

CERTIFICATE OF INTERESTED PERSONS

JOSEPH HOPPER

CLAIMANT/APPELLANT

V.

No. 2009-WC-00206

JOE KREVINEC d/b/a JOE'S GARAGE

EMPLOYER/APPELLEE

AND

AMERICAN HOME ASSURANCE COMPANY

CARRIER/APPELLEE

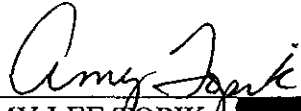

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Supreme Court may evaluate possible disqualification or recusal.

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## STATEMENT OF ISSUES

1. Whether the Full Commission's decision was based on the substantial weight of evidence presented, and thus the Circuit Court was correct in affirming the Full Commission's Order.
2. Whether Mr. Hopper's injuries arose out of the course and scope of his employment.

## STATEMENT OF THE CASE

This matter arises from an alleged work-related injury to Claimant, Joseph Hopper, (hereinafter referred to as “Hopper”) who claims he was unloading tires from a truck and injured his back and neck. This injury is alleged to have occurred on or about May 7 and/or May 14, 2004. Claimant also alleges he then sneezed, further injuring his neck on May 17, 2004. **Record Excerpts** at p. 11-15, 81-82.<sup>1</sup> The Employer and Carrier have denied the injury as being work related.

Hopper was initially hired by Joe Krevinec d/b/a/ Joe’s Garage (hereinafter referred to as “Joe’s Garage”) in June 2003 as a service manager. **RE** at p. 6, 82. As a service manager, Hopper was responsible for the mechanic operations, inventory, and sales of the shop. Hopper’s immediate supervisor was Robert “Bobby” Tyson. **RE** at p. 33-34, 82.

Hopper alleges that he was injured on May 7, 2004, as he unloaded tires at the store. **RE** at p. 11-13, 82. Hopper testified that when he reached out to catch a falling tire, he was jerked around a bit, and that after work, his right arm began to ache. **Id.** However, Hopper admitted that he neither sought medical treatment for this injury, nor reported it to his supervisor. **RE** at page 12-13, 36, 37, 82. Hopper stated that by the following week, his arm pain had completely subsided. **RE** at 14-15, 82.

The following Friday, May 14, 2004, Hopper stated that he again experienced soreness in his arm while unloading a truck. **RE** at p. 82. Three days later, on May 17, 2004, Hopper alleges he sneezed hard at work and immediately heard a loud pop in his neck. **RE** at 14, 82. This pop was accompanied by immediate pain in his arm and neck. **RE** at p. 14, 82. However, Hopper

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<sup>1</sup> Due to the Record containing various different page numbers, all citations will be to the Appellee’s Record Excerpts to eliminate any confusion as to the document being referenced.

did not notify his supervisor or anyone at Joe's Garage of either alleged injury. *RE* at p. 36, 37, 83.

Hopper's supervisor, Bobby Tyson, testified that he had no knowledge that Hopper was making a claim for his neck injury under workers compensation until the litigation of the claim commenced. *Id.* Tyson further testified that he had a telephone conversation with Hopper where the two discussed Hopper returning to work. In this conversation, Hopper told Tyson he injured his neck while working on his personal truck. *RE* at p. 36, 83.

Hopper sought medical treatment the following day, May 18, 2004, at Ocean Springs Hospital, where the treating physician notes indicate that Hopper had suffered no known trauma. *RE* at p. 82. Hopper was released to return to work on May 20, 2004. *RE* at p. 82.

On March 21, 2005, Hopper filed his Petition to Controvert with the Mississippi Workers Compensation Commission (hereinafter referred to as "MWCC"), alleging he sustained an injury to his back and neck on May 7 and 14, 2004. On March 25, 2005, Hopper filed a second Petition to Controvert, alleging he suffered back and neck injuries after he sneezed hard while at work on May 17, 2004. Joe's Garage filed its Answer denying the claim on April 14, 2005. The case ultimately went to a hearing before Administrative Law Judge Denise Turner Lott to determine compensability of the claim, on March 7, 2006. After hearing arguments of both parties and the testimony of the Claimant and witnesses, Judge Lott issued her Order on June 2, 2006, finding that Hopper did sustain a work-related injury on May 7, 2004, but that he did not meet his burden of proving he sustained a work-related injury on May 17, 2004. *RE* at p. 63.

