IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2009-WC-00206

JOSEPH HOPPER, APPELLANT

VERSUS

JOE KREVINEC d/b/a JOE'S GARAGE and
AMERICAN HOME ASSURANCE COMPANY, APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
CIVIL ACTION NO. A2402-08-21

BRIEF OF APPELLANT
JOSEPH HOPPER

(Oral Argument Requested)

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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 disqualifications or recusal.

Joseph Hopper (Claimant)	Appellant
James K. Wetzel with the law firm of James K. Wetzel & Associates	Counsel for Appellant
Joe Krevinec d/b/a Joe's Garage (Employer) and American Home Assurance Company (Carrier)	Appellees
Jeffrey S. Moffett with the law firm of Markow Walker, P.A.	Counsel for Appellees
Honorable Deneise Turner Lott Mississippi Workers' Compensation Commission	Administrative Law Judge
Honorable Lisa Dodson Harrison County Circuit Court	Circuit Judge

JAMES K. WETZEL, Counsel for
Joseph Hopper, Appellant (Claimant)

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STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND FACT IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION IN FINDING THE CLAIMANT, JOE HOPPER, FAILED TO CARRY HIS BURDEN OF PROVING A WORK RELATED INJURY.

INTRODUCTION

This is an appeal by Joseph Hopper, who filed a workers' compensation claim against his employer, Joe Krevinec d/b/a Joe's Garage and its workers' compensation carrier, American Home Assurance Company. For convenience hereinafter in this brief, the Appellant will be referred to as "Mr. Hopper" and the Appellees will be referred to as "Employer/Carrier".

Mr. Hopper is appealing the decision of the Harrison County Circuit Court dated January 28, 2009. (RE.14).

Mr. Hopper contends that errors of law and fact were made by the Circuit Court in affirming the Workers' Compensation Commission decision of January 24, 2008 (R.E.12), when it stated the Claimant failed to carry his burden of proving a work related injury. The Workers' Compensation Commission, through its administrative law judge, the Honorable Deneise Turner Lott, made significant credibility determinations, and heard the testimony of the Claimant at the first hearing held before her. She rendered her first decision on June 2, 2006, (R.E.7), and made the following significant statement in finding that the claimant met his burden of proof in proving a work-related injury:

> In resolving this conflict in the record, this administrative judge credits claimant's testimony – based upon her observation of the demeanor of the witness at the evidentiary hearing, medical evidence corroborating claimant's version of the facts, the record as a whole, and the well established rule of resolving doubts in favor of compensation.
>
> This administrative judge therefore concludes that a preponderance of the credible evidence establishes the claimant sustained an injury on May 7, 2004, that arose out of and in the course of his employment as required by the definition of "injury" contained in Miss. Code Ann. §71-3-3(b) (Rev. 2000).

Against the administrative decision, the Workers' Compensation Commission that did not hear the testimony of the Claimant, but only read the bare record, entered its decision on January 24, 2008, (R.E.12), and held as follows:

> In sum, the only evidence of a sneeze occurring at work comes from the claimant's own testimony. Further, the only evidence to the claimant's claim of injury while unloading the tire truck comes from his own testimony as well. Claimant never reported these injuries to his employer. Further, the Claimant gave no history to a medical provider of any work injury at all. His testimony is contradicted not only by the testimony of Bobby Tyson, but also by the medical evidence presented at the hearing. The only medical testimony which supports the Claimant's allegations come from Dr. Doty's deposition testimony, which is not based upon a review of the prior medical records, but upon the Claimant's own flawed history.
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> The Commission concluded:
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> The order of the administrative law judge dated January 7, 2008, is hereby reversed, and this claim dismissed accordingly.

As will be shown by Mr. Hopper hereinafter, the decision of the Circuit Court and the Workers' Compensation is against the overwhelming weight of the credible evidence and arbitrary and capricious. The decision of the Full Commission, which was affirmed by the Circuit Court, to reverse its administrative law judge on credibility determinations should be reversed and remanded back to the Commission requiring it to provide medical and indemnity benefits in accordance with the facts and law of the case.

FACTS OF CASE

Mr. Hopper filed two petitions to controvert on March 25, 2005, with the Workers' Compensation Commission alleging neck injuries on May 7, 2004, and May 17, 2004, respectively. The parties, after engaging in discovery, came to a hearing before Administrative Law Judge Deneise Turner Lott on March 7, 2006. The Employer/Carrier contested the occurrence of a work related injury and refused to pay Mr. Hopper's medical or disability benefits.

The parties specifically reserved the issue of "permanent disability benefits" pending Claimant's maximum medical improvement and development of further proof in that regard. The parties stipulated that Claimant's average weekly wage on the date of his injury was $540.00. The primary issue for consideration was whether Mr. Hopper sustained injuries arising out of and in the course of his employment on May 7 and May 17, 2004, as the term "injury" is defined in Miss. Code. Ann. §71-3-3(b) (Rev. 2000).

Mr. Hopper testified at the time of the hearing he was 43 years old and a resident of Biloxi, Mississippi. He testified he was a graduate of D'Iberville High School. The only vocational training he received after high school was a welding course at Jackson County Jr. College which he did not complete. The only other vocational training was from prior work that he had performed at Firestone Tire where he was certified through this employer for tire mounting, sales and shop safety. (MWCC Tr.4-6). Mr. Hopper testified that Joe Krevinec had two locations; one in East Biloxi and one located in west Biloxi called Joe's Garage West. Mr. Hopper testified that he always worked in Joe's Garage West and went to work for Joe's Garage in June 2003 and had been working with Joe for approximately one year.

He testified that when he applied for work with Joe's, it was for a service manager position. He testified his job as a service manager/technician was to oversee sales, parts, inventory, clean up and the general operations of the mechanic shop to see that it was run properly and safely. He also testified he did light mechanic work as part of his position and that he was more like a "glorified mechanic's helper." Mr. Hopper testified his prior work for Firestone was of a similar position. He testified that during his tenure with Joe's Garage he had a good relationship with the manager at Joe's Garage, Bobby Tyson; that he had worked previously with Bobby at Firestone. (MWCC Tr.7-8).

Mr. Hopper testified during his tenure, that Bobby Tyson nor Mr. Krevinec had ever written him up or disciplined him for any reason. He normally worked five to six days a week depending on the amount of work that was available. There were many days that he would have to work more than 8 hours a day and his average day was 10 hours plus. Mr. Hopper testified during the year of employment with Joe's Garage there were not any periods of time that he was absent from work or lost any time due to illness, sickness or any other particular family problems. (MWCC Tr.8-9).

