IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

JUAN JOSE LOPEZ — APPELLANT

VS. — CAUSE NUMBER 2009-WC-00123-COA

ZACHRY CONSTRUCTION CORPORATION AND
ZURICH AMERICAN INSURANCE COMPANY — APPELLEES

BRIEF OF APPELLEES, ZACHRY CONSTRUCTION CORPORATION AND ZURICH AMERICAN INSURANCE COMPANY

ON APPEAL FROM:
CIRCUIT COURT OF CHOCTAW COUNTY, MISSISSIPPI
CASE NUMBER 2008-0066-CV-L
AND
MISSISSIPPI WORKERS' COMPENSATION COMMISSION
CASE NO. 0401034-H-8870

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Circuit Court Judge may evaluate the possibility of disqualification or recusal.

1. Juan Jose Lopez
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   — Claimant/Appellant

2. Zachry Construction Corporation
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   — Employer/Appellee

3. Zurich American Insurance Company
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7. Hon. Liles Williams — Commissioners
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STATEMENT OF THE ISSUES

The instant appeal presents the following issues for review by the Court:

1. Whether the order of the circuit court dated December 15, 2008, is due to be affirmed.

2. Whether any issues are preserved for appeal when no brief or other document was filed with the circuit court other than the Notice of Appeal, which alleged that the commission's order was contrary to law and against the overwhelming weight of the evidence in failing to reverse the order of the administrative judge and award claimant all benefits entitled to him under the Act.

3. Whether the order of the commission dated June 19, 2008, is supported by substantial evidence, and thereby due to be affirmed.

4. Whether claimant is entitled to permanent partial indemnity benefits based only upon his admission that he could return to work at a minimum wage job without an adequate job search to substantiate that such a job is the best job that he could locate within his restrictions.

STATEMENT OF THE CASE

This appeal involves a review of the decision of the Circuit Court of Leake County, Mississippi dated December 15, 2008, where it affirmed the Mississippi Workers' Compensation Commission decision of June 19, 2008, where it adopted the opinion of the administrative judge dated January 3, 2008. The employer and carrier submit that the circuit court's decision is supported by the evidence, is in conformity with the law and must be affirmed by this Honorable Court.

I. Nature of the Case and Course of Proceedings

This particular appeal arises out of injuries allegedly sustained while the claimant/appellant, Juan Jose Lopez, was employed as a construction laborer with Zachry Construction Company near French Camp, Mississippi (hereinafter sometimes referred to as "the employer" or "Zachry"). As a consequence of his injuries, Mr. Lopez claims to have sustained a loss of wage earning capacity. He has admitted that he could return to work at a minimum labor job.

Historically, on February 2, 2004, the claimant/appellant filed his Petition to Controvert seeking compensation for injuries to his back caused when he twisted while lifting a piece of sheet metal. He alleged a date of injury of January 1, 2003.

On February 26, 2004, the employer and carrier answered the petition admitting the injury occurred, but denying that any further benefits were due.

A trial was held before Administrative Judge Cindy Wilson on September 10, 2007. The parties stipulated that: claimant suffered an injury to his low back on January 1, 2003; claimant's average weekly wage at the time of the injury was $488.70; claimant continued to work for this employer until May 14, 2003; claimant had been paid temporary total disability benefits of $4,080.17; claimant received a 5% rating to the body as a whole; and according to the treating

physician, Dr. Kenneth Staggs, claimant reached maximum medical improvement on December 12, 2003. The exhibits submitted at trial were the vocational reports and the medical records and reports of Dr. Staggs. The issues at the trial were what temporary total disability was attributable to the injury and what permanent partial disability or loss of wage earning capacity, if any, was due claimant.

On January 3, 2008, the administrative judge entered an order finding that claimant admitted that he did not comply with medical treatment by attending physical therapy as ordered by his treating physician. As such, he was due not further temporary total disability after October 8, 2003. Claimant was underpaid temporary total disability benefits, but the employer and carrier were entitled to credit for any indemnity paid after the agreed upon date of MMI, December 2, 2003. Claimant had been offered a job by a former employer making up to $500 per week. The judge thought that claimant might not be able to perform all of the tasks required of the job, but the tasks appeared to be within the restrictions assigned by Dr. Staggs. The judge discussed the claimant's predicament regarding his wife's earnings and that claimant believed he might be working only to pay the babysitter. That belief did not relieve him of his burden to seek alternative employment. Nevertheless, the administrative judge believed the rating and restrictions supported some loss of wage earning capacity and awarded $15.00 per week beginning December 2, 2003 and continuing for a period of 450 weeks. Because claimant had not been compliant with his medical treatment, the judge noted that any treatment claimant might now need would be very questionably related to this January 1, 2003, injury, so the employer and carrier had no duty to provide any further medical services.

