IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CAUSE NO. 2009-WC-00381

ALONZO SMITH — APPELLANT

V.

JOHNSTON TOMBIGBEE FURNITURE
MANUFACTURING COMPANY
AND
BRIDGEFIELD CASUALTY
INSURANCE COMPANY — APPELLEES

BRIEF OF APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF LOWNDES COUNTY, MISSISSIPPI

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 the Circuit Court of Lowndes County, Mississippi may evaluate possible disqualification or recusal.

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Johnston Tombigbee Furniture Manufacturing Company, Employer/Appellee
Bridgefield Casualty Insurance Company, Carrier/Appellee
Summit Claims Management, Third Party Administrator for Bridgefield Casualty, Carrier/Appellee
Dennis W. Voge, Attorney for Employer-Carrier/Appellees
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Dennis W. Voge, Attorney for
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STATEMENT OF ISSUES

This matter is before this court on appeal by Claimant, Alonzo Smith, from a Full Commission Order dated July 15, 2008 (R.40) reversing in part an Order of Administrative Law Judge dated December 4, 2007 (R.27), Motion of the Employer-Carrier to Clarify, Modify, Correct, or Amend the Full Commission Order (R.45), Notice of Appeal by Claimant Alonzo Smith (R.43), Notice of Cross-Appeal by Employer-Carrier (R.48), and Order of the Mississippi Workers' Compensation Commission dated August 15, 2008 (R.50), all of which are contained in the record excerpts filed by both parties to this appeal.

STATEMENT OF THE CASE

Alonzo Smith, the claimant/appellant (hereinafter referred to as "Smith") suffered an admitted injury on or about June 26, 2003 while in the course and scope of his employment (R.1). At the time of his injury, Smith's average weekly wage was $324.37 (Gen. Exhibit 2 to Transcript). Smith did not immediately seek medical treatment for his low back injury, but was seen a few days later at the emergency room of Baptist Memorial Hospital - Golden Triangle

in Columbus, Mississippi. He was subsequently referred to Dr. David Chang, a neurosurgeon then practicing in Columbus, Mississippi for further evaluation and treatment (T.31). Dr. Chang treated Smith conservatively for a period of time and when those treatment modalities did not bring about significant relief from the complaints, Dr. Chang performed a right L4-5 lumbar discectomy on January 14, 2004. Smith remained under the care of Dr. Chang for a substantial portion of 2004, which included a subsequent evaluation by Dr. Art Leis of Jackson, Mississippi for EMG/nerve conduction studies. Those studies were reported to be within normal limits. Dr. Chang ultimately released Smith as having reached maximum medical improvement on October 28, 2004. He assigned a 10% permanent partial impairment to the body as a whole to Smith. Dr. Chang did not assign any permanent restrictions or limitations to Smith's physical activities (Exhibit 4 to Transcript, Dr. Chang's records). Dr. Chang did not testify either live or by way of deposition at the hearing of this cause and his medical records were submitted under a medical records affidavit.

The employer, Johnston Tombigbee Furniture Manufacturing Company (hereinafter referred to as "JTB") and carrier (hereinafter referred to as "Bridgefield") had Smith evaluated by Dr. Rahul

Vohra, a board certified physical medicine and rehabilitation specialist of Jackson, Mississippi on November 17, 2005. Dr. Vohra's deposition was introduced as Exhibit 1 at the hearing of this case. After examination, Dr. Vohra was of the opinion that Smith had the presence of some mild lumbar paraspinal spasm at L4-5 with a fair amount of pain amplification behavior. Dr. Vohra further opined that he could not see any objective explanation for Smith's severity of symptoms after examination. Dr. Vohra was of the opinion Smith had reached maximum medical improvement on the day he saw him, November 17, 2005 and he assigned a 5% permanent partial impairment to the body as a whole as a result of his condition. Dr. Vohra did not place any restrictions or limitations on Smith activities (Exhibit 1 to Transcript, Dr. Vohra's deposition, Pages 15, 16).

Both Dr. Chang and Dr. Vohra released Smith to full duty without restrictions or limitations.