Mr. Hopper testified that when he was approximately 18 years old, twelve days after graduating from high school, he jumped off a bank at a lake that was probably 4-foot high, and he fell on his head. It was his understanding from Dr. Richard Buckley, neurosurgeon, that he had crushed the discs at C3, 4 and 5 and it took him approximately two years to get back to being 100%. He testified he was approximately 20 years of age when he was 100% well; and that since that time, in the next 22 years of his life, he did not have any significant neck problem. He did testify that at one time prior to his accident with Joe's Garage, he had bumped his head and had to have an x-ray of his neck. To his knowledge, it was a sprained

muscle and he could not give the date of the emergency room visit and did not have any significant problems with his neck until he was injured at Joe's Garage. (MWCC Tr.9-10).

Mr. Hopper further testified that after his neck injury at age 18, he worked for 22 years and his prior neck condition did not interfere with his work activities as a mechanic. (MWCC Tr.10). Mr. Hopper testified that on May 7, 2004, it was the day of the week that they normally received a delivery truck with tires and other parts. He testified it was part of his job to go out and unload the truck with a helper as well as to take inventory of these items as they came off the truck so that when he signed for it, he was not signing for anything he did not receive. He testified that on May 7th as they were unloading the truck, he had a helper doing most of the unloading work. They were trying to get the tires off the truck as quickly as they could and stack them up. He testified as he reached out, he grabbed a tire to keep it from rolling out onto Veterans Blvd. and possibly hitting a passing vehicle. He testified when he grabbed the tire with his right arm, the tire jerked him around. He testified that he finished the day's work and by the end of the day, his right arm was aching but he thought it was just a pulled muscle. He testified that it was real easy in his line of work to pull muscles because you are always in a strain some way or another. He testified that it was actually later that afternoon after work toward the evening that his arm really began hurting. He testified it kept him awake most of the night and when he got up the next morning, his arm was in excruciating pain but he went to work and worked all day which was Saturday, May 8, 2004. He testified that he walked around all day with his arm up over his head and laying it down on top of his head which was the only way that he could get relief from the pain. (MWCC Tr.11-12).

Mr. Hopper testified that on May 7, 2004, when this incident occurred, Mr. Tyson, his supervisor, was not at the store and therefore, did not mention anything to anyone else because he thought it was just a pulled muscle. He testified when he came back in on Saturday, May 8, 2004, Mr. Tyson was off again, and there was no one to complain to since Mr. Tyson nor Mr. Krevinec worked on Saturday. Mr. Hopper further testified that on Monday, May 10, 2004, the pain had eased up in the right arm; that it was not throbbing like it did on Saturday and Sunday. Mr. Hopper testified he discussed with Mr. Tyson that he thought he had pulled a muscle in his arm. Mr. Hopper testified that most of the pain started at the end of the collar bone and went down the outside of the arm all the way down to the fingers; "It just felt like somebody was pulling muscle through my arm, pulling muscle out of my arm." (MWCC Tr.12-13).

Mr. Hopper testified he did not go to the doctor and that he continued to work, "that he was the kind of person who did not like to go to doctors." It was probably Tuesday or Wednesday before it started feeling like it was clearing up and getting back to normal. Then Friday, following the May 7th incident, they were unloading tires again. Mr. Hopper testified that his arm was sore from unloading the May 14th delivery. He testified he got through that weekend and when he returned to work the following Monday morning, May 17, 2007, his arm was hurting bad. He went by and picked up the boy that rode with him to work. Mr. Hopper testified that he had been at work on Monday morning for approximately 20-30 minutes getting the shop opened up and sneezed. He testified that he sneezed so hard, that it was "about one of those that sounds like your lungs are coming out the middle of your back." From that point on the pain got severe and he had to leave work on May 17, 2004. (MWCC Tr.13-14).

Mr. Hopper testified that he went straight to Bobby Tyson and told him about the pain being severe after sneezing. He told Bobby that his arm was killing him which was hurting all the way up into his neck down into his back, behind his shoulder blade and that when he sneezed, it sounded like something "popped a little." He testified that he did not finish out the day and went on home at that particular point. (MWCC Tr.14). He testified that from his memory he remembered seeing Dr. Richard Smith, a general physician, who was the first doctor to evaluate him. Dr. Smith gave Mr. Hopper some pain medication and cortisone and advised him if the shot did not help then he would have to have a MRI. (MWCC Tr.15).

Mr. Hopper testified that while he was under Dr. Smith's care he did not have any discussion with Bobby or anyone at the garage about the treatments he was having and whether or not any workers' compensation claim was being processed or filed by his employer. Mr. Hopper testified that his mother referred him to Gulfport Memorial, When he arrived at Gulfport Memorial, they took a CT scan of his neck and he was immediately seen by Dr. James Doty who was head of the neurosurgical department at Memorial Hospital. Dr. Doty performed an exam and ordered a MRI of his neck. Mr. Hopper testified that Dr. Doty advised him he had damaged discs in his neck and that he would have to go in and do surgery with metal plates and screws to fix his injury. (MWCC Tr.16). Mr. Hopper testified that he had been on pain medication for approximately a month before being seen at Memorial Hospital. He further testified that he had surgery on June 20, 2004, that he was released from the hospital and was supposed to be follow up in six weeks. For some reason, Dr. Doty did not see him in six weeks. It took approximately three months before he could return post-operatively to Dr. Doty for follow up. Mr. Hopper testified that when he went back in to see Dr. Doty, he explained to Dr. Doty about the intense sharp pain that was going into the right

arm and that his arm still ached. He testified he explained to Dr. Doty that since the surgery the left arm had been doing the same as well and that he never had a problem with the left arm until after the surgery. (MWCC Tr.16-17).

Mr. Hopper testified he had no health insurance or any other ability to pay; that Dr. Doty had released him from his care advising him that he would have to get another neurosurgeon. Mr. Hopper testified that he continued to have significant problems and was unable to retain a neurosurgeon for additional treatment. (MWCC Tr.17). He testified that he had finally secured Social Security disability by the date of the Workers' Compensation Hearing and had been living with his mother since Hurricane Katrina. (MWCC Tr.19).

Mr. Hopper testified that he knew of no other activities off the job that would have accounted for this injury; that he did not have any kind of slip and falls and had no other injuries that he was aware of that would account for the neck injury. (MWCC Tr.20). Mr. Hopper testified at his hearing that Social Security had approved him for Medicare and he was waiting on Medicare to approve his seeing a neurosurgeon following the administrative hearing.

On cross-examination by the attorney for the Employer/Carrier, Mr. Hopper testified that he remembered one time earlier going to the Ocean Springs Hospital. Mr. Hopper testified he had been swimming in a pool and bumped his head on the side while swimming underwater which made his neck hurt. He went to Ocean Springs Hospital as a precaution and had a x –ray done to check because he knew he had broken his neck earlier in his life. He testified that he had an MRI scan between the time he broke his neck and the most recent one he had after his injury on the job. He testified he had a face droop like you would have Bells Palsy and they sent him to the emergency room thinking he possibly could have had a

stroke. He testified that the doctors at the emergency room said it was probably something to do with the old injury to his neck when he was eighteen and they performed a MRI and told him that he had a staph infection in his sinuses. He testified that at the time he had the MRI he was not having neck pain but was having pain in his face and that his face was drooping and it felt different all the way down his right side. They thought it had something to do with his neck at the time but it turned out to be a sinus infection type thing. (MWCC Tr.22).