On January 14, 2008, the claimant petitioned for review of the claim by the Full Commission alleging that the order of the administrative judge was contrary to law and against the overwhelming weight of the evidence and claimant was entitled to all benefits under the Act.

On March 25, 2008, claimant filed a motion to add an additional exhibit to the record. The exhibit was the definition of a construction work under the DOT guidelines. The proposed exhibit was offered to define a construction worker, as the claimant had speculated at trial that he could possibly be a construction worker. No explanation was provided for the delay in offering the exhibit, except to allege that there was no prejudice to either of the parties.

On March 31, 2008, the employer and carrier filed an objection to the motion to add additional evidence. The response stated, among other things, that the proposed exhibit was filed on or about March 26, 2008, but had not been listed as an exhibit in the claimant's Pretrial Statement or ever been attempted to be filed in the over 4 years of litigation. It was admitted that the rules of evidence are relaxed in a workers' compensation claim, but not ignored. The exhibit was not relevant to the issues of the claim. Further, while the 17 year old report did describe some general tasks performed by a construction worker, it did not explain or contradict the claimant's testimony wherein he described his specific job duties that he had performed as a construction worker.

On June 19, 2008, the Full Commission entered its order, with all three Commissioners in agreement, affirming the order of the administrative judge and denying the motion for additional evidence.

On June 27, 2008, the claimant filed his notice of appeal to the Circuit Court of Leake County, Mississippi, seeking reversal of the Full Commission's order. It was alleged that the commission's order was contrary to law and against the overwhelming weight of the evidence in

failing to reverse the order of the administrative judge and award claimant all benefits entitled to him under the Act.

Although the record was filed with the clerk on or about July 22, 2008, no brief was filed by the claimant setting forth or elaborating on any alleged error committed by the Full Commission.

The circuit court entered its order on December 15, 2008, affirming the order of the Mississippi Workers' Compensation Commission.

On January 6, 2009, the claimant filed his notice of appeal to this Court alleging that the circuit court order was contrary to law and against the overwhelming weight of the evidence.

II. Statement of Relevant Facts

Claimant filed his Petition to Controvert on February 2, 2004, alleging a work related accident on January 1, 2003. He alleged injuries to his lower back when he twisted while lifting a piece of steel. The claim was tried before the administrative judge on September 10, 2007. Among the stipulations of the parties, it was agreed that: (1) claimant suffered an injury to his low back on January 1, 2003; (2) claimant's average weekly wage at the time of the injury was $488.70; (3) claimant continued to work for this employer until May 14, 2003; and (4) claimant reached maximum medical improvement on December 2, 2003. (T 4-5)

The claimant's date of birth is April 12, 1977. (T 6) He lives in Leake County, Mississippi, with his wife and three children (who at the time of trial were ages 10, 7 and 2 with one child conceived and born post-injury). (T 6) Claimant is a high school graduate. (T 6) He also has completed a vocational degree in auto body work. (T 7) Concerning his work history, claimant had worked setting up banquets and attending to customers at a hotel, as a cashier and stocker at a convenience store and at a supermarket, at a chicken processing facility as a cutter and in the

maintenance department, on an assembly line manufacturing wiring harnesses for automobiles and for a construction company framing and building houses. (T 7-10) For around two months, claimant worked for a company handling money transfers for Spanish speaking clients. (T 30) He worked post-injury for this employer until May 14, 2003. He also worked post-injury cutting tile. (T 30) Additionally, claimant had worked as an interpreter for Spanish speaking patients at doctors' offices and at hearings in court and had been paid $60 to $100 per employment. (T 25) Claimant has a valid driver's license and does drive. (T 30)

Claimant began working for Zachry on about November 4, 2002. He was a laborer lifting powder, sheet metal and equipment. (T 8) He alleged an injury to his back on January 1, 2003, but continued to work for this employer until he was laid off on May 14, 2003, when the construction job was substantially completed.

