relating to question of whether injury was work related and the second related to the medical issues along with the nature and extent of permanent disability and loss of wage earning capacity.

³ As a personnel outsourcing company, ISM technically employed the individuals who worked at the One Source facility.

⁴ Crane had arrived at One Source to pick up his mother, Mildred Mack. Shortly after entering the facility in search of his mother, Crane was confronted by Reginald Davis, who was armed with a handgun. Davis forced Crane to join him, Crane's mother and about 6 or 7 of her co-workers in an office area at One Source. While holding the workers hostage, Davis sent Crane out of find Takisha Stephenson, who he acknowledged was the individual he wanted. V.2, p.122.

harm's way. Reginald Davis then turned the gun on himself and committed suicide. (V.2, p.126).

Given that Davis came to the One Source facility armed and looking for Takisha Stephenson, it should be no surprise that this was not the first interaction between two. Stephenson and Davis shared a tortured and tumultuous history. Stephenson began working at One Source in 1998, and in late 1999, Davis began working at One Source. (V.2, p.110). Davis often flirted with Stephenson on the job. (V.6, p.50). Davis even 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.51). Stephenson admitted that Davis had a crush on her, and had had one for months. (V.2, p.114. V.6, p.51).

Davis was terminated from One Source on June 20, 2000 following a dispute with his supervisor, Mildred Mack, about Davis leaving his work station on the assembly line. (V.2, p.108). During the discussion between the two, Davis began cursing Mack. When Mack reported the incident to her supervisor, Shawn Mullulay, Davis interjected into the conversation and began cursing Mullulay as well. He was terminated at that time. Stephenson had no involvement in the altercation between Mack and Davis which led to his termination.⁵ (V.2, p.113). Following his termination, Davis approached Mullulay and asked if he could file a sexual harassment claim against Source One based upon fact that he and Stephenson had been having sexual relations for several months. Mullulay advised Davis that he had no sexual

⁵ 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. (V.6, p.49). Stephenson never even spoke to Davis during the altercation which led to his termination. (V.6, p.49). There is no evidence of any involvement of the Stephenson in Davis's termination nor is there any evidence that Davis knew or might have known of any such involvement had there been any. (V.2, p.113; V.6, p.49). Davis never mentioned anything to anyone about those termination papers. (V.6, p.49).

harassment claim since Stephenson had nothing to do with his termination. Ex.Vol.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, 200 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 that same day, Stephenson and her husband swore out a complaint with the Olive Branch Municipal Court against Davis with regard to his threats to kill Stephenson. Stipulation, (V.2, p.109). Following up on that complaint that same day, Aubrey Broadway, a detective with the Olive Branch Police Department, telephoned Stephenson. During this conversation, Stephenson told Broadway that she wanted to talk to Davis before moving forward with the complaint. (V.2, p.129).

The drama continued the next day when 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 Police Officer Hughley went to a bus stop in Byhalia to confront Davis in regard to Stephenson's complaint, Davis stated he wanted to speak to Stephenson's husband. (V.2, p.128). Disregarding Hughley's orders that they not 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 photographs of Stephenson and that he was going to kill her. (V.6, p.71-2).

On the morning of June 28, 2000, Davis confronted Stephenson's husband at Ables Daycare in Byhalia, Mississippi. Stipulation, (V.2, p.109). This confrontation began at a daycare

facility when Stephenson's husband saw Davis staring at him. (V.6, p.64). 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 were contacted. (V.2, p.114-5; V.6, p.65). Stephenson visited the daycare later that morning, then returned to work at approximately 11:30 a.m. (V.2, p.112).

Later that afternoon, Stephenson was shot by Davis, as noted above. Davis was also suspected in the murder of his landlord, Nanny Jean Crutchfield. (V.2, p.131). Lieutenant Cleatus Oliver, of the Olive Branch Police Department, investigated the Stephenson incident. (V.2, p.131). During his investigation, he spoke with Dwayne Pitts, a friend of Davis, and Aurelia Kimble, Davis' mother. (V.2, p.131). Both Pitts and Kimble stated that Davis claimed to be the father of a child Stephenson was carrying and that he had threatened to kill Stephenson if she aborted their child⁶. (V.2, p.131). Kimble stated 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 her son's apartment. (V.2, p.127, 130-1). Additionally, Shawn Mullulay, a supervisor at One Source, told Oliver that Davis had claimed to have had a romantic relationship with Stephenson. (V.2, p.127). Davis's sister also represented

⁶ It is undisputed that Stephenson was early in her pregnancy at the time of the shooting. Ex.Vol.2, Ex.5 [Medical Records attached as Ex. 2 to Dr. Brophy deposition].

to Oliver that there was a romantic relationship between Stephenson and Davis. (V.2, p.131; Ex.Vol.3, Ex.9, p.15). Although Oliver asked Stephenson to make a statement about the incident to the police, she refused. (V.2, p.127; Ex.Vol.3, Ex.9, p.15). Detective Oliver, who had over ten years of law enforcement and investigative experience, who interviewed up to ten employees of One Source, concluded that personal motivations fueled this attack and that he "could not find *any other possible motivation* for Davis' behavior." (emphasis supplied) (V.2, p.131).

3. Overview of Applicable Law

Recovery under the Mississippi Workmen's Compensation Act requires a showing by the claimant that the injury sustained resulted from an accident "arising out of and in the course of employment." Miss. Code Ann. § 71-3-7 (1972) provides in part: "Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment. . . ."

The Mississippi Supreme Court has interpreted the "arising out of and in the course of" language as a two-pronged test. Under this approach, an injury arises out of employment when a causal connection exists between the injury and the employment. *Earnest v. Interstate Life & Accident Ins. Co.*, 238 Miss. 648, 652, 119 So. 2d 782, 783 (1960); *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 600, 55 So. 2d 381, 391 (1951). The additional requirement that the injury be in the course of employment is satisfied only when the injury occurs within the time and space limitations of the employment. *Persons v. Stokes*, 222 Miss. 479, 486, 76 So. 2d 517, 519 (1954). Although an assault is intentional by nature, Mississippi, like most other jurisdictions, has expressly included assaults under the statutory definition of accidents. Miss. Code Ann. § 71-3-3(b) (Supp. 1981). The assault-related cases normally have been divided between assaults by co-employees and assaults committed by third parties. The distinction

arising from the statutory formula provides that assaults by third parties must be directed against an employee because of his employment in order for the assault to be compensable.⁷ Such proof is not required in the co-employee assault scenario. *See Mutual Implement & Hardware Ins. Co. v. Pittman*, 214 Miss. 823, 828, 59 So. 547, 551 (1952) (assault committed by co-employee requires no proof that assault occurred because of employment). In either case, if the injured employee is assaulted because of some personal reason that is wholly disconnected from the employment, the injury is not compensable. When the animosity that instigates the assault originates in the injured employee's private life, the injury does not arise out of the employment, *See, e.g., Dewberry v. Carter*, 218 So. 2d 27, 30 (Miss. 1969) (death benefits denied when decedent's death caused by personal dispute unrelated to employment); *Ellis v. Rose Oil Co.*, 190 So. 2d 450, 450 (Miss. 1966) (same). *See generally* 1 A. Larson, *supra* note 7, § 11.21. Since an assault by a co-employee requires no proof that the attack was motivated because of the employment, the Mississippi Supreme Court has used various theories to compensate injuries caused by co-employee assaults. The additional burden of proving that an assault by a third party was directed toward the employee because of the employment has created a more difficult analysis.