Mr. Hopper testified on cross-examination the only time he remembers going back to the shop after having to leave work was to pick up his last check and return the keys to the shop to Mr. Tyson. (MWCC Tr.25, 42).

At the hearing in the cause, the Claimant and Employer/Carrier agreed to introduce the records of his family practitioner, Dr. Richard Smith (R.E.16); the medical records from Ocean Springs Hospital which included his treatment in the emergency room on May 18, 2004, and the emergency room record for Ocean Springs emergency room dated May 24, 2004. The medical records of Memorial Hospital were introduced when he went to the emergency room for the third time on May 27, 2004. The medical records of Dr. James Doty, neurosurgeon, were also admitted. (R.E.17). The only lay testimony submitted by the Employer/Carrier was the testimony of Bobby Tyson, Claimant's former supervisor and current store manager for the Employer. Tyson testified Mr. Hopper did not report a work connected injury to him; that claimant told him that he had injured his neck at home while repairing his personal vehicle. However, Tyson admitted that claimant told him before May 17, 2004, that he had had neck problems and that Hopper had continued to work after complaining of his neck pain until he was physically unable to perform his job as store manager.

The administrative law judge, the Honorable Deneise Turner Lott, on June 2, 2006, made the following Findings of Fact and Conclusions of Law (R.E.7):

> 1. A preponderance of the evidence indicates that Claimant sustained an injury on May 7, 2004 that arose out of and in the course of his employment as required by the definition of "injury" contained in Miss. Code Ann. Section 71-3-3(b)(Rev. 2000). Claimant was a credible witness, both generally and specifically in regard to his testimony regarding the occurrence of an injury on May 7, 2004.
>
> Also, Claimant's testimony regarding occurrence is corroborated by the medical evidence. The first medical history of record – from the Ocean Springs Hospital emergency room on May 18, 2004 – indicates that Claimant had experienced neck and upper extremity pain for several days before his sneeze on May 17, 2004. The emergency room nurse's notes from May 18, 2004 state that Claimant complained of right shoulder and arm pain that began one week prior to admission and that the pain was increased by neck movement. The emergency room physician's notes from May 18, 2004 state that Claimant presented with right-sided neck pain radiating down his arm which "ha[d] been going on for several days."
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> Although the May 18, 2004, emergency room record also states that Claimant's symptoms were unaccompanied by trauma, this history too is consistent with Claimant's testimony that he was injured while performing the usual work in the usual way, that he experienced gradual as opposed to immediate arm pain on May 7, 2004, and that he initially dismissed the soreness as a pulled muscle that would resolve with no residual effects.
>
> The only contrary evidence is the testimony of Bobby Tyson, Claimant's former supervisor and the current store manager for the Employer. Tyson testified that Claimant did not report a work-connected injury to him, and that Claimant told him that he had injured his neck at home while repairing his personal vehicle. However Tyson admitted that Claimant had told him before May 17, 2004 that he had neck problems and that Claimant had continued to work after complaining of neck pain until he was physically unable to perform his job as a store manager. In resolving this conflict in the record, this Administrative Judge credits Claimant's testimony – based on her observation of the demeanor of the witnesses at the evidentiary hearing, medical evidence corroborating Claimant's version of the facts, the record as a whole, and the well-established rule of resolving doubts in favor of compensation.
>
> The Administrative Judge therefore concludes that a preponderance of the credible evidence establishes that Claimant sustained an injury on May 7, 2004 that arose out of and in the course of his employment as required by the

definition of "injury" contained in Miss. Code Ann. Section 71-3-3(b) (Rev. 2000).

2. A preponderance of the evidence does not indicate that Claimant sustained a work-connected injury on May 17, 2004. Claimant's testimony regarding the events of May 17, 2004 are no less credible than his testimony regarding the events of May 7, 2004. There is little evidence to contradict and significant evidence to support Claimant's testimony that he experienced immediate, debilitating neck and arm pain when he sneezed at work on May 17, 2004, however, this fact alone is not sufficient to establish the occurrence of a work-connected injury on May 17, 2004. Claimant testified that he sneezed approximately twenty minutes after arriving at work, that he heard a loud pop, and that he experienced immediate neck and arm pain which became so unbearable he had to leave work fifteen minutes later. He did not testify and the proof does not otherwise indicate the nature of his work activities at the time of the sneeze or that he sneezed because of any irritant in the work environment or for any reason connected with his employment.

Although it is plausible that the May 17, 2004 sneeze ruptured cervical discs that had been injured or at least compromised by Claimant's work activities beginning May 7, 2004, there is no medical evidence to support a finding that Claimant's work activities at any time caused or significantly aggravated, accelerated or contributed to an injury on May 17, 2004 or to Claimant's current impairment. The medical evidence merely recites Claimant's credit medical histories – medical histories which establish a temporal sequence of events that support Claimant's contention of a casual connection between his work activities and his current impairment but which, in a case where Claimant's disability may or may not be related to his work activities, are alone insufficient to establish the requisite causal connection. *See* V. Dunn, *Mississippi Workers' Compensation Section 270* (3rd Ed. 1982).

The need for medical evidence of causal connection is particularly probative where the record indicates that Claimant had previously fractured his cervical spine in a nonwork-related injury, had undergone a multilevel anterior cervical fusion, and had preexisting degenerative disc disease on the alleged date of injury. For example, the cervical CT scan performed May 27, 2004 showed Claimant had a prior C4 through C6 anterior cervical fusion; multilevel cervical spondylosis; a broad-based C6-7 disc protrusion with osteophyte; osteoarthritic changes of the C2-3 and C3-4 facet joints; and no acute CT abnormality. The June 17, 2004 MRI showed multilevel cervical degenerative disc disease most prominent at C6-7 with mild cervical cord impingement and apparent right C7 nerve root compression.

Malone & Hyde of Tupelo, Inc. v. Hall, 183 So. 23d 626 (Miss. 1966) illustrates the need for a claimant to establish the requisite causal connection by a preponderance of the evidence, including medical proof, where the facts show

that disability may or may not be associated with a claimant's work activities. In that case, a truck driver sneezed or coughed after driving his truck a short distance. He experienced immediate, severe lower back and leg pain which forced him to pull his truck to the side of the road and stop. After an unsuccessful course of conservative treatment, he had surgery to repair a ruptured disc at L5-S1.