Hopper filed a Petition for Review on June 13, 2006, contesting the Administrative Judge's ruling. *RE* at p. 65. On July 25, 2006, Hopper filed a Motion for Introduction of

Additional Evidence, moving the Commission to allow the introduction of correspondence from Dr. James Doty, a neurosurgeon. This correspondence was obtained by Hopper subsequent to the March 7, 2006, hearing date. *RE* p. 68 (Dr. Doty's letter dated July 21, 2006 as requested by Hopper on June 14, 2006.) Joe's Garage filed its response to the Motion on August 1, 2006. The Full Commission granted Hopper's Motion and remanded the case, including the new testimony of Dr. Doty, back to the Administrative Law Judge for a determination as to the compensability of the claim. *RE* at p. 659-70.

Judge Lott issued a second Order on September 14, 2007, finding that Hopper's alleged injuries were work-related and should be considered compensable. *RE* at p. 75-78. Joe's Garage filed a Petition for Review of the Administrative Law Judge's decision to the Full Commission on October 1, 2007. *RE* at p. 80.

On January 24, 2008, the Full Commission rendered its decision finding that the alleged injuries were not work related and dismissed the claim. *RE* at p. 81-85.

Hopper filed his appeal to the Circuit Court on February 4, 2008. Briefs were submitted by both parties, and an oral argument was presented to the Circuit Court Judge on December 12, 2008. By Order dated January 28, 2009, Judge Lisa P. Dodson affirmed the Commission's Order. *RE* at p. 86-96. Hopper then filed his Notice of Appeal to this Court on February 5, 2009.



## SUMMARY OF THE ARGUMENT

The Circuit Court properly affirmed the decision of the Full Commission. The evidence introduced at the Commission level showed that Hopper was not injured while working in the course and scope of his employment. The facts of this case are not sufficient to prove Hopper's accident arose out of the course and scope of his employment. The decision of the Circuit Court should be affirmed, as the facts in the record do not show that Hopper was injured while working in the course and scope of his employment.

## ARGUMENT

### **I. Standard of Review.**

The standard of review in workers' compensation matters is well established. On appeal, the scope of review is limited to a determination of whether the decision of the Commission was supported by substantial evidence. *Westmoreland v. Landmark Furniture, Inc.*, 752 So. 2d 444, 447 (Miss. Ct. App. 1999). In fact, a decision of the Commission will only be reversed if it is not supported by substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (Miss. 2003)(citing *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss. 1992)). If the Commission's decision and findings of fact are supported by substantial evidence, then the decision is binding, even if an appellate court, as fact finder, would have been convinced otherwise. *Spann v. Wal-Mart Stores*, 700 So. 2d 308, 311 (Miss. 1997)(citing *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). Substantial evidence can further be said to be evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *County Nursing Center v. Moore*, 760 So. 2d 784 (Miss. Ct. App. 2000).

The Commission sits as the ultimate finder of fact and its findings are subject to normal, deferential standards upon review. *Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993). In *Hardaway Co. v. Bradley*, 887 So.2d 793 (Miss. 2005), the Supreme Court reaffirmed that the Commission sits as the ultimate finder of facts, and has broad discretion to determine “which evidence is credible, has weight, and which is not.” *Prophet v. Blackwell Chevrolet*, MWCC No. 02-03479-H-9502-E, 2006 WL 2613931, \*3 (MWCC Aug. 9, 2006).

