IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

WILLIAM M. SCOTT	APPELLANT/CROSS-APPELLEE
V.	NO. 2009-TS-00415
KLLM, INC., A SELF-INSURED	APPELLEES/CROSS-APPELLANTS

BRIEF OF APPELLANT/CROSS-APPELLEE

APPEALED FROM THE CIRCUIT
COURT OF HINDS COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant/Cross-Appellee, William M. Scott, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. William M. Scott, Appellant/Cross-Appellee;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant/Cross-Appellee;
3. KLLM, Inc., Appellees/Cross-Appellants;
4. Richard M. Edmonson, Jr., Esq., Counsel for Appellees/Cross-Appellants.

THIS the 22 day of July, 2009.

JOHN HUNTER STEVENS

TABLE OF CONTENTS

PAGE

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES **PAGE**

STATEMENT OF THE ISSUES

1. Whether or not the Full Commission Order dated December 19, 2007, is contrary to law and against the overwhelming weight of the evidence;

2. Whether or not the Full Commission erred in failing to award disability benefits and in failing to affirm the Order of the Administrative Judge dated April 2, 2007;

3. Whether or not the Full Commission Order dated December 19, 2007, is against the intent and purpose of the Workers' Compensation Act inasmuch as it ignores the liberal construction in favor of compensation.

4. The central issue is whether there was any evidence before the Commission to justify a reduction of the award by 80%, and whether there is any evidence, let alone substantial evidence, to support such a radical reduction.

STATEMENT OF THE CASE

This matter was heard by the Full Commission on August 13, 2007, pursuant to the Employer's appeal of the Order of Administrative Judge dated April 2, 2007.

STATEMENT OF THE FACTS

The Administrative Judge, based on well settled law and clear facts, found that the Claimant in this case was entitled to permanent total disability benefits for the maximum amount set forth in the Act. Aggrieved, the employer/carrier filed a petition review before the full commission urging the commission to reduce the award. The Commission lowered the award by 80%, and affirmed the remainder of the Order. However, the record is void of evidence to justify modification of the Judge's award. As such, the Judge's findings, based on a wealth of experience, well settled statutory and judicial authority from the Mississippi Supreme Court require the Order of the Administrative Judge be reinstated.

Apparently, despite simple facts, the employer urged this commission to reduce the award based on evidence which would be speculative at best. The only evidence is the limited, illogical opinions of a non-treating physician who evaluated the Claimant on one occasion over four years following the accident solely for the purpose of litigation. In order for the commission to modify or change the Judge's opinions, it would have to find some credibility in Dr. Weiss's opinion and completely ignore multiple treating doctors. However, the Commission's Order modifying the Administrative Law Judge is in and of itself flawed since Dr. Weiss' admittedly speculative opinions that he would not think the Claimant had permanent impairment or restrictions, is in direct contradiction of the Commission's findings of a 20% permanent loss of wage earning capacity. Yet the findings of the Commission reveal there is no basis and facts to substantiate the 80% reduction

of the Administrative Law Judge's findings.

However, based on review of his deposition and the wealth of other evidence, Dr. Weiss's opinions not only are illogical but speculative. His testimony is contradicted by primary treating physicians who treated the Claimant over a period of years from shortly after the accident. It would be in contradiction to the Claimant's un-refuted testimony, his medical conditions, and it would further be contradicted by the objective diagnostic evidence undertaken by treating physicians. The Full Commission, despite the lack of evidence, ignored the testimony of Dr. Powell assigning permanent impairment, chronic pain and job restrictions that prevented him from being a truck driver, ignored the Claimant's unrefuted testimony, ignored the Claimant's job search, favored the admittedly speculative testimony of Dr. Weiss, to reduce the Administrative Law Judge's award by 80%. Despite the fact that even the Commission admitted that the Claimant's "loss of access to the type of work he was accustomed to performing", said findings of the Commission indicate a total and utter lack of accountability and total lack of consideration of the objective evidence in favor of a one-time visit that the doctor admitted was speculative.

SUMMARY OF THE ARGUMENT

The law concerning the primary treating physicians requires this commission to put more weight on the primary treating physicians. Neither of which in this case, a neurosurgeon, a general physician and a nurse practitioner, were seriously questioned as to the treatment being reasonable, necessary and appropriate. Even Dr. Weiss agreed the treatment was appropriate and necessary, and further, it's evident in the fact that Dr. Weiss did not even consult with either of these physicians as to the treatment and the objective disk bulges in the MRI, nor did he disagree that the Claimant had genuine complaints of pain and was believable. He only testified that the MRI was sub-optimal.