As for the back injury, claimant admitted that he had hurt his back at home before January 1, 2003, but that he did not seek any medical treatment for the same. (T 10) Following this injury, he initially was examined at the Kilmichael Clinic, but was not taken off work. (T 10) Later, on his own initiative, claimant was seen by Dr. Jose Paz and referred to Dr. Lon Alexander, who saw him for the first time on June 11, 2003. He took the claimant off work and indemnity was paid. Claimant never had surgery performed upon his back, but was referred to Dr. Kenneth Staggs, where he was given several epidural steroid injections. (T 11-12)

On November 18, 2003, Dr. Staggs noted that claimant was scheduled for an EMG, but was a "no show" and that claimant "also had some problems being compliant and disappearing for times, a month or two trying to contact him." Claimant had a Functional Capacity Examination performed on October 24, 2003, where claimant had over a 100 pound bilateral carry. (T 19) In his medical opinion, Dr. Staggs believed claimant needed 2 weeks of work hardening to prepare

him for return to work. Claimant would be at MMI at the completion of the 2 week period and would be temporarily limited to 50 pounds lifting. The final determination would be made after the work hardening. Dr. Staggs noted that "Mr. Lopez seems disappointed by discussing all this and is worried about hurting his back again but I think his fear is unwarranted and unrealistic and he has not made a lot of effort to be compliant with the treatment plan up until this point. On examination, there are no signs of myelopathy with preserved reflexes, excellent strength in lower extremities and dorsi and plantar flexion of the feet." In an addendum to his records dated December 2, 2003, Dr. Staggs reported that claimant had refused to continue to show for his work hardening that he was assigned to do for two weeks. As such, claimant was released to a 50 pound final weight lifting limit and was at MMI immediately. He had a 5% impairment rating to the whole person due to the "minor impairment", which also would be continued.

Claimant testified at trial that he could not complete the physical therapy ordered by Dr. Staggs, as it was for 8 hours per day and that he needed to pick up children from school. (T 12, 19) He, however, admitted that his job at Zachry, like the physical therapy, was during the daytime hours. (T 20) Claimant testified that his back did not hurt like it used to and "feels a lot better" (T 17, 29). He was able to mow his yard with a push mower. (T 17) He admitted that he had moved a refrigerator into his home on two occasions - once with assistance from another person and once on his own. (T 20) At trial, claimant had no current prescriptions for his back. (T 17) Claimant testified that he was not totally disabled and was not alleging the same. (T 14)

Claimant testified that his wife was working for Tyson Foods. (T 31) At the time of trial, she was making $11.25 per hour, but was scheduled to receive another raise; she also received health and dental insurance and retirement benefits. (T 15, 31) As such, claimant did not believe it was economically feasible for him to locate a job and make his wife quit. (T 31-32) If he had

to pay a baby sitter for the children, claimant believed that he would be working for nothing or only working to pay the babysitter with no additional real, disposable income to his family. (T 32)

SUMMARY OF THE ARGUMENT

While the employer and carrier believe the Full Commission could have found no loss of wage earning capacity using the claimant's own testimony, the Full Commission's order is supported by the manifest weight of the substantial evidence and due to be affirmed. Claimant continued to work from the date of injury to May 14, 2007 when he was laid off when the construction project was substantially complete.

Claimant never had any surgery. He was released by his treating physician with a 5% rating to the body as a whole and restrictions. He had been able to carry over 100 pounds in his Functional Capacity Evaluation. He admitted that he could return to work and could return to some jobs in held in the past. To show any entitlement to an award for permanent benefits, claimant was required to make an adequate job search. He admitted to not having looked for work for 1 ½ to 2 years before trial. Claimant chose not to look for work under his belief that he could not locate a job making more than his wife or enough to justify paying for child care. His belief does not satisfy his burden of proof. All that truly can be gleaned from the evidence is that *all* parties believed the claimant was employable.

Primarily, Mr. Lopez seeks to have this Court give different weight to various testimony and evidence, but, as this Court is well aware, this Court cannot re-weigh the evidence in this appeal and render its own opinion of the testimony. The record supports the conclusions of the commission, and under the law, deference is given to those conclusions. Even if the order of the commission is not the opinion this Honorable Court would have rendered, the fact that it clearly is supported by the record necessitates it be affirmed.