Without referral from Dr. David Chang, Dr. Rahul Vohra or without seeking authorization from JTB and Bridgefield, Smith consulted with Dr. David Harding of Millport, Alabama for further treatment. Dr. Harding subsequently referred Smith to Dr. James T. Barnett, Jr., of Tuscaloosa, Alabama, who continued to treat Smith

periodically. Dr. Barnett had Smith seen by Dr. H. Chester Boston, Jr., also of Tuscaloosa, Alabama, for an evaluation. Dr. Boston was of the opinion Smith did not require further surgery. Neither of these physicians were deposed by Smith and the administrative law judge correctly ruled that their treatment was outside the scope of referral and that JTB and Bridgefield were not responsible for the payment of those medical services and supplies (R.35).

Smith submitted purported job searches performed by him on August 14, 2006, which did not commence until nearly two years after his release by Dr. David Chang on October 28, 2004 (Exhibit 7 to Transcript, R. 30). JTB and Bridgefield obtained the services of David Stewart, a vocational expert who testified live at the hearing of this cause and identified numerous jobs available for Smith within a comparable average weekly wage of those wages earned by him prior to his injury of June 26, 2003 (Exhibit 11 to Transcript, R.30).

SUMMARY OF ARGUMENT

The Amended Order of the Full Commission dated August 15, 2008 is an appropriate order awarding benefits to Smith under the facts, medical testimony and law developed at the hearing of this case and on appeal to the Full Commission of the Mississippi

Workers' Compensation Commission.

ARGUMENT AND AUTHORITIES

STANDARD OF REVIEW

As recently stated in *Lifestyle Furnishings v. Tollison*, 985 So.2d 352 (Miss. App. 2008) our Court of Appeals reiterated the standard of review in workers' compensation cases as follows:

> ¶15. This Court applies a limited standard of review to the decisions of the Commission. *Raytheon Aerospace Support Servs. v. Miller*, 861 So.2d 330, 335, (¶9) (Miss. 2003). By statute, the Commission sits as the finder of fact. *Id.* at (¶11). Therefore, it is the decision of the Commission, not that of the administrative law judge, which is entitled to deference on appeal. *Smith v. Jackson Constr. Co.*, 607 So.2d 1119, 1123-24 (Miss. 1992). The circuit court performs an appellate function and must employ the same deferential standard of review used by this Court. *Id.*
>
> ¶16. Under our standard of review, we may not reverse the Commission's decision unless its findings were unsupported by substantial evidence and were arbitrary and capricious. *Ga. Pac. Corp. v. Taplin*, 586 So.2d 823, 826 (Miss. 1991). We review the Commission's application of the law de novo. *ABC Mfg. Corp. v. Doyle*, 749 So.2d 43, 45 (¶10)(Miss. 1999). The legal effect of the evidence and the conclusions which the Commission has drawn thereform present questions of law. *Cent. Elec. Power Ass'n v. Hicks*, 236 378, 388-89, 110 So.2d 351, 356 (1959).
>
> ¶17. A reviewing court commits error if it simply re-weighs the evidence and substitutes its judgment for that of the Commission. *Raytheon*, 861 So.2d 335(¶11) (quoting *Natchez Equip. Co. v. Gibbs*, 623 So.2d 270, 274 (Miss. 1993)). "[I]t is not the role of the [reviewing] court to determine where the preponderance of evidence

> lies, when the evidence is conflicting, given that it is presumed that the Commission as trier of fact has previously determined which evidence is credible and which evidence is not." *Hale v. Ruleville Health Care Ctr.*, 687 So. 1221, 1224-25 (Miss. 1997). A Commission decision that is supported by substantial evidence may not be overturned even if, were this Court acting as the fact-finder, we would have reached the opposite conclusion. *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994).
>
> *Id.* 358, 359.

Smith failed to prove that he was permanently and totally disabled by the substantial evidence submitted in this cause.

Smith's treating physician, Dr. David Chang, released claimant as having reached maximum medical improvement on October 28, 2004 and did not assign any permanent physical restrictions or limitations to the claimant's physical activities. At the request of JTB and Bridgefield, Smith was later seen by Dr. Rahul Vohra of Jackson, Mississippi. Dr. Vohra was of the opinion that Smith had reached maximum medical improvement and was also of the opinion that Smith was not restricted or limited as to physical activity and he was released to full duty work. There was no medical opinion expressed that Smith was limited to light duty work only on a permanent basis. Smith testified that he was advised there was no light duty work available at JTB while he was still under the care of Dr. David Chang (T.13.) He further admitted after his release by