## **II. The Circuit Court was Correct in Affirming the Commission’s Decision.**

The Circuit Court, being fully informed of the facts and issues of this case and after hearing oral arguments, affirmed the Full Commission’s decision denying workers compensation benefits to Hopper. In it’s extensive eleven page Order, the Circuit Court reviewed the record and found that the Commission’s decision was sufficiently supported by the evidence presented. Specifically, the Circuit Court found that the Commission found “the testimony of Hopper and Dr. Doty not as credible or reliable as that of Hopper’s supervisor and the medical records.” (Order pg. 7). The Circuit Court also found that although Hopper continued to argue the weight and credibility of the testimony an exhibits on appeal, and although the Administrative Law Judge’s opinion awarding benefits may have been supported by substantial evidence, that the Commission’s decision was based on the substantial evidence presented and “must be affirmed.” (Order pg. 8). In citing case law, the Circuit Court ultimately held that there was “no misapplication of the applicable law” on the part of the Full Commission. (Order pg. 9). As no error of law was found, and the Full Commission’s decision was based on the substantial evidence presented, the Circuit Court affirmed the Full Commission’s decision denying benefits to Hopper. The Circuit Court’s decision should be affirmed.

### **III. The Commission, Not the Administrative Judge, Sits as the Ultimate Finder of Fact.**

Hopper alludes to the contention that the Administrative Law Judge sits as a better fact finder than the Full Commission. This is presumably in part because the Administrative Law Judge found in Hopper's favor. When Joe's Garage appealed the Administrative Judge's decision, the Full Commission reversed the previous order and found in favor of Joe's Garage. Although Hopper would be in a better position if the Administrative Judge was the fact finder of workers' compensation claim, decades of Mississippi appeals courts shows otherwise. It is a long standing rule that the Commission, not the Administrative Judge or appellate court, sits as the ultimate finder of fact. *Inman v. CocaCola/Dr. Pepper Bottling Co. of Memphis, Tennessee*, 678 So. 2d 992, 993 (Miss. 1996).

In a workers' compensation case on appeal, it is presumed that the trier of fact, the Full Commission, has already weighed the credibility of the evidence and testimony presented and has decided which evidence is credible and which is not. *Raytheon Aerospace Support Services v. Miller*, 861 So. 2d 330, 335 (Miss. 2003); *see also Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-5 (Miss. 1997). The Commission's findings of fact "are entitled to substantial deference when challenged on appeal to the judiciary." *Raytheon*, 861 So. 2d at 335, *referring to Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). The Supreme Court went further in *Raytheon* to explain that a reviewing court's function is:

"not [to] tamper with the findings of fact, where the findings are supported by substantial evidence ... Where the circuit court reverses the Commission by simply [substituting] its judgment for that of the Commission without regard to whether the Commission's find[ing]s were substantiated by the weight of evidence, the circuit court commits error."

*Raytheon*, 861 So. 2d at 335, *citing Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 274 (Miss. 1993).

An Appellate Court's scope of review is limited to whether there is *substantial evidence* to support the findings of the Workers' Compensation Commission. The findings of the Commission will be reversed by an Appellate Court only if the findings are clearly erroneous and contrary to the overwhelming weight of evidence. If the findings are supported by substantial evidence, then they are beyond the power of the Court to disturb. *Hardins Bakery v. Taylor*, 631 So. 2d 201 (Miss. 1994). *See also Sealed Power Corp. v. Young*, 744 So. 2d 813 (Miss. Ct. App. 1999).

"Substantial evidence, though not easily defined, means something more than just a 'mere scintilla' of evidence, [yet] it does not rise to the level of a 'preponderance of the evidence.'" *Attala County Nursing Center v. Moore*, 760 So. 2d 784, ¶ 8 (Miss. Ct. App. 2000), *quoting Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991). *See also Edwards v. Marshall Durbin Farms, Inc.*, 754 So. 2d 556 (Miss. Ct. App. 2000). "Substantial evidence can further be said to be evidence 'affording a substantial basis of fact from which the fact in issue can be reasonably inferred.'" *Id.* Some of the strongest language that was used by the Supreme Court in the case of *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, at 1247 (Miss. 1991), when the Supreme Court stated, "[t]herefore, this Court will not overturn a Commission decision unless it finds that the Commission's decision was arbitrary and capricious." *See also J. R. Logging v. Halford*, 765 So. 2d 580, ¶15 (Miss. Ct. App. 2000).