ARGUMENT AND LAW

I. Standard of review supports the commission's order.

Time and time again, the Mississippi Supreme Court has reiterated the narrow and limited standard of review in workers' compensation appeals:

> The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the Administrative Law Judge to the contrary notwithstanding.
>
> * * *
>
> [An appellate court may] reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence.

Smith v. Container General Corp., 559 So.2d 1019, 1021 (Miss. 1990) (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1988)). Thus, it is the commission's decision with which this Court must concern itself, and, as is well-settled, "[t]he Commission is the finder of facts. And if those facts are based on substantial evidence [an appellate court lacks] the power to disturb them, even though that evidence would not convince [the court] were [it] the fact finder." *Olen Burrage Trucking Co. v. Chandler*, 475 So.2d 437, 439 (Miss. 1985). See also *North Mississippi Medical Center v. Stevenson*, 2008-WC-00040-COA (¶7) (Miss.App. 2009) and *Omnova Solutions v. Lipa*, 2008-WC-00500-COA (¶6) (Miss. App. 2009).

Thus, the findings of the commission are binding so long as they are supported by substantial evidence. *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss.1988). Unless prejudicial error is found or the commission's decision is found to have been against the overwhelming weight of the credible evidence, the commission's order *shall* be affirmed. *Strickland v. M. H. McMath Gin, Inc.*, 457 So.2d 925, 928 (Miss. 1984). See also *KLLM, Inc. v. Fowler*, 589 So.2d 670 (Miss. 1991). The scope of review of an appellate court is, therefore, limited to a determination of whether the commission's decision is supported by substantial

evidence. If so, the decision of the Full Commission must be upheld. *Delta CMI v. Speck*, 586 So.2d 768, 772-73 (Miss. 1991); *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1247 (Miss. 1991).

As stated, by the court in *Delta CMI v. Speck*, 586 So.2d 768, 772-73 (Miss.1991):

> The substantial evidence rule serves as the basis for appellate review of the commission's order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.

See also *Toldson v. Anderson-Tully Co.*, 724 So.2d 399 (Miss. App. 1998). Simply stated, in workers' compensation cases, the Mississippi Workers' Compensation Commission is the ultimate finder of fact. *Natchez Equip. Co. v. Gibbs*, 623 So.2d 270, 273 (Miss. 1993); *R. C. Petroleum, Inc. v. Hernandez*, 555 So.2d 1017, 1021 (Miss. 1990). The appellate court for a workers' compensation appeal, whether it be the Circuit Court, the Court of Appeals or the Supreme Court, is not permitted to re-weigh the evidence to determine where the preponderance of the evidence lies. *Lanterman v. Roadway Exp., Inc.*, 608 So.2d 1340 (Miss.1992). Therefore, the decision of the commission should only be overturned for an unsupportable finding of fact showing the commission acted arbitrarily and capriciously.

II. No issue brought before the circuit court for review.

The record from the commission was filed with the circuit court on or about July 22, 2008. Claimant did not file a brief with the circuit court to address any particular issue. As such, it is not believed that any issue has been preserved for appeal. *Sawyer v. Dependents of Head*, 510 So.2d 472 (Miss.1987). There the court held, "In order to preserve a point for review by the Supreme Court, the point must be presented not only to the commission but also to the circuit court by an

assignment of error there by direct or cross-appeal. Dunn, Mississippi Workmen's Compensation § 291 (2d edition 1967; 3rd edition 1982)" *Sawyer* at 474. In *McElveen v. Croft Metals, Inc.*, 915 So.2d 14, 20 (Miss.App. 2005), the Court examined the record to determine that an issue regarding the burden of proof was never challenged prior this Court and found that the issue was not preserved.

The only "issue" presented to the Circuit court was the claimant's general statement in his notice of appeal to the court that the commission's order was contrary to law and against the overwhelming weight of the evidence in failing to reverse the order of the administrative judge and award claimant all benefits entitled to him under the Act. As such, it is not believed that any particular issue was preserved for appeal.

III. Commission's decision is supported by the substantial weight of the evidence.

Claimant had an admitted minor injury to his low back, but no surgery performed. He was not overly compliant with treatment, as noted by his treating physician, Dr. Staggs. Claimant could lift at least 100 pounds in his FCE. Claimant candidly testified that he was not totally disabled and was not alleging the same. He admitted that his back felt better. He had worked for this employer and others post-injury. No current loss was supported by the medical evidence or the claimant's testimony about his current physical condition.