The Mississippi Supreme Court's first encounter with a third party assault caused by personal animosity arose out of a factual scenario in which a delivery man was killed by the irate husband of a woman with whom he was having an affair⁸. *Brookhaven Steam Laundry v. Watts*,

⁷ Miss. Code Ann. § 71-3-3(b) (Supp. 1981) provides in part: "[I]njury' means accidental injury or accidental death arising out of and in the course of employment, and includes . . . 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. . . ."

⁸ As a delivery man, the employee was required to pick up and deliver laundry from various residences. He became involved in an affair with one of his customers. On the day of his death, the delivery man went to the residence of his lover to meet with her and, while there, was shot and killed by his lover's husband. *Id.* at 585, 55 So. 2d at 384. The court originally compensated the delivery man's death through an application of the positional-risk

214 Miss. 578, 55 So. 2d 381, *rev'd on rehearing*, 214 Miss. 626, 59 So. 2d 294 (1951). The court held that the mere fact that the employment brought the employee to the place he was injured was insufficient to establish a causal connection between the injury and employment when the assailant's animosity toward the employee was purely personal. *Id.* at 640, 59 So. 2d 302. The *Watts* Court succinctly stated the rule as follows:

[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.

Id. at 300.

The *Watts* decision has been followed in subsequent third party assault cases in which the animosity was of a personal nature. *See, e.g., Ellis v. Rose Oil Co.*, 190 So. 2d 450, 450 (Miss. 1966) (compensation denied where proof clearly showed that injury arose out of claimant's personal activities); *West's Estate v. Southern Bell Tel. & Tel. Co.*, 288 Miss. 890, 895, 90 So. 2d 1, 4 (1956) (no causal connection between injury and employment when animosity personal to employee).

The recent decision of *Hawkins v. Treasure Bay Hotel & Casino*, 813 So.2d 757 (Miss. Ct. App. 2001), affirmed and clarified this simple rule: "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." 813 So.2d at 761. Likewise, in *Green v. Glen Oaks Nursing Center*, 722 So. 2d 147 (Miss. Ct. App.1999), this Court stated:

doctrine. *Id.* at 597-98, 55 So. 2d at 390. The opinion was criticized as an improper application of the positional-risk doctrine since the doctrine only applies when the risk is neutral; the assault in *Watts* was purely personal. 1 A. Larson, *supra* note 7, § 11.21. On rehearing, the decision was reversed on the grounds that the employee's death had arisen because of personal reasons unrelated to his employment. 214 Miss. at 640, 59 So. 2d at 302.

[W]here the intentional tort is committed as the result of a personal vendetta, no causal connection exists, since such an act can as easily be committed in the workplace as anywhere else. *See Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 59 So. 2d 294, 300 (1952) (where irate husband killed an employee laundry man suspecting his to be his wife's paramour); *Alice v. Rose Oil Co.*, 190 So. 2d 450 (Miss. 1966) (where employee's death resulted from his affair with married woman). As stated by our supreme court, "[r]isks associated with such escapades cannot reasonably be viewed as risks associated with employment." *Big Two Engine Rebuilders*, 379 So. 2d at 891.

Glen Oaks Nursing Center, 722 So. 2d at 149.

Accordingly, if the attack by Davis was motivated by a personal vendetta, and not by reasons connected with or related to Stephenson's employment, then her injury is not compensable because it does not arise out of her employment.

4. The third-person assailant's motives were purely personal and, therefore, his assault on Stephenson was not connected to her employment

The first prong of analysis in determining whether third-party assault is work related is reaching determination as to whether the attack was fueled by a disagreement or some other occasion connected to the employment. "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 v. Treasure Bay Hotel & Casino*, 813 So.2d 757, 761 (Miss. Ct. App. 2001) (emphasis supplied.). The record before this Court does not provide substantial evidence in support of the Commission's finding that the assault was connected to Stephenson's employment.

Although the Administrative Judge⁹ found that, at a minimum, Stephenson was on the work site (V.2, p.135), that fact does not provide the necessary causal link to the employment

⁹ Since the Administrative Judge drafted a lengthy decision that was summarily affirmed by the Full Commission, any reference as to the analysis and basis for the Full Commission's decision must be to the Order of the Administrative Judge.

because the record clearly demonstrates that this attack could have just as easily been committed most anywhere else. *Green v. Glen Oaks Nursing Center*, 722 So. 2d 147 (Miss. Ct. 1999). The only evidence that Davis' actions were related somehow to Stephenson 's employment is the Stephenson 's self-serving, factually unsupported *speculative* statement that Davis must have shot her "because he got fired." (V.6, p.46).

Stephenson 's guesswork as to Davis' motivation pales in comparison with the following facts gleaned primarily from Stephenson's testimony: Stephenson was not involved in the altercation between Mack and Davis which led to his termination. (V.2, p.113; V.6, p.47-8). Stephenson did *not* fire or terminate Davis. (V.6, p.48). Mildred Mack instigated Davis's termination. (V.6, p.48-9). Stephenson did not sign Davis's termination papers. (V.2, p.113; V.6, p.49). Stephenson did not report Davis' absence from his work station to Mildred Mack. (V.6, p.49). Stephenson never even spoke to Davis during the altercation which led to his termination. (V.6, p.49). Stephenson was not involved in Davis' termination. (V.2, p.113; V.6, p.49). Stephenson does not know whether Davis ever saw his termination papers. (V.6, p.49). Stephenson admitted she had no idea whether Davis heard her supervisor ask her to sign Davis's termination papers. (V.6, p.49). Davis never mentioned anything to anyone about his firing or his termination papers. (V.6, p.49). When Davis called Stephenson on June 27, 2000, he did not mention his termination or anything else related to One Source. (V.6, p.51).

The Administrative Judge noted through his Order that the evidence of Davis' motivation was "at best, sparse" (V.2, p.136), but when viewed as a whole, the evidence of non-employment motivations for Davis' actions bursts from the seams of the record. Davis accosted and verbally attacked Stephenson and/or her husband at the Ables Daycare and a bus station in Byhalia on successive days prior to the assault. He had already sworn over the phone and in person that he

would kill Stephenson. Had he not gotten to her at One Source, he would have gotten to her elsewhere.

The record reveals still more facts that establish that Davis' attack on Stephenson was motivated by personal reasons that had absolutely nothing to do with Stephenson 's employment or any incident at One Source. Davis often flirted with Stephenson on the job. (V.6, p.50, 78). 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.51). Stephenson admitted that Davis had a crush on her, and had had one for months. (V.6, p.51).

