

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS**

ALONZO SMITH

APPELLANT

V.

NO. 2009-WC-00381

**JOHNSTON TOMBIGBEE FURNITURE MFG. CO.
AND
BRIDGEFIELD CASUALTY INSURANCE COMPANY**

APPELLEES

REPLY BRIEF OF APPELLANT

**APPEALED FROM THE CIRCUIT
COURT OF LOWNDES COUNTY,
MISSISSIPPI**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Alonzo Smith, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. Alonzo Smith, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Mark L. Pearson, Esq., Counsel for Appellant;
4. Johnston Tombigbee Furniture Mfg. Co., Appellee;
5. Dennis W. Vogue, Counsel for Appellee.

THIS the 30th day of June, 2009.



JOHN HUNTER STEVENS

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STATEMENT OF THE ISSUES

1. Whether the Commission erred in reversing the findings of the Administrative Judge.
2. Whether the Circuit Court erred in not reinstating the findings of the Administrative Judge.

INTRODUCTION

The Appellee's brief does nothing but substantiate the callous disregard for the facts developed in the instance case. The argument of the Appellee in somehow substantiating the actions of the Commission in reversing the Administrative Law Judge and the Circuit Court and affirming the Commission when error was clear on the part of not only the Commission, but also the Circuit Court.

Obviously, the Employer and Carrier, in the discussion brief recognize the Full Commission and its attempt to penalize the Claimant by reducing the award by 70% also made clear errors in calculations which the Employer and Carrier argued required reversal. Sadly, the Employer and Carrier argued that this Court should ignore all evidence except that submitted by its paid retained litigation experts. Furthermore, the Employer and Carrier would urge the Commission that the facts falsely show the Claimant was released without restrictions and made no legitimate effort to return to work. Despite this, and despite the fact that a mathematical error made by the Commission, the Commission further penalized the Claimant by reducing the award from 100% to 30%, with no legitimate explanation or basis for the percentage reduction. In addition, the Appellees argue there is apparently no error in the Circuit Court's affirmance of that Order, when a clear review of the excerpts of the Circuit Court's Order of February 20, 2009, refers to the affirmance of the Commission as the "Board of Review of the Mississippi Department of Employment Security" (Tab 8 of Record Excerpts), which obviously this case came from the Mississippi Workers' Compensation Commission is further indication that the Circuit Court ruled in error, or should have reversed the findings of the Mississippi Workers' Compensation Commission as unfounded, and reinstated the findings of the Administrative Law Judge.

DISCUSSION

To affirm the findings of the Mississippi Workers' Compensation Commission and Circuit Court in this action would be tantamount to a finding that the Mississippi Workers' Compensation Act is to be construed liberally in favor of the Employer and Carrier, that primary medical treating evidence from a Claimant's treating physicians are to be ignored when an Employer and Carrier retains an employer's medical expert (for a one time visit) who finds that the Claimant may have restrictions, but he does not know what those are without a functional capacity evaluation. Furthermore, that presumption in favor of Employer and Carrier would further find that despite a Claimant attempting to return to his employment of 40 years, and having been turned away admitting that there is no light duty available, and then the Claimant undergoing over 135 job search efforts (none of which are found to be not reasonable). A litigation expert physician retained by the Employer and Carrier acknowledges that Claimant is in need of significant pain medication, had major back surgery, yet the employee is not entitled to disability. (Gen. Ex. 1, Vohra Depo., P.17)

Amazingly, the Employer and Carrier's contorted version of the facts reveal nothing but the severe injustice to this Claimant. The Commission, by reversing the Administrative Law Judge blatantly ignored the substantial evidence, the intent and meaning of the Act, and obviously, the liberal interpretation of the Act. In this case, the Claimant's primary treating physician, even though one of its physicians did not come through a chain of any referral, there is no evidence whatsoever that Dr. James Barnett's opinions were anything less than credible. In this case, there is substantial, overwhelming evidence to support that the Claimant is permanently and totally disabled. There is substantial, overwhelming, credible evidence that support the findings of the Administrative Law Judge. The only evidence utilized by the Commission was the testimony of Dr. Vohra, and that of

the speculative testimony of the vocational consultant retained by the Employer and Carrier solely for purposes of giving testimony at the hearing. A review of his testimony shows the amazing speculative nature and requires reversal. The vocational consultant and Employer and Carrier provided not one basis for a legitimate job proposal to the Claimant. In fact, the vocational rehab specialist admitted as much that he could find only two potential jobs that the Claimant may be able to do. This was in a report produced less than two weeks before the hearing, (and after the discovery period had long since passed) after the Claimant had been released for light duty by his surgeon almost three years before.