Dr. Chang on October 28, 2004, he made no effort whatsoever to return to JTB regarding his future employment (T.14) The administrative judge apparently relied upon the answers to interrogatories propounded much earlier to JTB indicating that it could not accommodate any light duty work (R.31.) However, it is clear from the testimony of Dr. Vohra and the medical records of Dr. David Chang that no such restrictions were placed on Smith, permanently restricting him to light duty. To the contrary, he was released to ***full duty*** without restrictions. The administrative judge also apparently relied upon the inability of JTB to provide suitable employment for Smith after being released. However, that emphasis is misplaced due to the fact that Smith's own testimony clearly reflects that he made no effort to return to JTB following his release by his treating physician, Dr. David Chang, after reaching maximum medical improvement (T.14.) The administrative judge referenced the holdings in *Jordon v. Hercules, Inc.*, 600 So.2d 179, 183, (Miss. 1992) and *Thompson v. Wells-Lamont Corp.*, 362 So.2d, 638, 640 (Miss. 1978). JTB and Bridgefield believe emphasis on those two cited cases was misplaced and the proper review of this case should be found under *McCray v. Key Constructors, Inc.*, 803 So.2d 1199 (Miss. App. 2000). In that case,

the claimant asserted that he had met his burden of proof establishing a prima facie case of permanent total disability. Our Court of Appeals discussed the holdings in both *Jordon* and *Thompson, supra*. In distinguishing those cases, the Court stated:

> [2] ¶11. In the final analysis, we find it largely immaterial in this case as to whether McCray established a prima facie case of total disability or not, since, even if he did, case law is clear that the prima facie case may be overcome by affirmative evidence that ***other jobs existed in the relevant job market for which the claimant was at least facially qualified and that the claimant made no legitimate effort to pursue any such employment***.
>
> . . .

Id. at 1202, emphasis added.

Clearly, Smith did not meet his burden of proof and certainly did not establish a prima facie case of total permanent disability. It should be noted that Smith made no job search effort until August 14, 2006. JTB and Bridgefield conversely provided evidence from a recognized vocational expert that there were numerous jobs available to Smith in his area of residence. It should also be noted that Smith did not fully cooperate with the vocational expert who attempted to find him jobs in the relevant job market. Additionally, Smith admittedly did not seek to return to JTB after his final release from medical care by Dr. David Chang on October 28, 2004 (T.14.)

In addressing the permanent total disability the *McCray* Court said:

> [6-8] ¶17. In order to be deemed permanently totally disabled under Section 71-3-17(a), a claimant must show something more than an inability to return to the job existing at the time of injury. By definition, "disability" consists of "incapacity because of injury to earn the wages which the employee was receiving at the time of injury *in the same or other employment....*" Miss. Code Ann. § 71-3-3(i)(Rev. 1995)(emphasis supplied). The injured claimant, in order to demonstrate total disability must show that he has made a diligent effort, but without success, to obtain other gainful employment. ***A finding that the claimant has not pursued alternate forms of work with sufficient diligence is grounds to deny a claim of total disability.*** *Walker Mfg. Co. v. Cantrell*, 577 So.2d at 1249. In this case, the administrative judge, in findings later adopted by the Full Commission, termed McCray's effort to find other suitable employment "half-hearted." Based upon our review of the record, we find substantial evidence to support that conclusion.
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> *Id.* at 1203, emphasis supplied.

It is urged upon this Court that Smith's attempts to find suitable employment were at best "half-hearted" and not in accordance with the holdings in *McCray*. Smith did not commence a job search until at least October 14, 2006, almost two years after his release by Dr. Chang. He did not even attempt to return to work to his former employer, but instead sought benefits from the Social Security Administration for disability. He introduced into evidence, over the objection of JTB and Bridgefield, a notice of a

favorable decision from the Social Security Administration finding him totally disabled from and after July 21, 2003 for Social Security purposes only. Smith failed to provide the entire order which recited the medical and factual evidence considered in awarding those benefits (Exhibit 5 to Transcript).