More recently, the Mississippi Supreme Court has held that "[t]he 'substantial evidence' scope of judicial review of an administrative agency's decision is that the courts may interfere only where the agency action is arbitrary and capricious." *Raytheon Aerospace Support Services v. Miller*, 861 So. 2d 330, 335 (Miss. 2003). In the present case, the Commission's

ruling, finding for Joe's Garage, was based on the substantial weight of evidence presented by the parties and was not arbitrary or capricious. Thus, the Commission's decision should be affirmed.

**IV. The Commission's Ruling was Based on the Substantial Evidence of the Case and Was Not Arbitrary or Capricious.**

The evidence presented at the Commission level shows Hopper did not show enough proof that he sustained a work-related injury. In weighing the credibility of Hopper's testimony, the Commission considered the medical evidence presented and other witness testimony. Ultimately, the Commission found that Hopper's version of events was not credible.

"To recover benefits, a workers' compensation claimant must prove: (1) an accidental injury, (2) which arises from the course and scope of employment, and (3) there must be a causal relationship between the injury and the alleged disability." *Spencer v. Tyson Foods, Inc.*, 869 So. 2d 1069, 1073 (Miss. Ct. App. 2004), citing *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12-13 (Miss. 1994). Hopper's testimony was found to be contrary to the overwhelming evidence presented and was found to be unreliable and not credible. Thus, he was unable to prove the above mentioned, three necessary elements.

**A. The Commission Found that Hopper's Testimony was Contrary to the Overwhelming Weight of the Evidence Presented and was Not Credible.**

Hopper alleges that the Commission owed him the right to not reject his testimony as untruthful because his testimony was uncontradicted. Hopper cites Dunn, Section 262, Mississippi Workers' Compensation for the proposition that, "[i]f unimpeached testimony is supported by all the circumstances in the case and if there are no substantial grounds within the record ... the Commission may not base its decision upon speculation that the witness may have been mistaken or untruthful ..." *Appellant's Brief* p. 26-27. This is a misstatement of the facts

of the workers compensation claim and the Commission's Final Order dated January 24, 2008.

Hopper's testimony was contradicted by several other pieces of evidence, such as the medical records and the testimony of his supervisor, Bobby Tyson.

In its Order, the Commission noted the following evidence:

- (1) On May 18, 2004, the Claimant was seen at Ocean Springs Hospital where the treating physician notes indicate that Claimant had suffered no known trauma, and was released to return to work on May 20, 2004.
- (2) The claimant's supervisor, Bobby Tyson, testified that he had no knowledge of a work related injury until litigation of these matters commenced. Further, he testified that the Claimant did come back to work following a phone conversation where the Claimant advised that he injured his neck working on his personal truck.

**RE** at p. 82-83. The Commission, presented with much evidence about this claim, specifically noted in its Order that when Hopper presented to the emergency room on May 18, 2004, he made no mention of a work-related injury. In specifically mentioning this fact in its order, the Commission must have felt that this point was one that rested at the heart of this claim. The compensability of workers' compensation claims lies heavily on the claimant's testimony and on the medical records. Because the majority of workers compensation injuries are not witnessed by other employees, the claimant's story of how he/she is injured is usually assumed to be true. However, in a case, such as this one, where none of the initial medical records make any mention of a work related injury, or any acute trauma for that matter, the claimant's version of events is brought into question. This was especially true in the present case, as Hopper first alleged he sneezed at work, and then remembering another previous accident, alleged he actually injured himself a few days prior unloading some tires. This story was not corroborated by his medical records.