The issue was whether Claimant's ruptured disc arose out of and in the course of employment. Claimant did not contend that anything connected with his employment caused him to cough or sneeze at the time of injury. Rather, he contended that a causal connection was established by the fact that "the position [he] was required to be in in (sic) driving the truck made it more likely for the injury to occur in that it put more strain on his back or more pressure on his spine and precipitated or combined with the cough to precipitate the injury." *Id.* at 627.

The treating physician testified that claimant's sitting position as a truck driver at the time of injury caused or contributed to the rupture of his disc. Another physician, a Dr. Schultz, testified that sitting in the truck was not a contributing cause because standing, not sitting, made the rupture of a disc more likely; that, absent a preexisting diseases disc, no amount of coughing in any position would have caused the disc to rupture; and, therefore, that the claimant had a preexisting diseased disc from which symptoms could arise at any time or place in carrying out any bodily function. Dr. Schultz concluded that the claimant's preexisting condition contributed 99% to his impairment.

The Supreme Court noted the Commission's finding that "the record was totally silent as to the reason for Mr. Hall's coughing or sneezing," and concluded hat "[Mr. Hall], at the time of the incident was suffering either from a ruptured disc which, up to that time, had not caused any pain or showed any symptoms, or a disc degenerated to such a degree that its rupture was imminent." *Id.* at 628. The Court also noted the Commission's finding that "it appear[ed] beyond dispute that the claimant had a physical mechanism within the physical structure of his back that was ready to be triggered and that the sneezing triggered the mechanism, thereby causing the disability." *Id.* at 627. The Court further noted that the Commission not only found that the claimant had a preexisting degenerative disc, it also found that "the coughing or sneezing, which the Majority of the Commission believe[d] [wa]is totally unrelated to the employment, was the straw that broke the camel's back." *Id.*

The Court concluded:

> It is clear that the Commission's finding that there was no causal connection between appellee's employment and his disability, even though the disability occurred while he was on the job driving the truck, was substantiated by the evidence. *The mere fact that the*

disability occurred while he was on the job did not, under our interpretation of the Mississippi Workmen's Compensation Act, create a compensable injury. (Cites omitted.) (Emphasis supplied.).
Id. at 629

In so holding, the court distinguished Mr. Hall's claim from those cases which state that the fact that an employee could have been injured at home does not prevent an injury from being compensable if it occurs at work due to strain or exertion on the job: "In the case at bar there was no exertion, no strain, on the job. The appellee merely sneezed or coughed, unrelated to his employment." *Id. See also* V. Dunn, *Mississippi Workers' Compensation* Sections 268 and 273 (3rd Ed. 1982).

As in *Malone & Hyde of Tupelo, Inc. v. Hall,* this Administrative Judge finds that a preponderance of the evidence does not indicate either that any aspect of Claimant's employment caused him to sneeze on May 17, 2004 *or* that his work-connected injury on May 7, 2004 and its sequella caused or significantly contributed to the occurrence of a work-connected injury on May 17, 2004 or to his current impairment. There is no medical evidence that addresses either potential link to the employment, however, as noted above, there is medical evidence that Claimant sustained a significant, albeit remote, preexisting injury that necessitated a multilevel anterior cervical fusion and that he had a preexisting condition on the date of injury; radiographic tests performed just ten days after the alleged May 7, 2004 injury showed that Claimant had multilevel degenerative cervical disc disease. Although the work-connected injury on May 7, 2004 and its sequella may have combined with Claimant's preexisting condition to cause or significantly contribute an injury on May 17, 2004 and to Claimant's current impairment, the record at this time does not evince the requisite proof to support such a finding.

This Administrative Judge therefore concludes that a preponderance of the evidence does not establish that Claimant sustained an injury on May 17, 2004 arising out of and in the course of his employment as required by the definition of "injury" contained in Miss. Code Ann. Section 71-3-3(b) (Rev.2000).

In light of this finding and pending further proof, it is unnecessary to reach the other issues identified by the parties. Although Claimant sustained a work-connected injury on May 7, 2004, he did not miss work or seek medical treatment until on or after May 17, 2004, and there is no medical evidence to support a finding that his need for treatment or loss time from work on or after May 17, 2004 was occasioned by any work-connected injury.

ORDER

IT IS THEREFORE ORDERED that Claimant's claim for medical and disability benefits is denied at this time. (R.E.7).

Following the administrative law judge's first decision "that although the Claimant sustained a work connected injury on May 7, 2004, that he did not miss work or seek medical treatment until or on or after May 17, 2004, and there was no medical evidence to support a finding that his treatment or loss time from work on or after May 17, 2004, was occasioned by any work connected injury", the Claimant appealed the administrative law judge's decision of June 8, 2006, contesting Judge Lott's ruling. On July 25, 2006, Mr. Hopper's counsel herein filed a motion for introduction of additional evidence moving the Commission to allow medical correspondence from Dr. Doty which was obtained by Hopper's counsel subsequent to the evidentiary hearing to be admitted into evidence.

The Full Commission remanded the matter back to the administrative law judge in its first decision dated October 3, 2006, (R.E.9) holding as follows:

> The Commission heard the above styled and numbered cause on October 2, 2006 on the claimant's "Petition for Review Before Full Commission" and "Claimant's Motion to Re-Open Record for Additional Evidence to be Introduced." After considering the arguments of counsel, and having thoroughly studied the pleadings before the Commission, the contents of the file, the record and the applicable law, the Commission affirms Administrative Judge Lott's "Order of Administrative Judge" dated June 2, 2006.
>
> With respect to claimant's motion, the Commission remands this motion for the consideration of our Administrative Judge and direct that she consider and review the merits of the motion, determine whether or not it is reasonable under the circumstances and the law to grant said motion, and to do all things necessary to the ultimate disposition of the case.
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> It is, therefore, ordered that the decision of the Administrative Judge dated June 2, 2006, be, and the same is hereby Affirmed.
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> It is further ordered that the "Claimant's Motion to Re-Open Record for Additional Evidence to be Introduced" be, and the same is hereby Remanded to the Administrative Judge for disposition of not only the extant motion but for ultimate disposition of the case.

So ordered this the 3rd day of October, 2006. Signed by Commissioners Liles Williams, Barney Schoby and Lydia Quarles.