Claimant did receive a 5% impairment to the body as a whole by Dr. Staggs. To support a loss beyond this impairment rating, the claimant bears the burden of making a prima facie showing that he has sought and has been unable to find work in the same or other employment, pursuant to Miss.Code Ann. §71-3-3(i). See also *Pontotoc Wire Products Co. v. Ferguson,* 384 So.2d 601, 603 (Miss. 1980). Also, as claimant did return to work following his injury at equal or greater pay than he earned pre-injury, there is a presumption of no loss of wage earning

capacity. *Univ. of Miss. Med. Ctr. v. Smith,* 909 So.2d 1209 (¶32) (Miss.App. 2005). Claimant's evidence failed to rebut the presumption.

Following his lay off after the construction job with this employer was substantially completed, the claimant certainly made a less than spectacular job search (other than the employment he admitted actually obtaining). He looked for work at around 5 jobs in 2004 and 3 in 2005, but was unsuccessful. He admitted to not having looked for work in 2006 or 2007, well over a year and a half to two years prior to trial. (T 34) Claimant admitted the least he could earn was minimum wage ($6.55 per hour effective July 24, 2008, and $7.25 per hour effective July 24, 2009), which does set an upper limit on his alleged loss (of $132.47 per week).

The question remains, however, if a minimum wage type job is the best job the claimant could hope to locate. As an indication otherwise, claimant admitted that he was offered a job by a former employer building houses making up to $500 per week, although he apparently ineffectively persuaded the administrative judge that this was an actual "offer" for employment that had been made. A vocational expert hired by the employer and carrier made a cursory attempt to locate jobs for the claimant and submitted those to him. There was no testimony that this list of jobs was exhaustive. It simply was a preliminary search.

Claimant admitted that his real excuse in looking for employment was that his wife was making a good wage and benefits. As they have children needing care, he did not believe it fiscally responsible to make his wife quit her job or for him to take a job that he believed would cover only the costs of child care. This "predicament" (the same held by every two parent household) does not alleviate the claimant's duty under the Act to seek employment. Without an adequate job search, it is unknown what an actual job might have paid. Claimant made the conscious decision not to look for work beyond a cursory attempt and could not support any loss

of wage earning capacity. He was forced to admit that he could earn minimum wage and allege, without factual support, that he could not earn more. Claimant pointed to the jobs located by the employer and carrier's vocational expert, but no testimony was presented that the jobs located were an exhaustive list. No one can now state the accuracy of the claimant's belief.

IV. Commission's decision to deny additional evidence is supported.

The trial of the claim was held on September 10, 2007, and the administrative judge's order was entered on January 3, 2008. Claimant filed a motion to add an additional exhibit to the record on March 25, 2008. The exhibit was the definition of a construction work under the DOT guidelines. The proposed exhibit was offered to define a construction worker as the claimant had speculated at trial that he could possibly be a construction worker. No explanation was provided for the delay in offering the exhibit, except to allege that there was no prejudice to either of the parties.

On March 31, 2008, the employer and carrier filed an objection to the motion stating, among other things, that the proposed exhibit was offered months after the trial and long afer the judge's order. It had not been listed as an exhibit in the claimant's Pretrial Statement or ever been attempted to be filed in the over 4 years of litigation. It was admitted that the rules of evidence are relaxed in a workers' compensation claim, but not ignored. The exhibit was not relevant to the issues of the claim. Further, while the 17 year old report did describe some general tasks performed by a construction worker, it did not explain or contradict the claimant's testimony wherein he described his specific job duties while he was a construction worker.

The commission's Procedural Rule 9 states, in part:

> All testimony and documentary evidence shall be presented at the evidentiary hearing before the Administrative Judge which hearing shall be stenographically reported or recorded. Where additional evidence is offered on the review before the

> Full Commission, it shall be admitted in the discretion of the Commission. A motion for the introduction of additional evidence must be made in writing at least five (5) days prior to the date of the hearing of the review by the Full Commission. Such shall state with particularity the nature of such evidence, the necessity therefor, and the reason it was not introduced at the evidentiary hearing. If additional evidence is admitted, it shall be stenographically reported or recorded and become a part of the record.