The above facts are not the only facts establishing the non-employment motivation for Davis' assault. On June 26, 2000, Davis called Stephenson and, when she picked up the phone, threatened to kill her and her family. Stipulation, (V.2, p.109, 111). During this conversation, Davis mentioned nothing about One Source or his termination. (V.2, p.114). Also on June 26, 2000, Stephenson and her husband swore out a complaint concerning Davis's threats to kill the Claimant. Stipulation, (V.2, p.109). Following up on that complaint, Aubrey Broadway, a detective with the Olive Branch Police Department, telephoned Stephenson about her complaint and Stephenson told Broadway that she wanted to talk to Davis before proceeding with the Complaint. (V.2, p.129). It makes no sense for Stephenson to want to speak to Davis before proceeding with the Complaint if they had no personal relationship or history of some sort. If Davis had threatened her life, and the lives of her family, why would Stephenson want to speak to Davis before proceeding against him? Wouldn't she put the safety of her family above all else? The *only* rational and reasonable conclusion to be drawn from that conduct and Stephenson 's response is that Davis and Stephenson shared a personal history or relationship of some nature above and beyond their working relationship.

Still even more facts establish the personal nature of Davis' attack and the reason therefore. On June 27, 2000, Stephenson visited the Byhalia Police Department to complain about Davis who had been harassing her. (V.2, p.127). When Byhalia Police officer went to a bus stop in Byhalia to confront Davis, Davis stated he wanted to speak to Claimant's *husband*. (V.2, p.128). Claimant and her husband, despite the officer's orders not to interfere, followed Hughley to the bus stop. (V.2, p.132; V.6, p.70). When he 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.71-2).

The events of June 28, 2000 also support the conclusion that the reason for Davis' attack on Stephenson had nothing to do with, and no connection, to her employment with ISM at One Source. On the morning of June 28, 2000, Davis confronted Stephenson 's husband at Ables' Daycare in Byhalia, Mississippi. Stipulation, (V.2, p.109). At the daycare, Davis told Stephenson 's husband that he wanted to talk, but not 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 his or Stephenson's employment with One Source. (V.6, p.78). Davis wanted to speak with Stephenson's husband about personal matters, namely that he had a crush on Stephenson and that they were having an affair. (V.6, p.75).

While at One Source, Davis specifically asked for Stephenson and no one else. (Ex.Vol.2, Ex.3, p.11 [Deborah Bogan]; Ex.Vol.2, Ex.4, p.15 [Terry Crane]; Ex.Vol.2, Ex.2, p.9 [Mildred Mack]; Ex.Vol.2, Ex.1, p.8 [Jackie Cook]). Stephenson argues that Davis did not single claimant out because Davis, after arriving at One Source, also mentioned something about Mildred Mack *see* (Ex.Vol.2, Ex.3, p.13 [Deborah Bogan]). Although Davis mentioned Mildred Mack, he did

not assault, or even attempt to assault Mack, despite having a clear opportunity to do so. Davis' statement actually shows he recognized that it was Mack who orchestrated his termination.

The investigation following the incident also found that the only possible motivation for Davis' actions was personal. Lieutenant Cleatus Oliver, of the Olive Branch Police Department, investigated the incident and, as part of his investigation, spoke with Dwayne Pitts, a friend of Davis, and Aurelia Kimble, Davis' mother. (V.2, p.131). Oliver learned 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.2, p.131). Ms. Kimble saw Davis and Stephenson together in her home, Kimble spoke to Stephenson a number of times on the telephone, and, while cleaning her son's apartment, Kimble found a picture of Stephenson in a revealing negligee. (V.2, p.127, 130). Davis had also told his supervisor, Shawn Mullulay, that he was having a romantic relationship with Stephenson. (V.2, p.130).

Davis' sister also represented to Oliver that there was a romantic relationship between Stephenson and Davis. (Ex.Vol.3, Ex.9, p.15 [Cleatus Oliver]). Oliver asked Stephenson to make a statement about Davis and about the incident to the police, but she never did. (Ex.Vol.3, Ex.9, p.15 [Cleatus Oliver]). Detective Oliver, who had over ten years of law enforcement and investigative experience, and interviewed up to ten employees of One Source, concluded that personal motivations fueled this attack and that he "could not find *any other possible motivation* for Davis' behavior." (emphasis supplied) (V.2, p.131).

The Administrative Judge's Order noted that the evidence of a romantic relationship between Davis and Stephenson was "meager," and, therefore, the "personal vendetta" exception should not apply. (V.2, p.137). The Administrative Judge concluded that the "personal vendetta" defense was limited to intentional torts fueled by "a love triangle." (V.2, p.136). The evidence of

non-employment reasons for the attack is certainly not "meager." As demonstrated above, the record is laden with reasons *other than the employment* for Davis's assault on the plaintiff. Furthermore, the "personal vendetta" defense is not limited to "love triangles." As previously noted, the rule provided by *Brookhaven Steam Laundry* is:

[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.

The Administrative Judge's legal requirement of a "love triangle" not contained within the Watts decision or any subsequent decision involving the compensability of workers' compensation claims arising out of third party assaults. Accordingly, the Administrative Law Judge's application of the applicable law is too narrow and erroneous. For instance, the assault in *Hawkins v. Treasure Bay* was not fueled by romantic difficulties or jealous paramours. In *Hawkins*, the assailant's specific reasons for the assault were unknown, but, at a minimum, were fueled by "personal problems unconnected with any duties or events at work. No duties relevant or reasonably incidental to the employment were involved. The reasons were personal." *Hawkins v. Treasure Bay Hotel & Casino*, 813 So.2d 757, 761 (Miss. Ct. App. 2001). There was no "love triangle" in *Hawkins* yet the "personal vendetta" defense still applied and the intentional attack was held not to be compensable. There may or may not be a "love triangle" here, but there is no other conclusion to reach based on the evidence of record but that Davis's motivations for the attack were purely personal. There is absolutely no evidence that Davis harassed or stalked any other employee, including Mildred Mack. There is absolutely no evidence that Davis contacted any other spouses of One Source employees. There is absolutely no evidence that

Davis claimed to be having an affair with anyone else. Regardless whether Davis and Stephenson were actually having an affair, or even a flirtatious relationship, it is clear that Davis harassed, stalked, and, ultimately, assaulted Stephenson for personal reasons completely unrelated to Stephenson's employment. As the attack was motivated by this personal vendetta, by personal reasons unrelated to the employment, the injury is not compensable.

As noted earlier, this Court is bound by the decision of the Commission so long as the Commission's findings of fact and order are supported by substantial evidence and do not contain an error of law. *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988). That is not the case here. In this instance, the Commission's finding that Stephenson's third party assault by Davis was work related is clearly erroneous and contrary to the overwhelming weight of the evidence, warranting reversal. *Hardaway Co. v. Bradley*, 887 So. 2d 793, 795 (Miss. 2004). Moreover, the Commission's application of the legal standard for determination of compensability of third party assaults was erroneous, also warranting reversal.