The administrative law judge, Deneise Turner Lott, conducted a subsequent hearing pursuant to the Commission's remand and entered her second order dated September 14, 2007. (R.E.10). The administrative law judge in a second very analyzed decision found as follows:

> 1. A preponderance of the evidence indicates that Claimant sustained an injury on May 17, 2004 that arose out of and in the course of his employment as required by the definition of "injury" contained in Miss. Code Ann. Section 71-3-3(b) (Rev. 2000).
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> On June 2, 2006, this Administrative Judge entered an order finding Claimant sustained a work-connected injury on May 7, 2004, and that Claimant's testimony regarding the events of May 17, 2004 was no less credible than his testimony regarding the events of May 7, 2004. This Administrative Judge also concluded:
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> > Although it is plausible that the May 17, 2004 sneeze ruptured cervical discs that had been injured or at least compromised by Claimant's work activities beginning May 7, 2004, there is no medical evidence to support a finding that Claimant's work activities at any time caused or significantly aggravated, accelerated or contributed to an injury on May 17, 2004 or to Claimant's current impairment. The medical evidence merely recites Claimant's credible medical histories – medical histories which establish a temporal sequence of events that support Claimant's contention of a causal connection between his work activities and his current impairment but which, in a case where Claimant's disability may or may not be related to his work activities, are along insufficient to establish the requisite causal connection.
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> On remand, this Administrative Judge finds that (1) Claimant's proof establishes that his May 17, 2004 injury was a direct and natural consequence of his May 7, 2004 injury, and (2) Employer's proof does not establish that Claimant's sneeze on May 17, 2004 was an independent agency that terminated the effect of the prior, work-connected injury on May 7, 2004. *(Emphasis added).*
>
> This finding is supported by the medical evidence. Dr. Doty was Claimant's treating physician and surgeon. He stated that it was his opinion that Claimant "probably injured his disc [on May 7, 2004], and then that one precipitating event when the sneeze happened finally sort of put him over the edge." Dr. Terry Smith disagreed with Dr. Doty based on his finding that Claimant gave no

history of a work-connected injury on May 7, 2004, but, as noted above, this Administrative Judge has already found that a preponderance of the evidence, including medical histories which do support the occurrence of a work-connected injury on May 7, 2004, indicate that Claimant sustained a cervical injury on May 7, 2004. Also, as the treating physician and surgeon with the greater opportunity to observe and treat Claimant, Dr. Doty's opinion has more probative value in this case than Dr. Smith's opinion. *(Emphasis added).*

In *1 Larson's Workers' Compensation Law*, Chapter 10, Sections 10.00-10.02 (2007), Professor Larson illustrated the range of compensable consequences that an injury may have by referencing a case in which a sneezing episode aggravated a prior work-connected back condition:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.
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> ....
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and sequelae that flow from the primary injury are compensable. The cases illustrating this rule fall into two groups.
>
> The first group, about which there is no legal controversy, comprises the cases in which an initial medical condition itself progresses into complications more serious than the original injury; the added complications are of course compensable.
>
> ....
>
> In a Utah case, claimant had suffered a compensable accident in 1966, injuring claimant's back. Several years later, this condition was triggered by a sneeze into a disc herniation, for which claimant required surgery. The medical testimony was that because of the back condition, it was probable that had claimant not had the sneezing episode, some other major or minor event would have eventually necessitated surgery. The finding that the sneezing episode was the independent cause of claimant's disability, and the resultant denial of compensation, were held to be error, and benefits were awarded on

appeal. This result is clearly correct. The presence of the sneezing incident should not obscure the true nature of the case which is nothing more than that of a further medical complication flowing from a compensable injury.

In *Wal-Mart Stores, Inc. v. Fowler,* 755 So. 2d 1182 (Miss. App. 1999), the Court of Appeals found that the claimant's back injury, sustained while brushing her hair at home two years after a work-connected back injury, was part of continuous chain of back problems that arose from a preexisting condition that had manifested itself due to the initial, work-connected back injury; the Court also found, alternatively, that the work-connected back injury made claimant more susceptible to the later back injury, and, thus, the subsequent back injury sustained while claimant was brushing her hair at home was compensable. *(Emphasis added).*

> The burden of proof of affirmative defenses, including the defense of intervening cause, rests upon the employer. *Marshall Durbin Companies v. Warren,* 633 So. 2d 1006, 1008 (Miss. 1994). Under the defense of intervening cause, an employer remains liable for all manifestations of an injury, regardless of how long the manifestations continue, but if an "independent agency" terminates the effects of the original injury, the employer is not liable for subsequent injuries. *Kelly Brothers Contractors, Inc. v. Windham,* 410 So. 2d 1322, 1324 (Miss. 1982).
>
> . . . .As with pre-existing conditions, an employer remains liable for subsequent injuries related to a prior work injury. Dunn, *Mississippi Worker's Compensation,* Section 157 (3rd Ed. 1990).
>
> *Id.* at 1185.

Moreover, the fact that Claimant's May 17, 2004 injury was a further medical complication of a prior *work-connected* injury distinguishes it from *Malone & Hyde of Tupelo, Inc. v. Hall,* 183 So. 2d (Miss. 1966), another "sneeze" case cited in this Administrative Judge's prior order, in which the sneeze injury was a further medical complication of a prior *nonwork-connected* condition.

This Administrative Judge therefore concludes, based on the more competent testimony of Dr. Doty in combination with Claimant's credible testimony, that the May 17, 2004 injury was a direct and natural consequence of the May 7, 2004 compensable injury, that Claimant's sneeze on May 17, 2004 was not an independent agency terminating the effect of the work-connected injury which occurred while Claimant was unloading tires on May 7, 2004, and, thereby, that Clamant sustained an injury arising out of and in the course of his employment on May 17, 2004. *(Emphasis added).*

2. Claimant is entitled to temporary total disability benefits for any time that he was off work because of injury per Dr. Doty, including the twelve weeks following surgery. Dr. Doty testified that although Claimant did not return to the clinic for a post-surgical office visit, he should have reached maximum medical improvement twelve weeks after surgery.

3. Claimant is entitled to payment of all medical services and supplies required by the nature of his injury and the process of his recovery as provided in Miss. Code Ann. Section 71-3-15 (Rev. 2000) and the Medical Fee Schedule.

4. Claimant is entitled to a 10% penalty on any untimely paid installments of compensation pursuant to Miss. Code Ann. Section 71-3-37(5) (Rev. 2000).

ORDER

It is therefore ordered that Employer/Carrier pay compensation benefits to Claimant as follows:

1. Temporary total disability benefits for any time that he was off work because of injury per Dr. Doty, including the twelve weeks following surgery;

2. All medical services and supplies required by the nature of his injury and the process of his recovery as provided in Miss. Code Ann. Section 71-3-15 (Rev. 2000) and the Medical Fee Schedule; and

3. A 10% penalty on any untimely paid installments of compensation pursuant to Miss. Code Ann. Section 71-3-37(5) (Rev. 2000).

So Ordered on 9/14/07. (R.E.10).

As this Court can readily ascertain, the administrative law judge concluded based upon the competent testimony of Dr. James Doty, neurosurgeon, in combination with Mr. Hopper's credible testimony, that the May 17, 2004 injury was a direct and natural consequence of the May 7, 2004 compensable injury. Claimant's sneeze on May 17, 2004, was not an independent agency terminating the effect of the work related injury which occurred while Claimant was

unloading tires on May 7, 2004, and thereby, Claimant sustained an injury arising out of and in the course of his employment on May 17, 2004.