The Commission made note of this fact again on page 4 of its Order, noting,

The Administrative Judge found that the Claimant's sneeze was a continuous chain of events which began with the Claimant's alleged neck injury while unloading tires. There is no evidence except the Claimant's own testimony that this sneeze even occurred at work. The *initial medical reports*, which are the *most probative* evidence in this case, make absolutely *no mention* of this [] alleged injury on May 7, 2004, or a sneeze-inducing injury at work on May 17, 2004.

*RE* at p. 84 (emphasis added). In looking at further evidence presented, the Commission also noted that Hopper had a history of cervical spine pain and injuries. In fact, Hopper had a previous anterior cervical fusion. *RE* at p. 83. In reviewing the medical records, the Commission noted, that a 1997 cervical MRI revealed disc herniations at the same levels as a 2004 cervical MRI. *RE* at p. 83. The Commission ultimately held that Hopper's emergency room visit on May 18, 2004, was not due to an acute injury, but was rather due to his long standing cervical condition, "[t]he fact that Claimant sought medical attention soon after the alleged injury on May 7, 2004 and May 17, 2004 does not render the Claimant's testimony more credible given the fact that *he had a long standing history* [of] pre-existing non-work related neck problems." *RE* at p. 84(emphasis added). Hopper's story of a sneeze-induced injury was simply contradicted by his medical records. The Commission found that "not one medical note from any of the initial treating physicians" reports that Hopper informed them of a "work injury." *RE* at p. 84.

Hopper cites case law and makes much of the fact that his testimony was unimpeached. As explained above, this was not the case. Hopper states in his brief that upon appearing to the Ocean Springs emergency room on May 18, 2004, he "was not aware of what was wrong with him." *Appellant's Brief* p. 28. This assertion appears to be Hopper's attempt to now back track his testimony presented at the final hearing of his matter, wherein Hopper testified that immediately after sneezing, he heard a loud "pop," experienced immediate neck pain, and could not finish work for the day. *RE* at p. 14, 82. If Hopper did in fact experience immediate pain

from his sneeze at work, why would he not have reported it to the emergency room physicians? The Ocean Springs Hospital Emergency Room report dated May 18, 2004, states that Claimant had right shoulder pain with no known trauma. *RE* at p.82. Additionally, Hopper denied sustaining any known trauma. *Id.*

Hopper argues in his brief that the Commission failed to state where the testimony was “inherently improbable or so inconsistent as to be [un]credible.” *Appellant’s Brief* p. 28 and 29. As outlined above, and upon a quick reading of the Commission’s Order, the reasons Hopper’s testimony was found to be unreliable are clearly addressed.

Hopper alleges the Commission disregarded the medical evidence presented in this case and did not consider it at all in making its decision. As explained above, the Commission’s Order shows otherwise. The Commission heard, evaluated, and weighed all evidence, including the medical evidence and testimony of all witnesses, and determined which evidence was credible, ultimately deciding the injury was not related to Hopper’s work. The Commission focused on the initial emergency room report from the Ocean Springs Hospital, finding that not only did it not mention any work-related injury, but also that Hopper “specifically reported that he sneezed ‘at night,’ not in the morning as he testified at hearing.” *RE* p. 84. Hopper also contradicted his testimony at the hearing by stating that following his alleged sneeze at work, he experienced an immediate onset of severe pain. *RE* p. 14, 23-24. In reviewing the medical records, the Commission found that Hopper reported following his night sneeze, “he had no pain following the sneeze until the next morning.” *RE* at p. 84-85. In the Commission’s opinion as the fact finder, “[t]his [made] the Claimant’s version of the events more suspect than credible.” *Id.*



The Commission further noted that Hopper failed to notify his supervisor, Bobby Tyson, of either injury. Actually, Tyson, testified that Hopper confessed to him he injured himself working on his personal vehicle. *RE*, p. 34, 36, 37, 83. In mentioning this specific point, the Commission obviously felt this fact was of great importance to their final decision. By noting the fact that Tyson was not alerted to the fact that Hopper was claiming his injury was work-related, the Commission evaluated and weighed this evidence against Hopper's testimony.