In *Lifestyle Furnishings v. Tollison*, 985 So.2d 352 (Miss. App. 2008) our Court of Appeals addresses the issue of job searches:

> ¶24. The Commission correctly found that Tollison had not established a prima facie case under *Jordan*. Tollison reported back to work at Lifestyle, but she was unable to perform her former job. Lifestyle did not provide Tollison with work within her restrictions. The circuit court concluded from these facts that Tollison had established a prima facie case under *Jordan*. However, to establish a prima facie case under *Jordan*, the claimant must report back to work after reaching MMI. *Mueller Copper Tube Co. v. Upton*, 930 So.2d 428, 435 (¶27)(Miss. Ct. App. 2005). Tollison reported back to work in February 2003 before she reached MMI on March 10, 2003. Therefore, even assuming the evidence otherwise supported the application of the *Jordan* presumption, Tollison did not establish a prima facie case of total disability under Jordan.
>
> ¶25. We now turn to the Commission's assessment of Tollison's job search. The Commission must evaluate the extent of any disability by considering the evidence as a whole, *McGowan v. Orleans Furniture, Inc.*, 586 So.2d 163, 167 (Miss. 1991). A claimant is totally disabled if she is disqualified for regular employment in the labor market. *Roling v. Hatten & Davis Lumber Co.*, 226 Miss. 732, 741, 85 So.2d 486, 489 (1956). Factors which should be considered in determining loss of wage-earning capacity "include the amount of education and training

which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances." *McGown*, 586 So.2d at 167. In assessing the reasonableness of a claimant's job search, relevant factors for consideration are: "the economic and industrial aspects of the local community, the jobs available in the community and surrounding area, the claimant's general educational background, including work skills, and the particular nature of the disability for which compensation is sought." *Thompson*, 362 So.2d at 641.

¶26. The Commission found from the evidence that Tollison could not resume work in her pre-injury employment, but she had made insufficient efforts to obtain "other employment," that is, "employment in another or different trade for which she might be suited." *Sardis Luggage co. v. Wilson*, 374 So.2d 826, 828 (Miss. 1979). The Commission found that Tollison's search for other employment was not reasonable because: (1) Tollison delayed her job search for seven months after reaching MMI; (2) her job search was a "quick, unsustained effort in the months leading up to the hearing." (3) several employers disputed that Tollison applied for work; (4) Tollison made no effort to determine whether the jobs she located were within her work restrictions; (5) Brawner testified that Tollison remained employable in a number of jobs in the geographic area given her relatively young age, her work restrictions, her education level, and her work history in jobs other than assembly line work; and (6) Brawner's opinion that, with the proper effort, Tollison is capable of securing gainful employment.

Id. at 360, 361.

JTB and Bridgefield attempted to have Smith evaluated by David Stewart, a vocational expert which was met with resistance by Smith. Claimant's attorney would not allow a personal interview by

the vocational expert with Smith. David Stewart found available work for Smith within the area of his residence which Smith did not pursue. This claimant, Smith, simply failed to prove prima facie evidence of a total permanent disability and the administrative judge erred in finding him permanently and totally disabled.

JTB and Bridgefield would further cite *Ford v. Emhart, Inc.*, 755 So.2d 1263 (Miss. App. 2000). In that case the claimant sought to be determined permanently and totally disabled as a result of her work injuries. The Court of Appeals stated:

> [6] ¶11. According to the Mississippi Code, disability means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." Miss. Code Ann. §71-3-3(i) (Rev. 1995). In determining whether a claimant has made reasonable efforts to find gainful employment, the facts of each case must be examined individually, because "we cannot ... delineate any hard and fast rule as to how many or exactly what type efforts a claimant must make in every case in order to establish 'disability' within the purview of §71-3-3(i)." *Thompson v. Wells-Lamont Corp.*, 362 So.2d 638, 641 (Miss. 1978). In *Compere's Nursing Home v. Biddy*, 243 So.2d 412, 414 (Miss. 1971), and again in *Sardis Luggage Company v. Wilson*, 374 So.2d 826, 828 (Miss. 1979), the Mississippi Supreme Court adopted the general rule for disability as stated in V. Dunn, MISSISISPPI WORKERS' COMPENSATION § 72 (2d ed.1967):
>
> > 'Disability' means incapacity because of injury to earn wages which the employee was

> receiving at the time of the injury in the same or other employment. If the injury prevents the employee from resuming his former trade, work or employment, this alone is not the test of disability to earn wages or the test of the degree of such disability, but the definition relates to loss of capacity in 'the same or other employment', and the meaning is that the employee, after his period of temporary total incapacity, must seek employment in another or different trade to earn his wages. Thus, when an employee is prevented from resuming his trade because of a developed allergy to the materials with which he is required to work, he must seek other employment and may not recover as for a permanent disability solely because of total incapacity to engage in the same or similar work.