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

1. Introduction

Even if the Full Commission's decision that Stephenson's injury was work related had been supported by substantial evidence and the correct rule of law had been applied by the Full Commission, the Commission's subsequent Order dated April 18, 2007 erred in finding that Stephenson was permanently totally disabled based upon the medical testimony offered into evidence and considered by the Full Commission.

The testimony of Dr. John Brophy, the neurosurgeon who served as Stephenson's treating physician and followed the course of her recovery from the gunshot wound, clearly establishes

that Stephenson reached maximum medical improvement from a work injury on November 27, 2000, and she was released to return to work on that date with *no restrictions*. Nothing within the definitive testimony of Dr. Brophy is contradicted by the testimony of Dr. Keith Atkins, the Commission-appointed neuropsychologist who testified following his performance of an IME and reviewing the actual test data and deposition of Dr. Nan Hawkes, the neuropsychologist who examined Stephenson upon referral of Stephenson's attorney. Dr. Atkins testified at length to the fact that the test results from both neuropsychological examinations show that Stephenson gave inconsistent, poor and inadequate effort during both examinations, coupled with symptom exaggerations, which serve to invalidate the test scores. In addition, the test data from Hawkes' examination was also tainted by her non-standardized methods in administering the various tests. Finally, Dr. Atkins testimony notes that in spite of Stephenson's poor effort and exaggeration of symptoms on both neuropsychological examinations, he was able to make some affirmative findings from the test results that enabled him to form an opinion that Stephenson was able to return to work and perform the same type of job she held prior to suffering her work injury. In accord with the evidence presented by Drs. Brophy and Atkins, the adoption of findings consistent with the Administrative Judge's Order is appropriate – that Stephenson reached maximum medical improvement on November 28, 2000 and has no permanent impairment or loss of wage earning capacity as a result of her work injury.

2. Overview of facts related to medical treatment and Full Commission's findings as to nature and extent of Stephenson's permanent disability and Orders of Administrative Judge and Full Commission

a. Dr. John Brophy – Primary Treating Physician

After sustaining her injury, Stephenson was taken by ambulance to a local hospital in DeSoto County, Mississippi, where she underwent surgery and was released. Her primary medical care was undertaken by Dr. John Brophy, a neurosurgeon practicing in Memphis,

Tennessee. During a July 11, 2000 visit, Dr. Brophy noted within his office notes that Stephenson had suffered a right sub occipital gunshot wound with a 2 cm. in-driven bone fragment into cerebellum. She was treated with a sub occipital craniectomy with debridement of the entry wound and removal of the in-driven bone fragment. A postoperative CT scan demonstrated decompression of the cerebellum with no significant residual hematoma. Her postoperative course was uncomplicated. When Dr. Brophy saw Stephenson on July 11, 2000, he noted, among other things, that she was in no acute distress, her visual fields were intact to confrontation, and he found an adequately healed sub occipital cervical incision without evidence of subcutaneous cerebral spinal fluid collection. Her cerebella function was demonstrated normal and her gait was stable.

Dr. Brophy continued to care for Stephenson and follow-up to his initial visit. Finally, on November 21, 2000, Dr. Brophy noted within his office notes that:

Ms. Stephenson is now approximately 5 months status post gunshot wound to the posterior fossa. In the past 3 months she describes resolution of her headaches and neck pain. Her husband describes significant improvement in her mental status, memory and judgment. As far as Mr. Stephenson is concerned, she has returned to her baseline personality. She is currently driving a motor vehicle.

In regard to his examination of Stephenson, Dr. Brophy noted that she was:

Alert and oriented times three and appropriate. Normal affect. Normal speech. Able to discuss current events related to the Presidential election controversy in Florida. Gait-normal.

It was Dr. Brophy's opinion that Stephenson's residual encephalopathy following the gunshot would had resolved as of the November 21, 2000 office visit. Furthermore, it was his opinion that she could be cleared to return to work as of Monday, November 27, 2000. He noted that no specific follow-up was required unless she developed new symptoms.

When asked during his deposition as to whether or not Stephenson had sustained any permanent impairment as a result of these injuries, Dr. Brophy stated as follows:

Well, obviously she had a potentially fatal injury; however, she has done very well. And I have referred to the Fifth Edition of the AMA Guides and on page 306 it says, "It's important to remember that an abnormality found on testing is an impairment but is not necessarily assigned an impairment rating if functions needed for activities in daily living are not affected." So it appears that she sustained a serious injury; however, she has made an outstanding recovery.

(Ex.Vol.2, Ex.5, p.22-3 [Dr. John Brophy]). Since Dr. Brophy was of the opinion that the Claimant's functions for daily living had not been affected, it was his opinion that the Claimant had suffered no permanent impairment as a result of the gunshot wound.

During his deposition, Dr. Brophy noted that the Claimant's injury to the brain was in an area that "could be injured and people could make a full recovery. (Ex.Vol.2, Ex.5, p.24). In regard to encephalomalacia, Dr. Brophy testified that this could have a small affect on a patient's coordination, but in the Claimant's case, it did not. (Ex.Vol.2, Ex.5, p.27). Dr. Brophy noted that by November 21, 2000, the residual encephalopathy had resolved. (Ex.Vol.2, Ex.5, p.27-8).

In regard to his opinion that Stephenson had reached maximum medical improvement as of November 21, 2000 and had suffered no impairment whatsoever as a result of the gunshot wound, Dr. Brophy testified that this was based upon his evaluation of Stephenson on November 21 and the comments of Stephenson and her husband. (Ex.Vol.2, Ex.5, p.28). Dr. Brophy also noted that Stephenson had improved from the time when he first saw Stephenson. Dr. Brophy testified that on November 21, 2000, Stephenson was doing very well. Moreover, Stephenson and her husband indicated to Dr. Brophy that Stephenson was not having any specific problems performing household chores or other tasks. (Ex.Vol.2, Ex.5, p.28).

When questioned as to whether or not he felt a functional capacity evaluation was necessary, Dr. Brophy testified as follows:

We usually do those when a patient feels that he is unable to return to his previous functional status or return to work at full duty. And she indicated that she was able to do so, so what's the point of a functional capacity evaluation.

(Ex.Vol.2, Ex.5, p.28).

Dr. Brophy also noted that Stephenson's husband specifically "indicated that she was back to the normal behavior and patterns and she was the exact person that she was before the gunshot wound." (Ex.Vol.2, Ex.5, p.29-30). Accordingly, Dr. Brophy indicated within his office notes that "as far as Mr. Stephenson is concerned, she has returned to her baseline personality." (Ex.Vol.2, Ex.5, p.30).

b. Dr. Keith Atkins – IME physician selected by Administrative Judge

Within the Administrative Judge's Order dated April 3, 2002, which found that this claim was compensable, the Administrative Judge ordered that Stephenson submit to a thorough neuropsychological evaluation by Dr. Keith Atkins, a clinical neuropsychologist, with the Semmes Murphy Neurologic & Spine Institute. Dr. Atkins was requested to then provide the Administrative Judge with opinions as to the nature and extent of Stephenson's work injuries; and whether Stephenson had reached maximum medical improvement and, if so, her permanent impairment rating, if any; whether Stephenson suffered from any restrictions as a result of her work injuries; and his recommended course for Stephenson's future treatment, if any.