The Commission's Order shows that they based their decision on the substantial evidence presented in this matter. Thus, their decision should be affirmed. See *Attala County Nursing Center v. Moore*, 760 So. 2d 784, ¶ 8 (Miss. Ct. App. 2000), holding "[s]ubstantial evidence can further be said to be evidence 'affording a substantial basis of fact from which the fact in issue can be reasonably inferred.'" In the final paragraph of its Order, the Commission found that (1) Hopper never reported either injury to his employer; (2) the only testimony of the sneeze occurring at work came from Hopper's own testimony; and (3) Hopper's testimony was contradicted "not only by the testimony of Bobby Tyson, but also by the medical evidence presented at the hearing." *RE* at p. 85. Clearly, the Commission evaluated and judged the credibility of this cumulative evidence in reaching its decision. As this decision was supported by substantial evidence, it should be affirmed by this Court. See *Hardins Bakery v. Taylor*, 631 So. 2d 201 (Miss. 1994), *Tyson Foods, Inc. v. Thompson*, 765 So. 2d 589 (Miss. Ct. App. 2000), and *Barber Seafood, Inc. v. Smith*, 911 So. 2d 454, at ¶ 27 (Miss. 2005), all holding that if the findings of the Commission are supported by substantial evidence, then they are beyond the power of the Court to disturb.

***B. The Commission Found that Dr. Doty's Testimony was unreliable as it was based solely on Hopper's version of the events.***

Hopper asserts that the Commission “totally disregarded ... competent medical testimony from Dr. James Doty,” and that this was an “error of law” which can be reversed on *de novo* review. The Commission’s Order shows that not only they did hear and evaluate Dr. Doty’s testimony and medical records, that they found evidence to contradict it. In its Order, the Commission devotes an entire paragraph to address Dr. Doty’s findings and records. **RE** at p. 83-84. However the Commission, as the fact finder, noted that Dr. Doty’s testimony was based solely on the Claimant’s version of the events and was therefore unreliable, given the facts noted above. The Commission then noted that Dr. Terry Smith reviewed Hopper’s prior medical records, “which all negate the contention that [he] sustained a work related injury to his neck,” and opined that Hopper’s spinal condition was not work related. **RE** at p. 84.

Even Dr. Doty could not state with 100% assurance that Hopper’s injury happened the way he stated it did. Dr. Doty admitted that he based his opinion solely on Hopper’s version of events and that Hopper “probably” injured his disc at work. **RE** at p. 68, 83-84.

Hopper alleges that the Commission “totally disregarded” Dr. Doty’s testimony “without making a specific finding that the testimony” was “improbable ... incredible ... unreasonable ... or untrustworthy,” and that such a finding is necessary before his testimony could be rejected. **Appellant’s Brief** at p. 23. Although the Commission did not list any of the four specific words in its Order, as arbitrarily chosen by Hopper and listed in his brief, the Commission did weigh the substance of Dr. Doty’s testimony and found it was unreliable. Ultimately, the Commission found that because it was based on the sole testimony of Hopper, the testimony was suspect. Additionally, Hopper fails to cite any Mississippi case law which stands for the proposition that the Commission must make a finding that medical testimony is “improbable ... incredible ...

unreasonable ... or untrustworthy,” again all words chosen by Hopper and not found in any Mississippi law, before holding that an expert’s opinion is unreliable. The Supreme Court has long held that, “[t]he failure to cite relevant authority, or to make a connection between the authority cited and his case constitutes a procedural bar.” *Stewart v. State*, 938 So. 2d 344, 346 (Miss. Ct. App. 2006), citing *King v. State*, 857 So. 2d 702, 705 (Miss. 2003). Therefore, Hopper’s argument that Dr. Doty’s testimony was improperly rejected by the Commission, need not be considered by this Court.