It was from this decision that the Employer/Carrier filed a Petition for Review with the Workers' Compensation Commission dated October 1, 2007, claiming that the "finding and award of the administrative judge was contrary to the credible evidence and contrary to the great and overwhelming weight of the evidence and contrary to law. (R.E.11).

The Workers' Compensation Commission heard arguments of counsel on January 7, 2008, and on January 24, 2008, entered its Full Commission Order finding that the claimant failed to carry his burden of proving a work related injury and reversed the order of the administrative law judge. (R.E.12).

The Full Workers' Compensation Commission, in a strange decision, proceeded to make credibility determinations not only regarding the Claimant's testimony but also regarding the testimony of his treating neurosurgeon, Dr. James Doty. The Workers' Compensation Commission, in an arbitrary and capricious manner, held:

> In sum, the only evidence of a sneeze occurring at work comes from the Claimant's own testimony. Further, the only evidence of the Claimant's claim of injury while unloading the tire truck comes from his testimony as well. The Claimant never reported these injuries to his Employer. Further, the Claimant gave no history to a medical provider of any work injury at all. His testimony is contradicted not only by the testimony of Bobby Tyson, but also by the medical evidence presented at the hearing. The only medical testimony which supports the Claimant's allegations come from Dr. Doty's deposition testimony, which is not based on a review of the prior medical records, but upon the Claimant's own flawed history.
>
> The Order of the Administrative Judge dated January 7, 2008 is hereby reversed, and this claim dismissed accordingly. (R.E.12).

Strangely enough, two of the Commissioners who agreed with this decision were appointed by Governor Haley Barbour and they replaced Commissioners Schoby and Quarles. Chairman Liles Williams reversed himself from his first decision.

It is from this decision that Mr. Hopper filed his Notice of Appeal on January 29, 2008, (R.E.13) and Mr. Hopper, through counsel herein, would submit to this Honorable Court that this decision is a "travesty of justice", wherein the Commissioners took it upon themselves to reverse their administrative law judge who made credibility determinations based strictly upon a preponderance of the evidence from the testimony of the Claimant as well as the Claimant's treating physician, both of whom were cross-examined by Employer's counsel. After competent testimony was evaluated and scrutinized by their administrative law judge on two occasions, the Commission decided to reverse their administrative law judge based strictly upon credibility determinations which they did not make themselves in the first decision. These Commissioners at no time heard the testimony, saw the demeanor of the witnesses or considered that their administrative law judge was in fact judging the believability of the witnesses. Mr. Hopper will hereinafter show that the Commission's finding of fact is clearly arbitrary and capricious and their decision is not supported by substantial evidence in this record.

ARGUMENT

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND FACT IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION IN FINDING THE CLAIMANT, JOE HOPPER, FAILED TO CARRY HIS BURDEN OF PROVING A WORK RELATED INJURY.

It is very clear from the outset of this case that the Commissioners who rendered their decision in this matter on January 24, 2008, reversing their administrative law judge, have made credibility determinations which this Court will have to scrutinize very closely. In Paragraph 3 of the Second Commission Decision (R.E.12), the Commission held as follows:

III.

> 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. Further Bobby Tyson testified at the hearing that he had no knowledge that the Claimant was claiming to have sustained an injury until he received the Petition to Controvert from the Mississippi Workers' Compensation Commission.
>
> The 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 pre-existing non-work related neck problems. Further, there is not one medical note from any of the initial treating physicians, which gives a history of any work injury. To the contrary, the most compelling evidence weighing in favor of the Employer/Carrier is the history provided to the emergency room at Ocean Springs Hospital. The Claimant specifically reported that he sneezed "at night", not in the morning as he testified at hearing, and further that he had no pain following the sneeze until the next morning, no immediate onset of severe pain as the Claimant testified, not once, but twice, at hearing. This makes the Claimant's version of the events more suspect than credible.

The Workers' Compensation Commission totally disregarded competent testimony from the Claimant as well as competent medical testimony from Dr. James Doty, Chief of Neurosurgery, of the Neurosurgical Department of Memorial Hospital, that Claimant's cervical injury was causally related to his industrial accident as testified to by both parties. For the Workers' Compensation Commission to disregard said testimony is an error of law which the Court has the *de novo* right to review and reverse. The actions of the Workers' Compensation Commission were arbitrary and capricious, and the findings were clearly erroneous, although there is slight evidence to support it.

Mr. Hopper submitted positive, credible medical and trustworthy testimony from Dr. James Doty. Mr. Hopper would submit to this Honorable Court that it will have to determine whether or not the Mississippi Workers' Compensation Commission will be allowed to totally disregard competent medical testimony and the testimony of Mr. Hopper. The Court will also have to determine whether or not the Workers' Compensation Commission has the authority to totally disregard medical testimony without making a specific finding that the testimony of Dr. Doty was (1) inherently improbable; (2) incredible; (3) unreasonable; or (4) untrustworthy, before it arbitrarily rejects it. Mr. Hopper would submit to this Honorable Court that after the record is reviewed in its entirety, this Court will be left with a clear and firm conviction that a mistake has been made by the Full Worker's Compensation Commission in its application of the Act to the findings of fact made by the Commissioners of the Mississippi Workers' Compensation Commission.

Further, Mr. Hopper would submit to this Honorable Court that the decision by the Workers' Compensation Commission failed to follow established Mississippi Workers'

Compensation jurisprudence in giving the benefit of all statutory presumptions to the claimant under the Workers' Compensation Act as it must.

This Honorable Court has stated in numerous cases, "doubt should be resolved in favor of a finding of compensability, to the end that the beneficent purposes of the Mississippi Workers' Compensation Act may be carried out." *See, South Central Bell Telephone v. Aden,* 474 So. 2d 584 (Miss. 1985).

Further, this Supreme Court has stated time and again to its lower circuit courts, "when the circuit courts are reviewing awards or denials of compensation benefits, the court should give broad and liberal construction to the statute without over emphasis or technicalities and on form over substance. Further, the liberal interpretation of the Act should be afforded the claimant." *See, Central Electric Power Assn. v. Hicks,* 110 So. 2d 351 (Miss. 1959). This Honorable Court has also stated time and again that even though testimony may be somewhat ambiguous as to casual connection, all that is necessary is that medical findings support a casual connection. *Sperry-Vickers, Inc. v. Honea,* 394 So. 2d 1380 (Miss. 1980).

The Mississippi Workers' Compensation Act provides for review of decisions of the Mississippi Workers' Compensation Commission by the circuit court of the county in which the injury occurred. Specifically, Section 71-3-51 of the Mississippi Code of 1972, provides as follows:

> The circuit court shall review all questions of law and fact. Miss. Code Ann. Section 71-3-51 (1972).