The Appellant respectfully submits that this Court upon its review of the evidence will unequivocally find that the decision of the Commission and the Circuit Court to be clearly erroneous. Looking at the entire evidence, there can be no mistake that this Court will be left with a definite and firm conviction that a mistake has been made and should be rectified in accordance with the law. The Commission in this case clearly and unequivocally refused to adhere to the well established precedent that doubtful cases should be resolved in favor of the claimant with the beneficent purposes of the Act being accomplished. The Commission should not punish a forty year loyal employee with a legitimate injury which required major back surgery leaving him with chronic pain for the remainder of his lifetime.

This Court previously evaluated the opinions of Dr. Vohra when he evaluated the claimant for purposes of an employer's medical examination and solely for purposes to be utilized as evidence in a hearing. This Court previously found that Dr. Vohra's opinions in such a case correctly should be ignored. *Department of Health/Ellisville State School v. Stinson*, 988 So. 2d 933, 937 (Miss. Ct. App. 2008) (finding that Dr. Vohra's "suspected" opinions and examination of the claimant in order

to prepare an opinion for the Commission was properly ignored). This Court in *Stinson* correctly found that:

“treating physician’s opinion is entitled to more weight than a physician who examines the individual solely for the purpose of testifying.” *Id.*

citing *Clements v. Welling Truck Serv., Inc.*, 739 So.2d 476, 478 n. 1 (Miss. Ct. App. 1999).

What is additionally most disturbing by the Commission’s findings relate to its acceptance of the vocational consultant expert retained by the Employer/Carrier solely for purposes of testifying against the Claimant. A review of not only the Commission’s findings but also the Brief of the Appellee indicate that the findings of the Commission are unprecedented. There is no case authority nor statute in the Act which would require a claimant to actively cooperate with a litigation expert retained by the Employer/Carrier after discovery whose opinions were solely to testify (against him) before the Commission without producing any single, legitimate job search effort. To do so would, in effect, change the intent and meaning of the Workers’ Compensation Act and, in fact, even the justice system as a whole. Based on these facts, the Commission’s findings must be reversed.

CONCLUSION

The Employer and Carrier in this case would urge this Court to basically ignore all evidence from the primary treating physicians. They would have you ignore the loyalty of an employee who gives his employer over 40 years of work, only to be chastised with claims that he is now not credible based on the opinions of a one-time visit from a litigation physician (non-surgeon) 100 miles away from his home. With the distorted version of the facts by the Employer and Carrier aside, it is logical that the findings of the Commission should be based on legitimate medical evidence. Claimant’s testimony was not refuted, his 135 job search efforts were not refuted. The

fact that the Commission would rely on an expert witness who provided a report two weeks before the hearing saying that he believes that the Claimant is possibly employable and utilizes that evidence to reduce the award by 70% is shocking against the overwhelming evidence and requires reversal.

RESPECTFULLY submitted, this the 30 day of Jun, 2009.

ALONZO SMITH, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

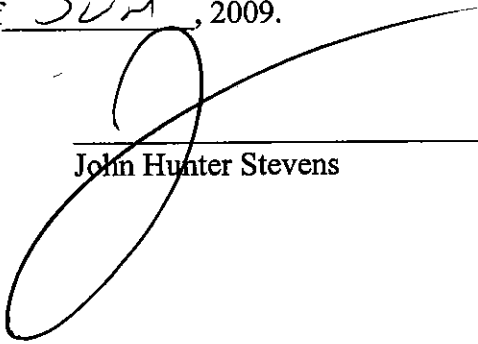
I, John Hunter Stevens, do hereby certify that I have this day mailed by United States Mail, postage prepaid, the above and foregoing to:

Hon. Lee J. Howard
Lowndes County Circuit Court Judge
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DATED, this the 30 day of Sept, 2009.



John Hunter Stevens