[7] ¶12. In determining whether one made a reasonable effort to obtain employment in the same or other occupation, several factors may be relevant, including: the economic and industrial aspects of the local community, the jobs available in the community and surrounding area, the claimant's general educational background, including work skills, and the particular nature of the disability for which compensation is sought. *Robinson v. Packard Elec. Div., General Motors Corp.*, 523 So.2d 329, 331, (Miss. 1988).

[8-10] ¶13. If a claimant makes a prima facie showing of reasonable efforts indicating there are not suitable jobs, the burden then shifts to the employer or insurer to show otherwise. *Thompson v Wells-Lamont Corp.*, 362 So.2d at 640. The claimant has the burden of proof to make out a prima facie case for disability, after which the burden of proof shifts to the employer to rebut or refute the claimant's evidence. After the burden shifts, evidence indicating that suitable employment was available to claimant becomes relevant and admissible; therefore, the employer may present evidence showing that the claimant's efforts to obtain other employment were a

> mere sham, or less than reasonable, or without proper diligence. *Id.* Whether the claimant has made a prima facie case is a question of fact. This reminds us of our standard of review which requires us to defer to the finding of the Commission if there is substantial evidence to support the decision.

Id. at 1267, 1268.

The Full Commission is the ultimate finder of fact based upon substantial credible evidence. Neither the treating physician, Dr. David Chang, nor the evaluating physician, Dr. Rahul Vohra, found Smith to be permanently and totally disabled and to the contrary, released Smith to return to work without restrictions or limitations. **"...[t]o establish a prima facie case under *Jordan*, the claimant must report back to work after reaching MMI," *Lifestyle* at 360.** Claimant failed to do so. Additionally, the administrative judge overlooked the testimony of JTB and Bridgefield's vocational expert, David Stewart, who found that there was relevant work available for Smith at wages similar to that which he earned at the time of his injury in 2003.

CONCLUSION

JTB and Bridgefield do not dispute the Full Commission Order of July 15, 2008 wherein the Commission reversed the award of permanent total disability and found instead a 30% permanent partial disability to Smith. JTB and Bridgefield dispute the

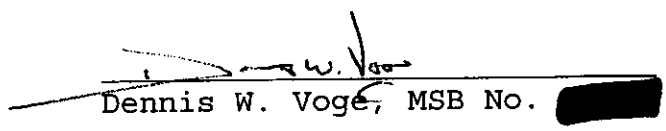
calculations set forth in that Order and on the basis of the financial calculations in that Order, filed its Motion to Clarify, Modify, Correct, or Amend the Full Commission Order in order to preserve its rights on appeal for a correct calculation of the financial recovery due to Smith. On the prior day Smith filed his first Notice of Appeal to this court. In order to preserve its rights on appeal, JTB and Bridgefield filed their Notice of Cross-Appeal stating the reversal by the Full Commission reducing disability benefits from 100% to 30% was not disputed, but the calculations of the Full Commission Order of July 15, 2008 were disputed. JTB and Bridgefield do not dispute the Amended Order entered by the Full Commission on August 15, 2008 and believe it is a proper calculation of the benefits intended to be awarded to Smith by its initial order of July 15, 2008.

In his brief before this court Smith has mis-stated the medical findings which released him to full duty work without restrictions by both Dr. David Chang and Dr. Rahul Vohra. Smith has also cited purported testimony from Dr. James Barnett, Jr., but failed to depose or obtain testimony of that physician regarding his care and treatment of Smith and therefore, that testimony is not before this court in any fashion other than some medical

records which were admitted as an exhibit. Dr. Barnett's records do not establish a causal relationship between the condition for which he treated Smith and Smith's work injury.

JTB and Bridgefield respectfully request that this Court affirm the Amended Order of the Full Commission of the Mississippi Workers' Compensation Commission dated August 15, 2008 and as affirmed by the Circuit Court of Lowndes County, Mississippi on February 20, 2009, as being the correct evaluation of the benefits due Smith.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Dennis W. Voge, counsel for Appellees, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellees* to counsel of record addressed to them as follows:

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This, the 17th day of June, 2009.

Dennis W. Voge