Mr. Hopper would admit that the general rule normally followed by this Court is that a decision of the Commission based upon undisputed issues of fact will be affirmed, where there is substantial and reasonable inference in the records to support the Commission's finding of fact. *See, Central Electric Power Assn. v. Hicks, supra.*

According to this Supreme Court judicial review of findings of the Mississippi Workers' Compensation Commission extends to a determination of whether the Commission's decision is clearly erroneous. The standard for that test has been provided by this Supreme Court in *Central Electric Power Assn. v. Hicks, supra.*, as follows:

> A finding is clearly erroneous when, although there is slight evidence to support it, the reviewing court on the entire evidence and the record, is left with a firm and definite conviction that a mistake has been made by the Commission in its finding of fact and its application of the Act. *Id.*, at 357.

This Court further noted:

> In reviewing awards of denials of compensation benefits, the Court shall examine the record to determine whether the salutary policies and humane purposes of the Compensation Act are being carried out in a particular case; and further, whether the Act is receiving the broad and liberal construction which the statute requires, without over emphasis on technicalities and on form over substance. *Id.*, at 356.

When reviewing workers' compensation cases on appeal, this Honorable Supreme Court has noted that the function of the circuit court is to determine whether there is substantial, credible evidence which supports the factual finding made by the Commission. *Accord, South Central Bell v. Aden,* 474 So. 2d 584, 589 (Miss. 1985). However, this Supreme Court has also noted that the substantial evidence rule does not require a circuit court or this Supreme Court to act as a "rubber stamp" every time the Workers' Compensation Commission is appealed. Although great weight is given to the findings of the Workers' Compensation Commission, the Worker's Compensation Act does provide court review of questions of law and fact. *Compare, Bechtel Construction v. Bartlett,* 371 So. 2d 398, 401 (Miss. 1979). As this Court noted in *Bechtel, supra.*:

> The lawmakers specifically and mandatorily require circuit judges to act in a meaningful but responsible fashion in acting upon appeals of this sort. *Id.*, at 401.

In reviewing a case, this Supreme Court has stated time and again that the circuit court is required to look at all of the evidence on both sides. *See, Grey v. Poloron Products of MS.*, 347 So. 2d 363, 365 (Miss. 1977). In *Poloron, supra.*, this Honorable Court went on to further state the following rule with regard to the Mississippi Workers' Compensation Act:

> The Workers' Compensation Act is given broad and liberal construction. Doubtful cases should be resolved in favor of compensation in order to serve the humane purposes of the Act.
>
> Further, this Supreme Court in *Stuart's v. Brown,* 543 So. 2d 649 (Miss. 1989), stated that:
>
> > It is in the above context that we have often held (1) that close questions of compensability should be resolved in favor of workers, and (2) the Act should be liberally construed to carry its beneficent remedial purpose.

Mr. Hopper would contend that after review of all the evidence and the record in this matter, the Commission erred as a matter of law in finding the claimant did not prove a work related injury.

While Mr. Hopper is ever mindful that the Commission is the sole judge of the weight and sufficiency of the evidence, on the other hand, the Commission is burdened with the responsibility not to arbitrarily reject the evidence contrary to the rules governing the administrative actions and specifically when their administrative law judge has made credibility determinations. As stated in Dunn, Section 262, *Mississippi Workers' Compensation*:

> Evidence which is not contradicted by positive testimony or circumstances, and which is not inherently improbable, incredible or unreasonable, cannot, as a matter of law, be arbitrarily or capriciously discredited, disregarded or rejected, even though the witness is a party or interested; and unless uncontradicted evidence is shown to be untrustworthy, is to be taken as conclusive and binding on the trier of fact. If unimpeached testimony is supported by all the circumstances in the case and if there are no substantial grounds within the record upon which cogent and logical emphasis may be

> drawn to the contrary, the Commission may not base its decision upon speculation that the witness may have been mistaken or untruthful and something else might possibly be true. *Accord., Tanner v. American Hardware Corp.*, 119 So. 2d 380 (1960); *Machine Products Co. v. Wilemon,* 107 So. 2d 114 (1958).

Mr. Hopper would submit that the Workers' Compensation Commission denied him the benefits of all presumptions to which Mr. Hopper was entitled to under the Act. *See, Central Power Electric Assn. v. Hicks,* 110 So. 2d 351 (1959); *Russell v. Sohio Pipeline Co., Inc.,* 112 So. 2d 357 (1959); *Shannon v. City of Hazlehurst,* 116 So. 2d 546 (1959).

The administrative law judge in this matter found that the claimant's sneeze was a continuous chain of events which began with the claimant's alleged neck injury while unloading tires on May 7, 2004. The Workers' Compensation Commission states: "There is no evidence except the claimant's own testimony that this sneeze even occurred at work." It would appear that the Workers' Compensation Commission is requiring corroboration by an independent witness to corroborate the claimant's own testimony. There was absolutely no testimony, other than the co-employee, Mr. Tyson, who was the claimant's supervisor, who testified that he told him after he was injured that he was injured while working on his vehicle. There is no rule of law which requires the injured worker to submit testimony to corroborate his testimony in order to carry his burden of proof.

When the Employee/Claimant testifies he sustained an accidental injury and this testimony is uncorroborated by other witnesses, if also uncontradicted, the mere fact that he has an interest in the outcome of the claim, is not alone and with more, a sufficient basis for rejecting his testimony. *See, Fortune Furniture Mfg. Co. v. Sullivan,* 279 So. 2d 644 (Miss. 1973); *Edwards v. Mid-State Paving,* 307 So. 2d 794 (Miss. 1974). There was no finding of fact made by the Workers' Compensation Commission that physical facts, circumstances and

self-contradictions of the Claimant was sufficient to rebut the testimony of the Claimant that an injury was sustained in the course of employment. The Workers' Compensation Commission then states, "The initial medical reports which are the most probative evidence in the case, makes absolutely no mention of this alleged injury on May 7, 2004, or a sneeze inducing injury at work on May 17, 2004."

First of all, Mr. Hopper was not aware of what was wrong with him other than he was having pain run down his upper extremity. He had no idea he had sustained a serious neck injury. Furthermore, he is not a medical doctor and less and except breaking his neck, would he have known that he had a neck injury. It was not until he went to the doctors and they performed MRI's that he was advised he had a neck injury or that the pain he was having in his upper extremity was coming from the neck. How the Workers' Compensation Commission can find that the medical testimony is the most probative evidence, outside of the lay testimony of the Claimant and the medical testimony of Dr. Doty, is totally unbelievable to counsel herein. To further show the arbitrariness of this decision, the Commission then states, "Further, Bobby Tyson testified at the hearing that he had no knowledge that the Claimant was claiming to have sustained an injury until he received the petition to controvert from the Mississippi Workers' Compensation Commission." The fact that he may not have had the knowledge the incident occurred on May 7, 2004, or allege that he did not have information, did not make his testimony more probative than that of Mr. Hopper.