(Ex. 13, P.25). Based on the evidence, the commission was in error not to affirm the findings of the Administrative Law Judge. *Clements v. Welling Truck Serv., Inc.*, 739 So.2d 476, 478 (Miss. Ct. App. 1999).

ARGUMENT

The Administrative Law Judge found the Claimant had sustained a loss of wage earning capacity, and that was in excess of the maximum and an award of benefits basically provides that the Claimant was permanently and totally disabled. The Full Commission with no justification or basis whatsoever reduced the award by 80% despite no evidence, reason or basis whatsoever. Both sides argue the Commission was in error by coming up with a figure of 20% when there was no evidence to substantiate that percentage. Claimant submits that the findings of the Full Commission have no basis in law or fact. The Claimant sustained an injury that was ultimately admitted by the Employer and Carrier, despite the fact that it was denied for over three years wherein the Claimant was unable to obtain limited medical treatment. His primary treating physician found him to have disability which prevented him from returning to work as a truck driver. He underwent significant job search efforts which were not questioned. There was no vocational rehabilitation to rebutt the job search efforts, and the Employer and Carrier's only fact witness admitted that she would not allow him to return to work as a truck driver. There is no evidence that the Employer and Carrier have made any efforts to accommodate or offer the Claimant any position within his restrictions or even if such position would have been offered, the amount of that pay which would undoubtedly been much less than that of a truck driver. The job likely would have been at the Employer's home office in Jackson, Mississippi, not his residence in Tennessee. The only evidence by the Employer and Carrier, a expert detained four years after the accident, who opined that the Claimant certainly

could have impairment and believed the Claimant had some chronic pain symptoms, yet he simply could not come up with a diagnosis. He further admitted that his own findings were speculative. (Ex. 13, P. 16-17) This is not evidence to sustain a 80% reduction in the award of the Administrative Law Judge.

In addition, the overwhelming evidence further substantiates the Claimant proved a loss of wage earning capacity in excess of the maximum. The employer's own witness could not refute the Claimant could not return to his prior job as a truck driver, the job that he had done for his entire work career. (T. 63) The employer's own witnesses further could not refute the legitimate extensive job search efforts undertaken by the Claimant. The employer's only fact witness could not refute the evidence from the United States Government that the claimant was approved to receive social security disability benefits (since the date of accident) because he was not able to return to his usual occupation as a truck driver. (Ex. 8) Because of his advanced age the federal government found that he was permanently and totally disabled. In short, the employer/carrier has no legitimate evidence to justify reversing or modifying the esteemed Administrative Law Judge's findings.

Claimant's physicians, specifically including Dr. Powell, his neurosurgeon, testified that he would not be able to return to his usual occupation as a truck driver. (Gen. Ex. 2, 7-26-05 report; Ex. 4, P.23-24) Dr. Powell gave Claimant a 11% permanent impairment rating according to the AMA Guidelines, and gave him significant restrictions and a maximum medical improvement date of July 26, 2005. (T. 23) The Claimant's testimony indicated that he could not drive for the long distances and he could not return the type of work he did in his profession as a truck driver. (T. 22) The KLLM representative testified that the Claimant would not be allowed to drive if he was taking narcotic pain medications, which have been prescribed by his physicians, and which Claimant

continues to take. (T. 63)

Considering the evidence as a whole applying the law, the speculative opinions of Dr. Weiss simply cannot carry any weight when compared to treating physicians who treated the Claimant over an extended period. Dr. Weiss having only seen the claimant one time more than four years after the injury, at the request of the Employer, paid for solely for purposes of testifying in litigation and not treatment.

The interpretation of the Mississippi Workers' Compensation Act, especially those relating to those physicians, has long recognized principles that:

a. Treating physician's opinions are generally afforded more credibility and weight than those of physicians who examine the Claimant solely for purposes of testifying and do not establish a physician/patient relationship;

b. Close questions are typically resolved in favor of the injured worker; and

c. This furthers the statutory mandate that doubtful cases are to be resolved in favor of compensation so as to satisfy the beneficiant remedial purpose of statutory law. (Emphasis added.)