The Appellant ISM appealed the Administrative Judge's ruling to the Full Commission. While the appeal was pending Dr. Atkins proceeded with an independent medical examination of Stephenson, performing the examination over a two-day period in June 2002. On July 3, 2002, Dr. Atkins submitted his report regarding his evaluation of Stephenson. (V.2, p.148-52). In his report, Dr. Atkins detailed his evaluation of Stephenson, noting that:

Stephenson put forth poor and inconsistent effort on numerous tests during this psychological evaluation. This was true not only for effort measures, but also on multiple components of two memory tests, two problem-solving tests, and the personality inventory. More specifically, she failed two well-validated measures of effort which have been shown to be easily passed by individuals with severe head injuries, various neurological diseases, and children, and mentally retarded

adults. Irritability on Wisconsin, Card, Sorting Tests likely led to her responses on this particular test in validating the results. Her pattern of memory scores was opposite from what should have occurred and what is seen both for individuals with normal memory as well as those with memory impairment. Similarly, symptom exaggeration was noted on the personality questionnaire. Such widespread poor effort and symptom exaggeration invalidates the remainder of her neuropsychological profile. In other words, I have no confidence in the validity of her neuropsychological scores, most of which fell within the impaired range. Further, both her report and her husband's description of her memory problems run counter to what is known about memory systems and impaired memory functioning following head injuries.

(V.2, p.151-52).

Dr. Atkins concluded his report by noting that if Stephenson "does have any cognitive sequelae from the gunshot wound, it is doubtful that these would include impaired memory, particularly are the type that she and her husband describe." (V.2, p.152).

c. Dr. Nan Hawkes – IME physician selected by Claimant's attorney

In January 2003, Dr. Nan Hawkes performed a neuropsychological evaluation of Stephenson upon referral from Stephenson's attorney.¹⁰ Dr. Hawkes drafted her evaluation report on January 14, 2003. (V.2, p.241-44). Within that report, Dr. Hawkes indicated that based upon the Word Memory Test (WMT) and the Computerized Assessment of Response Bias (CARB), Stephenson was felt to have good effort on testing procedures. (V.2, p.243). Dr. Hawkes also felt that Stephenson provided a profile suggestive of a valid, non-symptom exaggerating and non-lingering record. (V.2, p.243). Dr. Hawkes noted that Stephenson was estimated to have functioned in a low-average range of intelligence prior to her head injury. Dr. Hawkes concluded her report by noting that Stephenson was not able to return to work due to "her memory problems as well as other cognitive deficits." (V.2, p.244). Dr. Hawkes also

¹⁰ Stephenson has previously argued in this matter that "[d]ue to the fact that Dr. Atkins refused to re-evaluate [Stephenson], and in an effort to comply with the Order of this Court, [Stephenson] underwent a neuropsychological evaluation by Dr. Nan Hawkes on January 13-14, 2003" This is simply wrong. Stephenson saw Dr. Hawkes upon "referral" by her attorney over 22 months before Dr. Atkins declined to perform a second evaluation.

testified that she did not interview any family members to get their perspective as to how Stephenson was functioning on a daily basis, though she acknowledged this would be “good information.”¹¹ (Ex.Vol.1, Ex.1, p.35 [Dr. Nan Hawkes]).

d. Dr. Keith Atkins testimony

As previously noted, Dr. Atkins reported that Stephenson failed to give full effort during his initial examination of her. Afterwards, the Administrative Judge issued a follow-up Order requiring Stephenson to return to Dr. Atkins for a second examination, this one at Stephenson’s expense. This examination never took place as Dr. Atkins declined to re-evaluate Stephenson. As Dr. Atkins explained in his deposition testimony, it is important that the examiner build up a good rapport with patient and he did not believe that he could establish that rapport given the fact that he had already written a report that was critical of Stephenson’s effort. (Ex.Vol.1, Ex.3, p.75 [Dr. Keith Atkins]). However, Dr. Atkins did testify by deposition as to his findings and conclusions based upon his initial examination of Stephenson. (Ex.Vol.1, Ex.2). In addition, Dr. Atkins had an opportunity to review Dr. Hawkes test data prior to his deposition. *Id.* Based upon the test data compiled by Dr. Atkins during his testing of Stephenson along with the data compiled by Dr. Hawks, Dr. Atkins provided extensive testimony, which was offered into evidence by Appellant ISM. (Ex.Vol.1, Ex.3 [Dr. Keith Atkins]).

i. Hawkes test data flawed

Without attempting to re-state all of Dr. Atkins’ testimony and opinions, it is sufficient here to note that 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

¹¹ This can be compared to Dr. Atkins, who deemed this information important enough that he included an interview with Stephenson’s husband as a part of his examination.

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 at length as to the fallacy of such a reading and conclusion¹². (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

¹² First of all, Dr. Atkins testified that he could not understand why Dr. Hawkes would only give one portion of the test. Dr. Atkins stated that he doesn't know how you can take the score from one subtest, when the complete test includes seven subtests, and then declare the Claimant gave good effort. (Ex.Vol.1, Ex.3, p.157 [Dr. Keith Atkins]). Dr. Atkins pointed out 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.94-5). Dr. Atkins notes that if he had not given the remaining 6 subtests, he would have had to say that Stephenson passed the WMT, though on a borderline basis. Dr. Atkins would have never been able to see that Stephenson's consistency and effort were so poor had it not been for the remaining six subtests. (Ex.Vol.1, Ex.3, p.96). Dr. Atkins also testified that the literature shows that the delayed recognition subtests within the WMT are the most powerful and accurate scores to establish effort. With Dr. Hawkes only giving subtest 1, she never gave Stephenson the delayed recognition portion of the WMT. (Ex.Vol.1, Ex.3, p.95).

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).