The problem we have here, is that the Workers' Compensation Commission has not set out what the substantial evidence was in this case to contradict the positive testimony of Mr. Hopper and the medical testimony of Dr. James Doty, both of which were found by the administrative law judge to have been credible. The administrative law judge found,

"Claimant was a credible witness, both generally and specifically in regard to his testimony regarding the occurrence of an injury on May 7, 2004. Also, Claimant's testimony regarding occurrence is corroborated by the medical evidence." Further the administrative law judge stated as follows, "In resolving this conflict in the record, this administrative judge credits Claimant's testimony – based on her observation of the demeanor of the witness at the evidentiary hearing, medical evidence corroborating Claimant's version of the facts, the record as a whole, and the well-established rule of resolving doubt in favor of compensation." If the Commission is going to accept well-founded testimony by its administrative law judge in making decisions, it is incumbent upon them in rejecting the testimony, to find where the testimony was inherently improbable or so inconsistent as to be credible; that the witness was interested or that his testimony on this point and issue was impeached by falsity in his statements on other matters. Unless some explanation is furnished by the Commission for the disregard of all the uncontradicted testimony in the record or contradicted testimony in the records found by the administrative law judge, the Commission's denial should be viewed as arbitrary and unsupported. This sometimes occurs when the Commission denies compensation on a record that contains nothing but favorable testimony to the claimant with no indication whether all or part of the testimony was believed and if so, why. *Compare*, Larson, *The Law of Workers' Compensation*, Section 80.20, at 268-272 (1971).

In the instant case the great weight of the testimony leads to but one conclusion as stated by the administrative law judge as follows:

> The administrative judge, therefore, concludes that a preponderance of the credible evidence establishes that the claimant sustained an injury on May 7, 2004, that arose out of and in the course of employment as required by the definition of "injury" contained in Miss. Code Ann. Section 71-3-3(b). (R.E.7).

It appears that the Workers' Compensation Commission gave undue prominence to one part of the record, that being where they stated, "There is not one medical note from any of the initial treating physicians, which gives a history of any work related injury. To the contrary, the most compelling evidence weighing in favor of the Employer/Carrier is the history provided to the emergency room at Ocean Springs Hospital. The Claimant specifically reported that he sneezed 'at night' , not in the morning as he testified at hearing, and further that he had no pain following the sneeze until the next morning, not immediate onset of severe pain as the Claimant testified, not once but twice at hearing. This makes the Claimant's version of the events more suspect than credible." Again the administrative law judge weighed this testimony and found not in one decision, but two decisions; (1) that the Claimant's proof establishes that his May 17, 2004 injury was a direct and natural consequence of his May 7, 2004 injury and (2) the Employer's proof does not establish that the Claimant's sneeze on May 17, 2004, was an independent agency that terminated the effects of the prior related injury on May 7, 2004. Regardless of whether he sneezed at night or in the morning, it would not have mattered because the operative injury occurred on May 7, 2004, at work. This was clearly related by Dr. James Doty. Dr. Doty stated it was his opinion that Claimant "probably injured his disk on May 7, 2004, and then that one precipitating event when the sneeze happened, finally sort of put him over the edge." (R.E.18-pg.20). The administrative law judge then citing Larson's *Workers' Compensation* illustrated the range of compensable consequences that an injury may have by referencing a case in which a sneezing episode aggravated a prior work related back condition.

Even though the Claimant testified the sneezing incident took place on the job on May 17, 2004, and the medical records recorded at night, there was no testimony from any doctor

from the hospital who testified that the history was correct or it could have been incorrect. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury is compensable if it is the direct and natural result of a compensable primary injury. The simplest application of the principle is the rule that all medical consequences and sequelae that flow from the primary injury are compensable.

This decision is no different than the recent case of *Wal-Mart Stores, Inc. v. Fowler,* 755 So. 2d 1182 (Miss. App. 1999), wherein the Court of Appeals found that a claimant's back injury, sustained while brushing her hair at home two years after a work related back injury, was part of a continuous chain of back problems that arose from a pre-existing condition that had manifested itself due to the initial, work connected back injury; the Court also found, alternatively, that the work connected back injury made claimant more susceptible to the later back injury and thus, the subsequent back injury sustained while claimant was brushing her hair at home was compensable.

What the Commission failed to analyze in its final decision was "the burden of proof on affirmative defenses," including the defense of intervening cause which rests upon the Employer. The administrative law judge did consider the defense of intervening cause by the sneeze and found as follows:

> The burden of proof of affirmative defenses, including defense of intervening cause, rests upon the employer. *Marshall Durbin Companies v. Warren,* 633 So. 2d 1006, 1008 (Miss. 1994). Under the defense of intervening cause, an employer remains liable for all manifestations of an injury regardless of how long the manifestations continue, but if "an independent agency" terminates the effects of the original injury, the employer is not liable for subsequent injuries. *Kelly Bros. Contractors, Inc. v. Windham,* 410 So. 2d 1322, 1324 (Miss. 1982).

The administrative law judge concluded:

> This administrative judge therefore concludes, based on the more competent testimony of Dr. Doty in combination with claimant's credible testimony, that the May 17, 2004 injury was a direct and natural consequence of the May 7, 2004 compensable injury, that claimant's sneeze on May 17, 2004, was not an independent agency terminating the effect of the work-connected injury which occurred while claimant was unloading tires on May 7, 2004, and, thereby, that claimant sustained an injury arising out of and in the course of his employment on May 17, 2004. (R.E.10).

In the Commission's final decision, at no time did the Workers' Compensation Commission submit that the substantial evidence presented by the Employer outweighed the probative testimony of the Claimant and his treating doctor in order to conclude that the Employee failed to sustain his burden of proof.

CONCLUSION

Mr. Hopper respectfully requests this Honorable Supreme Court to reverse this arbitrary and capricious decision of the Workers' Compensation Commission and the Circuit Court as not being supported by substantial evidence and contrary to established Mississippi Workers' Compensation Jurisprudence.

Respectfully submitted, this the 26 day of May, 2009.

JOSEPH HOPPER (Claimant), APPELLANT

BY: _____
JAMES K. WETZEL, Esquire

CERTIFICATE OF SERVICE

I, James K. Wetzel, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to Jeffrey Moffett, Esquire, with the law firm of Markow Walker, at his usual mailing address of1161 Robinson St., Ocean Springs, MS 39564; to the Honorable Deneise Turner Lott, Administrative Law Judge, Mississippi Workers' Compensation Commission, at P. O. Box 5300, Jackson, MS 39296-5300; and to the Honorable Lisa Dodson, Harrison County Circuit Court Judge, at P. O. Box 1461, Gulfport, MS 39502.

DATED this the 26th day of May, 2009.

JAMES K. WETZEL, ESQUIRE

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