Claimant did not comply with the rule. He failed to state why the additional evidence was not offered at the hearing before the administrative judge or why he waited over six months to offer the exhibit. A request to add evidence is admitted at the discretion of the commission. *North Miss. Med. Ctr. v. Stevenson*, 2008-WC-00040-COA (¶18) (Miss.App. 2009). The commission chose not to accept the offered exhibit. As quoted by this Court, "[I]t is a rare day when we will reverse the Commission for an action taken in the implementation and enforcement of its own procedural rules...." *Garcia v. Super Sagless Corp.*, 975 So.2d 267, 270 (Miss.App. 2007). This rare day should be even more rare when this report would have done little, if anything, to assist in addressing or explaining any issue before the commission. The commission should not be reversed for its discretionary ruling to deny admission of this DOT report, which did not contradict the claimant's own testimony.

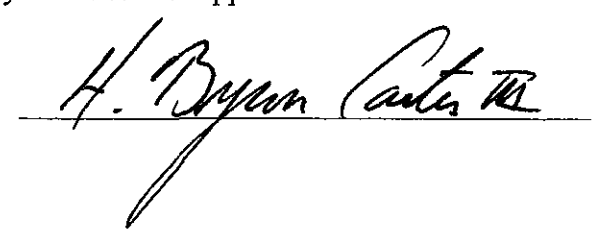
CONCLUSION

No issues were presented to the circuit court to review. The arguments now presented refer to the commission's order and not the circuit court's order. As such, the circuit court order should be affirmed. Beyond that position, claimant admitted that he was not totally disabled and was not alleging the same. Post-injury, he worked for this employer making the same wage. He also worked for other employers post-injury, making as high as $8.00 per hour and $60 to $100 for working as a translator. To show any entitlement to an award for permanent benefits, he was required to make an adequate job search, but consciously chose not to look for work under his

belief that he could not locate a job making more than his wife or enough to justify paying for child care. All that truly can be said is that *all* parties believed the claimant was employable. Any other belief is speculation. In the claimant's opinion (without an actual showing of an unsuccessful job search), he could not earn what he made with this employer (where he continued to work making the same wages until the job ended after substantial completion of the construction project). Claimant's unsubstantiated opinion does not support a loss of wage earning capacity. Actually, with the wage and benefits paid to the claimant's wife, he might have the same "predicament" regarding return to work versus "paying the babysitter" even if he were to find a job paying a wage higher than what he earned with this employer. The predicament alone does not substantiate a loss of wage earning capacity. The judge did make an award, which it is contended was not supported by the medical evidence and testimony. The employer and carrier have not cross-appealed, although an examination of the facts, testimony and legal precedent would support a reversal of any award of permanent benefits. As such, it is requested that the order of the circuit court (and ultimately the administrative judge) be affirmed.

Respectfully submitted,

ZACHRY CONSTRUCTION CORPORATION AND
ZURICH AMERICAN INSURANCE COMPANY,
employer and carrier/appellees

BY: 

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, I, the undersigned on behalf of Zachry Construction Corporation and Zurich American Insurance Company, do hereby certify that we have this day hand-delivered the original and three copies of this Brief of Appellees, Zachry Construction Corporation and Zurich American Insurance Company, along with an electronic disk of the same, to the Clerk of Supreme Court of the State of Mississippi and mailed by first class mail with postage prepaid one true and correct copy of the same to:

John H. Stevens, Esq.
Grenfell, Sledge & Stevens, PLLC
1535 Lelia Drive
Jackson, MS 39216

THIS, the 5th day of June, 2009.

H. Byron Carter III
OF COUNSEL

6098-0077

AMENDED CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, I, the undersigned on behalf of Zachry Construction Corporation and Zurich American Insurance Company, do hereby certify that we have this day hand-delivered the original and three copies of this Brief of Appellees, Zachry Construction Corporation and Zurich American Insurance Company, along with an electronic disk of the same, to the Clerk of Supreme Court of the State of Mississippi and mailed by first class mail with postage prepaid one true and correct copy of the same to:

Hon. Joseph H. Loper, Jr.
Choctaw County Circuit Court Judge
Post Office Box 616
Ackerman, MS 39735

John H. Stevens, Esq.
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1535 Lelia Drive
Jackson, MS 39216

THIS, the 5th day of June, 2009.

H. Byron Carter III
OF COUNSEL

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