Dr. Atkins also gave numerous other examples of instances in which Dr. Hawkes only gave portions of the neuropsychological tests. These included the Wechsler's three tests, which is a ten or eleven part test. Dr. Atkins noted that Dr. Hawkes only gave an abbreviated test, which was not a standardized abbreviated test, but a selected group of subtests from the full IQ test. (Ex.Vol.1, Ex.3, p.77-9). Dr. Hawkes also used shortcuts in giving the finger tapping test (Ex.Vol.1, Ex.3, p.97-99), the group strength test where it is standard to perform two trials of grip strength tests and Dr. Hawkes only performed one (Ex.Vol.1, Ex.3, p.112-13), and the MMPI-2 test, which Dr. Hawkes gave only an abbreviated version (Ex.Vol.1, Ex.3, p.131-32).

ii. Both neuropsychological examinations of Stephenson show that she gave inconsistent, poor and inadequate effort along with symptom exaggeration

Dr. Atkins noted succinctly within the report concerning his neuropsychological exam of Stephenson that the examination results were replete with evidence that Stephenson gave poor and inconsistent effort throughout the examination. (Ex.Vol.1, Ex.3, p.149). Dr. Atkins also noted that the test results reflected instances in which Stephenson was exaggerating or magnifying her symptoms. (Ex.Vol.1, Ex.3, p.149). Dr. Hawkes has testified that when she administered the neuropsychological examination of Stephenson, she found evidence of good effort and no symptom exaggeration. Dr. Atkins has reviewed Dr. Hawkes' test data and has testified that he strongly disagrees with Dr. Hawkes' conclusions in this regard. (Ex.Vol.1, Ex.3, p.153-54). Dr. Atkins gave other examples of where the test results indicated Stephenson gave poor and inconsistent effort on the examinations by both Dr. Atkins and Dr. Hawkes. (Ex.Vol.1, Ex.3, p.146-48). Dr. Atkins testified that Stephenson's effort were equally bad and inconsistent

in Dr. Hawkes' examination as it was on his examination of Stephenson. (Ex.Vol.1, Ex.3, p.169-70).

In regard to Stephenson's effort, Dr. Atkins noted that the validity of the test data can be compromised by the patient's effort on the examination. (Ex.Vol.1, Ex.3, p.14). Dr. Atkins testified that the CARB and WMT tests were performed specifically to measure Stephenson's effort. According to Dr. Atkins, these tests had been normed and shown that individuals with severe traumatic brain injuries were able to pass these tests. When Dr. Atkins administered these tests on Stephenson, her scores were unbelievably low. (Ex.Vol.1, Ex.3, p.42). Dr. Atkins also testified that there were other effort tests embedded within the various tests he administered to Stephenson. For example, there is a test that is a subtest of the Wechsler's scales called the digit span test. Stephenson scored extremely low on this test with both Drs. Atkins and Hawkes. (Ex.Vol.1, Ex.3, p.43-4). Dr. Atkins also testified that on a verbal learning test Stephenson scored lower than anyone on the standardized sample. (Ex.Vol.1, Ex.3, p.45). It was Dr. Atkins' opinion upon reviewing the Hawkes test data along with his own that both exams showed inconsistent, poor and inadequate effort by the Claimant. (Ex.Vol.1, Ex.3, p.149).

Dr. Atkins also testified as to evidence of symptom exaggeration by Stephenson throughout both exams. He specifically testified concerning a Fake Bad Scale obtained within the MMPI-2 tests. The test results on both the Atkins and Hawkes examinations indicated that the Claimant was simply over-reporting her cognitive memory and emotional symptoms. (Ex.Vol.1, Ex.3, p.74, 140). Dr. Atkins testified that it was his opinion that Stephenson exaggerated all of her complaints and tried to present herself as being worse off than she really was, particularly in the cognitive area and memory area. (Ex.Vol.1, Ex.3, p.141-42).

Dr. Atkins also testified as to what he deemed a "behavior discrepancy" when he administered a neuropsychological examination on Stephenson. He pointed out that Stephenson's complaints of physical pain included complaints of right shoulder pain and difficulty holding her right hand at shoulder length. Despite having verbalized these complaints, during the TPT exam Stephenson held her right hand at or above her shoulder on two occasions for more than ten minutes and verbalized no complaints of pain nor did she offer any outward display of pain during this time. (Ex.Vol.1, Ex.3, p.145).

Dr. Atkins also noted that Stephenson's self-purported memory problems included complaints that she had remote memory loss but not immediate memory loss. Dr. Atkins noted that this was the reverse pattern from what you would normally expect to see in someone with a traumatic brain injury. (Ex.Vol.1, Ex.3, p.31). Dr. Atkins pointed out that the story presented to him by both Stephenson and her husband simply did not make sense. (Ex.Vol.1, Ex.3, p.32). It is also noteworthy that Dr. Atkins testified that the Claimant's mental status exam with him was normal. (Ex.Vol.1, Ex.3, p.34-5). Dr. Atkins also noted that Stephenson's wound was to the cerebellum and right occipital lobe. Both structures of the brain are not directly involved in learning and memory. Accordingly, Dr. Atkins testified that it would surprise him if Stephenson had memory or learning problems as a result of her head injury. (Ex.Vol.1, Ex.3, p.42-3).

iii. Definitive findings and conclusions offered by Dr. Atkins

Dr. Atkins was able to reach some definitive opinions concerning the test data from both his examination and Dr. Hawkes' examination of Stephenson. He specifically testified that it was his opinion, based upon the test data, that there was no reason why Stephenson could not return doing the same kind of job she held prior to her injury. (Ex.Vol.1, Ex.3, p.178-79).

Through her brief before the Commission, Stephenson makes much of the testimony by Dr. Atkins where he acknowledges that he is unable to say that Stephenson does not have a

problem based upon the test results. Stephenson then took this testimony and argued that she was entitled to an award of permanent disability benefits based upon this testimony. There are many problems with this analysis, the first of which is the fact that nowhere does Dr. Atkins testify that based upon a reasonable degree of medical probability is his opinion that Stephenson has suffered an impairment as a result of the gunshot wound. Quite the opposite, Dr. Atkins specifically testified that he cannot say, based upon his independent medical examination of Stephenson, his review of Dr. Hawkes test data, her deposition and the medical records concerning Stephenson's recovery from the injury that Stephenson has a neuropsychological impairment from the gunshot wound. (Ex.Vol.1, Ex.3, p.195). Dr. Atkins followed this up by stating that he cannot testify based upon a reasonable degree of medical probability that Stephenson has a problem from this work injury. (Ex.Vol.1, Ex.3, p.195-96). Another point to be made about this argument is the fact that the reason Dr. Atkins cannot give a definitive opinion as to Stephenson's neuropsychological condition is due to the fact that Stephenson has impeded his ability to do so by giving poor and inconsistent effort on both examinations and magnifying or exaggerating her symptoms. In other words, Stephenson seeks to benefit from Dr. Atkins' inability to give definitive conclusions when the reason he cannot give definitive conclusions is because Stephenson "failed to cooperate and exaggerated her symptoms in an effort to frustrate Dr. Atkins' findings." January 7, 2004 Order (V.3, p. 292).

As noted above, Dr. Atkins testified that he cannot state with any degree of competence what Stephenson's strengths and weaknesses are based upon the test data. However, he was able to give some definitive findings from the test data. In this regard, Dr. Atkins explained that while a patient such as Stephenson can give poor effort and exaggerate that their condition is worse than it really is, they cannot exaggerate that their condition is better than it really is.