**C. *Hopper was Not Denied Any Statutory Presumption.***

Hopper alleges that the Commission “denied him the benefits of all presumptions to which [he] was entitled to under the [Mississippi Workers Compensation] Act.” *Appellant’s Brief* at p. 27. However, Hopper does not state or list which presumptions to which he is entitled. Therefore, it is unknown what Hopper’s intentions are exactly as to how he was denied any presumption.

**D. *Wal-Mart Stores, Inc. v. Fowler is Factually Dissimilar from the Case at Hand.***

Hopper also asserts that the present case is similar to the case of *Wal-Mart Stores, Inc. v. Fowler*, 755 So. 2d 1182 (Miss. Ct. App. 1999). Upon a cursory glance at *Fowler*, it is apparent that the present situation is factually dissimilar from *Fowler*. *Fowler* is first and foremost distinguishable from the present case as it stands for the proposition that a subsequent aggravation or flare up of an admittedly, work-related injury, is compensable. *Fowler*, 755 So. 2d at 1186.

In *Fowler*, the claimant initially injured her back in 1992 while putting out dog food at Wal-Mart. *Id.* at 1184. She filed a workers compensation claim which was deemed compensable by the employer and carrier. *Id.* She then returned to work for Wal-Mart, but

continued to experience back pain. In 1994, she re-injured her back while brushing her hair. *Id.* The Administrative Judge found the second injury was a continuation of her 1992 injury and was not an intervening incident. *Id.* at 1185. The Commission affirmed the Administrative Judge's decision, and the circuit court then affirmed the Commission's decision. *Id.* The Court of Appeals ultimately affirmed the circuit court. *Id.* at 1186.

Unlike in *Fowler*, there is no initial, admitted, work-related injury in the present case. Hopper's years of prior cervical conditions, injuries, and surgeries were caused by other events, unrelated to his work for Joe's Garage. Thus, Hopper's alleged cervical aggravation caused by sneezing, is not a continuation of an admitted work-related injury. Hopper alleges that his sneeze injury on May 17, 2004 was a continuation of his tire lifting injury on May 7, 2004. *Appellant's Brief* p. 32. However, Hopper failed to prove either injury, allegedly occurring within weeks of each other, ever happened. These injuries are essentially treated as the same injury when viewed in conjunction with Hopper's multitude of prior cervical injuries, pains, conditions, and surgeries, spanning several years. The fact of the matter is that Hopper failed to prove he sustained a work-related injury in May 2004.

Secondly, in *Fowler*, the circuit court affirmed the Commission's decision finding that the aggravation injury was compensable. Again, as outlined above, when the Commission's decision has been based on the substantial weight of the evidence presented, its decision should be affirmed. Such is the case here, where the Commission's decision should be affirmed.


## CONCLUSION

The decision of the Circuit Court should be affirmed. The Circuit Court affirmed the decision of the Full Commission, finding that its decision was based on the substantial evidence presented. Hopper failed to prove he sustained a work-related accident. The Commission's ruling was based on the substantial evidence presented by all parties and was not arbitrary or capricious. Hopper's testimony was suspect, as he did not timely report either May 2004 alleged injury to his employer. The evidence presented also revealed that Hopper told his supervisor he injured his neck working on his personal vehicle. Additionally, Hopper failed to report any work-related injury to the emergency room physicians on May 18, 2004. These facts, plus the discrepancy in Hopper's own testimony about when his onset of pain actually began, created doubt in the Commission's view as to how the alleged injury occurred. The Commission as the ultimate finder of fact, weighed all evidence appropriately, and came to a determination that this injury is not compensable. This decision should be affirmed.

RESPECTFULLY SUBMITTED THIS THE 23<sup>rd</sup> day of June, 2009.

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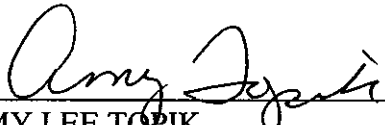
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the **Brief of Appellees** to:

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