See generally *Clements v. Welling Truck Service*, 739 So.2d 476, 478 (Miss. 1999). See also *Raytheon Aerospace v. Miller*, 850 So.2d 1159, 1176 (Miss.App. 2002), reversed on other grounds, 861 So.2d 330 (Miss. 2003); *South Central Bell v. Aden*, 474 So.2d 584 (Miss. 1985); *Barham v. Klumb Forest Products, Inc.*, 453 So.2d 1300, 1303-04 (Miss. 1984); *Holman v. Standard Oil Co. of Kentucky*, 136 So.2d 591, 594 (Miss. 1962); *Big Two Engine Rebuilders v. Freeman*, 379 So.2d 888 (Miss. 1980); *Stewart v. Singing River Hospital System*, 2005 WL 1870031 (Miss. Ct. App. Aug. 9, 2005). These authorities mandate that the administrative law judge's findings be reinstated. Furthermore, the record is void of any evidence that the Claimant's job search efforts were

unreasonable or constituted a mere sham. (Ex. 7) The case law requires that the employer/carrier prove that the job search efforts are unreasonable, and in this case the employer did not. See *Siemens Entergy v. Pickens*, 732 So.2d 276, 284 (Miss. App. 1999).

Even if the employer/carrier would have produced through some type of vocational rehabilitation expert or other testimony showing that Claimant had some wage earning capacity in another position, he still would be entitled to the maximum. Then even if he was able to earn wages at an amount of up to sixty-three percent (63%) of his pre-injury wages of seven hundred seventy-five dollars ($775.00) he still would have been entitled to receive the maximum disability benefits.

With no evidence to the contrary and while affirming most of the affirmative findings that claimant's injury obviously caused disability, amazingly, the Full Commission lowered the award with no evidence to the contrary. It basically pulled this figure 'out of the sky'. There is no question but the findings, in lowering the award for no apparent reason, was against the overwhelming and substantial weight of the evidence. The lowering of the Administrative Law Judge's findings do not justify reversal, modification or change in any manner, shape or kind. When the Commission's rulings are found to be unsupported by substantial evidence or clearly erroneous it must be reversed. A finding can be found to be clearly erroneous when ... 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 finding of fact and its application of the Act. *J. R. Logging v. Halford*, 765 So.2d, 580, 583 (Miss. Ct. App. 2000). (citations omitted) At a minimum, the Commission's findings in arbitrarily reducing the award by 80% is clearly erroneous. More likely, the findings with no evidence to substantiate or support a reduction of this amount is arbitrary and capricious.

CONCLUSION

Sadly, the Full Commission speculatively, and without legal or factual justification arbitrarily lowered the Claimant's award by 80% despite no evidence whatsoever to justify penalizing the Claimant. The Commission acknowledged that all the proof revealed that he was "unable, because of his injury, to return to work as a truck driver". The Commission further made no effort to explain why the federal government declared him totally disabled for social security basis if that was not apparently in the 80% reduction of the award. What is most disturbing about the findings of the Commission, is that it apparently based the 80% reduction solely on the fact that the KLLM witness stated that if they would have known of the restrictions they would have provided "suitable light duty such as driving shuttle vans at terminals or even shredding paper". (T. 55) Despite the fact that there was no evidence to indicate the amount of wages would be or anywhere near those earned as a truck driver. Even if there was some evidence to indicate the Claimant was able to earn wages at minimum wage, or even as much as $10 to $12 per hour, he still would have been earning less than 63% of his pre-injury wage of $775.00 per week. All of which would have still provided an award in excess of a maximum allowable under the Act as correctly found by the Administrative Law Judge. Specifically, the Defendant's only witness did not testify to how much such wages could be. This is the only evidence which the Commission could possibly rely on to reduce the award; however, its reduction of the award by 80% when there is no evidence to substantiate such a figure is without merit, disturbing and represents a complete and utter disregard for the clear meaning of the Act. The findings of this Commission must be based on legitimate evidence. In this case, the evidence is pure speculation. When considering the evidence as a whole, the age of the Claimant, the fact that he cannot return to work a truck driver, has legitimate restrictions that will likely put

him at a loss in excess of the maximum benefits allowable under the Act. To say that the findings of the Commission are against the substantial weight of the evidence would be an understatement. In this case, the findings of the Commission represent a travesty and an injustice. To justify the reduction of an award by 80%, while admitting that the Claimant has permanent disability, and loss of wage earning capacity, based solely on the speculative evidence of one visit from a doctor four years after the fact, defies common sense. The findings of the Administrative Law Judge when compared to those of the Commission substantiate clear mistake and error on behalf of the Commission.

Respectfully, Appellant requests this Court, at its appellate level, to reverse the findings of the Full Commission and reinstate the findings of the Administrative Law Judge.

Respectfully Submitted, this the 22 day of July, 2009.

WILLIAM M. SCOTT, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, John Hunter Stevens, attorney for William M. Scott, do hereby certify that I have this day mailed by United States Mail, postage prepaid, the above and foregoing document to:

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DATED this the 22 day of July, 2009.

JOHN HUNTER STEVENS