Therefore, Dr. Atkins was able to look at the test data and specific isolated scores to determine that Stephenson's condition is at least as good as her test results, her poor effort notwithstanding. (Ex.Vol.1, Ex.3, p.60-1). In that regard, Dr. Atkins noted that one test which was used to assess executive skills reflected that Stephenson was working on an average level, which is higher than what Dr. Atkins would have expected from Stephenson giving her academic background. (Ex.Vol.1, Ex.3, p.67-8). Dr. Atkins testified that this was an indication that Stephenson's left brain was working pretty efficiently. (Ex.Vol.1, Ex.3, p.69). He also testified that Stephenson's test results from the Tactual Performance Test ("TPT"), which is a test that basically shows 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 Stephenson's brain was working pretty well. (Ex.Vol.1, Ex.3, p.72). Dr. Atkins testified that based upon this test date, there was no evidence of damage to the Claimant's cerebellum. (Ex.Vol.1, Ex.3, p.73-4). Dr. Atkins further stated that it was his opinion that the TPT indicated Stephenson's brain was working efficiently and he did not see any reason based upon the TPT results that indicated Stephenson could not return to work. (Ex.Vol.1, Ex.3, p.74).

Dr. Atkins also testified that an individual's ability to drive is a very good test as to how their brain is working and that they are forced to constantly adapt to a changing situation. Dr. Atkins said he would find it significant if Stephenson was driving. (Ex.Vol.1, Ex.3, p.179, 188, 192). In this regard, it is important to note that Stephenson admitted to Dr. Brophy that she was driving within five months after her accident. When you consider Dr. Atkins' testimony as to the normal recovery curve, it would be extremely unusual if Stephenson's condition worsened after this improvement within the five months of the injury. Furthermore, it is noteworthy that

Stephenson admits to driving and has actually renewed her driver's license since being released to return to work without restrictions by Dr. Brophy.

e. Administrative Judge's Order

After reviewing "all of the evidence which consisted of testimony entered both live, by medical records affidavits, depositions and all other exhibits..." the Administrative Judge held "that claimant reached maximum medical improvement on November 27, 2000, an[d] has no permanent impairment or loss of wage earning capacity as a result of her work injury." Administrative Judge Order, March 31, 2006. (V.4, p. 345-353). Relying on evidence presented by Dr. Atkins, the Administrative Judge found that the testimony of Dr. Hawkes was *not credible* and should not be relied upon because Dr. Hawkes *failed to properly administer complete standardized tests during her evaluation of Stephenson*. (V.4, p. 345-353).

f. Full Commission Order

The Full Commission reversed the Order of the Administrative Judge based exclusively on the disputed testimony of Dr. Hawkes. (V.4, p. 359-362). Within the Order, which was signed by two Commissioners and entered on April 18, 2007, the Commission noted that "[o]bviously, the Claimant must prove her claim for permanent disability benefits by a preponderance of the *credible* evidence." (emphasis added) (V.4, p. 359). The Commission went on to point out that Stephenson "admitted [that] she has not applied for work since being released from the care of her treating neurosurgeon, Dr. John Brophy," but excused this because Stephenson had a "justifiable reluctance to reemployment because of a fear of being shot again." (V.4, p. 360).

The Full Commission Order noted that while Dr. Brophy successfully treated Stephenson and found her fit to return to work from a "physical standpoint," there remained "telling proof" as to how this injury affected Stephenson's earning capacity. (V.4, p. 360). The Full Commission

Order then addressed with approval the testimony of Dr. Hawkes before turning a critical eye toward the testimony of Dr. Atkins. (V.4, p. 360-361). After characterizing Atkins' evaluation of Stephenson as a "bust," the Commission stated that Atkins declined to reexamine her because "his highly critical report of [her] following the first evaluation prejudiced his ability to objectively evaluate [her] any further."¹³ (V.4, p. 361).

The Commission Order continued, noting that despite Atkins testimony criticizing the test data of Hawkes as being unreliable, Atkins actually offered his opinion, based upon Hawkes' test data, that Stephenson was able to return to work with no impairment or restrictions. (V.4, p. 361-362). The Full Commission questioned how Atkins was able to reach such a conclusion based upon test data that Atkins termed "invalid, tainted and unreliable." (V.4, p. 361).

The Full Commission Order concluded that

In the end, Dr. Brophy apparently performed magnificently in treating Ms. Stephenson for this penetrating wound to the brain. Beyond this, Dr. Hawkes conducted a *thorough* neuropsychological evaluation of the Claimant and offered a *very credible opinion*, based on this evaluation, that Ms. Stephenson is permanently and totally disabled. *Nothing in the testimony of Dr. Atkins convinces us that Dr. Hawkes' opinion is flawed or otherwise unreliable. That is enough, in our opinion, to carry the day for the Claimant*, and we, therefore, reverse the Opinion of the Administrative Judge and hereby award permanent total disability benefits commencing on June 28, 2000 and continuing for a period of 450 weeks.

(V.4, p. 362)(emphasis added).

¹³ As previously noted, this is incorrect. First, Dr. Atkins testified that despite the inadequate effort put forth by Stephenson when undergoing the testing administered by him, he was able to glean some definitive findings from the test data. This was based in part on the concept that while one may be able to fake that they are not as good as they really are by giving less than full effort, they cannot fake to show that they are better than they really are. Thus, even with Stephenson giving less than full effort, her test scores in some areas provided Dr. Atkins with a base line that he was able to use to reach certain conclusions as to her condition. Second, the reason Dr. Atkins declined to re-test Stephenson at the Commission's request was because he did not feel he would be able to establish the trust and full cooperation of Stephenson, without which the test scores would be tainted and without import. Accordingly, Dr. Atkins declined to go forward with a two day testing program that he believed would be flawed from the beginning. Ironically, Stephenson now tries to cast Dr. Atkins in a bad light for this decision, which actually displays both professionalism and integrity.

3. Full Commission Order not supported by substantial evidence since expert opinion relied upon by Commission was based upon an inadequate and incomplete examination that does not carry as much weight and has little or no probative value when compared to the opinion of two experts that had made a thorough and adequate examination

Because the opinions voiced by Dr. Hawks' were based upon flawed test data, they do not represent credible evidence upon which this the Full Commission was entitled to rely, particularly when the Commission used it to override the clear and unequivocal testimony by Stephenson's treating physician. *See, e.g., Liberty Mut. Ins. Co. v. McKneely*, 862 So. 2d 530, 535 (Miss. 2003) (claimant must produce credible evidence proving the claim). As the Mississippi Supreme Court has found:

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 1082, 1085-1087 (Miss. 1999).

Moreover, the Full Commission Order handed down in this matter on April 18, 2007 not only ignores the testimony of the neurosurgeon who was Stephenson's treating physician for the entire period of her recovery (and who observed her periods of improvement along the way), it further ignores the only neuropsychologist who performed a *complete* series of diagnostic tests – all to place reliance upon a neuropsychologist who performed an incomplete, non-standardized battery of neuropsychological testing, and particularly of the effort-related tests, even though she knew in advance that Stephenson had already undergone a series of neuropsychological tests where she was found to have not given full effort based upon the effort related testing measures contained within the testing data. As pointed out by Dr. Atkins, who has reviewed Dr. Hawks' actual test data and actually re-graded the same data, Dr. Hawkes did not perform complete standardized tests on a great portion of the neuropsychological evaluation she performed on

Stephenson. Dr. Atkins testified as to the problems that are inherent when the complete test is not given. He has also testified that based upon the test data that he did review, there are numerous instances in which there is evidence that Stephenson did not give full and complete effort. There is also evidence of symptom exaggeration, the same of which was found during Dr. Atkins' examination of Stephenson.

Finally, Dr. Atkins was able to draw some definitive conclusions from the material. Based upon this, Dr. Atkins testified that based upon a reasonable degree of medical probability he could see no reason that Stephenson cannot return to work performing the same type of job she performed prior to her work injury¹⁴. This is entirely consistent with the testimony and medical records of Dr. John Brophy.

¹⁴ The Full Commission Order raises a question as to how Dr. Atkins, the Commission's appointed IME physician, could offer any affirmative opinions as to the testing completed by both Atkins and Hawks when he felt Stephenson had not given full effort for either. (V.4, p.361). Dr. Atkins addressed this head-on when he testified that while he cannot state with any degree of competence what Stephenson's strengths and weaknesses are based upon the test data, he was able to give some definitive findings from the test data. In this regard, Dr. Atkins explained that while a patient such as Stephenson can give poor effort and exaggerate that their condition is worse than it really is, they cannot exaggerate that their condition is better than it really is. Therefore, Dr. Atkins was able to look at the test data and specific isolated scores to determine that Stephenson's condition is at least as good as her test results, her poor effort notwithstanding. (Ex.Vol.1, Ex.3, p.60-1 [Dr. Keith Atkins]). In that regard, Dr. Atkins noted that one test which was used to assess executive skills reflected that Stephenson was working on an average level, which is higher than what Dr. Atkins would have expected from Stephenson giving her academic background. (Ex.Vol.1, Ex.3, p.67-8). Dr. Atkins testified that this was an indication that Stephenson's left brain was working pretty efficiently. (Ex.Vol.1, Ex.3, p.69). He also testified that Stephenson's test results from the Tactual Performance Test ("TPT"), which is a test that basically shows 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 Stephenson's brain was working pretty well. (Ex.Vol.1, Ex.3, p.72). Dr. Atkins testified that based upon this test date, there was no evidence of damage to Stephenson's cerebellum. (Ex.Vol.1, Ex.3, p.73-4). Dr. Atkins further stated that it was his opinion that the TPT indicated Stephenson's brain was working efficiently and he did not see any reason based upon the TPT results that indicated Stephenson could not return to work. (Ex.Vol.1, Ex.3, p.74).

Dr. Atkins also testified that an individual's ability to drive is a very good test as to how their brain is working and that they are forced to constantly adapt to a changing situation. Dr. Atkins said he would find it significant if Stephenson was driving. (Ex.Vol.1, Ex.3, p.179, 188, 192). In this regard, it is important to note that Stephenson admitted to Dr. Brophy that she was driving within five months after her accident. When you consider Dr. Atkins' testimony as to the normal recovery curve, it would be extremely unusual if Stephenson's condition worsened after this improvement within the five months of the injury. Furthermore, it is noteworthy that Stephenson admits to driving and has actually renewed her driver's license since being released to return to work without restrictions by Dr. Brophy.

This Commission's reliance on evidence provided by Dr. Hawks, which is contrary to that of Dr. Brophy and Dr. Atkins, is against the overwhelming weight of the evidence and based upon an erroneous application of the law since Dr. Hawks test data, and subsequent opinions based upon the same, are not credible. As the Mississippi Supreme Court stated in *Smith*:

It really makes no difference if there are three doctors or thirty doctors who agree with Dr. Neill *if none of them used necessary diagnostic tools, tests, or procedures to allow them to see the problem.* The test in such a case is not one of the weight of the sheer number of duly qualified experts, but *rather the credibility of the expert(s) based on the weight of objective proof, evidence, or results used in rendering an opinion.*

Smith v. Commercial Trucking Co., 742 So. 2d 1082, 1085-1087 (Miss. 1999)(emphasis added).

Because the Full Commission Order relied on expert testimony which is not, by definition, credible, this Court should reverse the decision of the Mississippi Workers' Compensation Commission on the basis that it is not supported by substantial evidence, and reinstate the conclusions reached by 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.

In addition, the decision of the Full Commission should be reversed on grounds that it is clearly erroneous and contrary to the overwhelming weight of the evidence. The record is clear that the testimony of Dr. Hawkes is flawed because her examination was flawed, incomplete and does not stand up to the learned testimony and opinion of Dr. Brophy, her treating physician, and the complete testing performed and subsequent testimony on opinion of Dr. Atkins, the Commission-appointed IME physician, who provided an unbiased, detailed account as to the basis of his own opinions and the clear reasoning he employed in discounting Dr. Hawkes interpretation of her test results in determining whether Stephenson gave full effort when

undertaking the psychological testing. As the Mississippi Supreme Court noted within *Weatherspoon v. Croft Metals, Inc.*:

A finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act.

853 So. 2d 776, 780 (Miss. 2003) (citations omitted).

In this case, the Full Commission's finding that Stephenson was permanently, totally disabled based upon the flawed testimony of Dr. Hawkes, and to the contrary of the testimony of Dr. Brophy and Dr. Atkins, is clearly erroneous for the reasons stated herein and should be reversed.

CONCLUSION

For the reasons stated herein, the Full Commission award of permanent total disability benefits should be reversed since the Full Commission Order dated April 3, 2002 erred in finding that Stephenson's injuries were suffered in the course and scope of her employment with ISM. Even if the shooting incident was work related, the Full Commission Order dated April 18, 2007 should be reversed and her award of any additional disability benefits should be denied based upon determination that the Full Commission's 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. Finally, even if Stephenson's injuries determined to be work related and Commission Order is found to be supported by substantial evidence and based upon correct application of law, the Commission's award of permanent total disability benefits should be reversed and Stephenson should be denied any award of permanent disability benefits based upon her total failure to make reasonable efforts to obtain gainful employment after her treating physician, Dr. John Brophy, released her

from his care in November, 2000 upon determining that she had reached maximum medical improvement.

This the 22nd day of May, 2009.

Respectfully submitted,

INTERNATIONAL STAFF MANAGEMENT
AND LEGION INSURANCE COMPANY

By: 

F. HALL BAILEY
Their Attorney

OF COUNSEL:

WATKINS LUDLAM WINTER AND STENNIS, P.A.

Post Office Box 427

Jackson, Mississippi 39205

(601) 949-4900

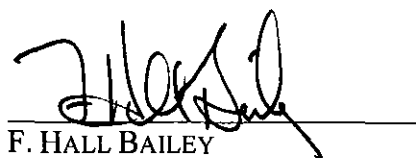
(601) 949-4804 (fax)

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 document to:

D. Briggs Smith, Esq.
Parker H. Still Esq.
Smith, Phillips, Mitchell & Scott
695 Shamrock Drive
Batesville, MS 38606

This the 22nd day of May, 2009.


F. HALL BAILEY