IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

WILLIAM M. SCOTT	**APPELLANT/CROSS-APPELLEE**
V.	**NO. 2009-WC-00415**
KLLM, INC., A SELF-INSURED	**APPELLEES/CROSS APPELLANTS**

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 Court may evaluate possible disqualification or recusal.

1. William M. Scott, 344 Bell Rd, Apartment F96, Nashville, Tennessee 37217 – 3829, Claimant;

2. John Hunter Stevens, Esq., P.O. Box 16570, Jackson, Mississippi 39236 – 6570, Attorney of Record for the Claimant;

3. KLLM, Inc., P.O. Box 6098, Jackson, Mississippi 39288 – 6098, Employer;

4. The law firm of Markow Walker, P.A., P.O. Box 13669, Jackson, Mississippi 39236 – 3633, Attorneys of Record for the Employer.

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Statement of the Case

On December 15, 2006, a Hearing on the Merits was held in Jackson, Mississippi, before Administrative Law Judge Deneise Turner Lott. Judge Lott, in an Order dated April 2, 2007, awarded Scott permanent total disability benefits at a rate of $322.90 per week for 450 weeks. Aggrieved by the decision of the Administrative Law Judge, KLLM appealed to the Full Commission.

The Full Commission heard the case on August 13, 2007 and found Scott was not entitled to permanent total disability benefits, reversing the Order of the Administrative Law Judge. The Full Commission ordered KLLM to pay temporary total disability benefits from May 5, 2002 through July 26, 2005, and permanent partial disability for a period not to exceed 450 weeks, commencing on July 27, 2005. Additionally, the Commission assigned a 20% loss of wage earning capacity on a permanent basis.

From this Order, KLLM appealed to the Circuit Court of Hinds County, Mississippi, requesting the ruling of the Full Commission be overturned. An Order was entered by the Circuit Court on September 15, 2008, upholding the Order of the Full Commission and finding it to be supported by substantial evidence. KLLM now appeals this decision to the Court of Appeals of Mississippi. As shown by the following, the decision of the Full Commission is not supported by the overwhelming weight of credible evidence and thus should be overturned.

Statement of the Facts

The appellant/cross-appellee in this matter, William M. Scott, was employed with KLLM, Inc., the appellant/cross-appellee and the employer herein, as a tractor-trailer operator/driver at the time of the alleged incident at issue. Scott was employed with KLLM for approximately five months, from January 2002 to May 2002, during which time he claims he suffered a back injury that left him permanently and totally disabled.

According to Scott, he injured his lower back when he fell out of the back of his trailer on March 19, 2002, while loading at the Pillsbury plant in New Jersey. There were no witnesses to this alleged accident. Scott continued to work full time for 45 days after this incident. Scott did not consider his injuries serious enough to require treatment from a physician until almost two months after the alleged incident, when he presented at the emergency room at St. Dominic/Jackson Memorial Hospital on May 5, 2002. His chief complaint at that time was leg pain, complaining that he thought he had broken his leg. (Gen. Ex. 1).

While at St. Dominic, a CT study was completed and revealed no lumbar disc herniation, a disc bulge at L5-S1, and mild canal narrowing at L4-5. Then on May 9, 2002, Scott sought treatment from Dr. James R. Head, his personal physician, in Nashville, Tennessee. Dr. Head referred Scott to Dr. Garrett Powell, a neurosurgeon.

Dr. Head testified he first saw Scott regarding the alleged injury to his back on May 9, 2002, at which time he referred Scott to Dr. Powell. Dr. Head thereafter saw Scott regarding his back on June 18, 2002; July 10, 2002; September 9, 2002; and January 22, 2003. By a certificate completed on a Mississippi Employment Security Commission form dated January 29, 2003, Dr. Head certified that Scott was physically able "to return to his usual work" as of January 5, 2003.

(Gen. Ex. 5, p. 15-16).

Dr. Head testified that he next saw Scott on May 12, 2003, at which time he presented with new symptoms caused by an incident the day before when "[h]e had picked up a toolbox . . . and felt something pop in his back. And he was having pain similar to what he had the year before, lower back and going down his left leg." (Gen. Ex. 5, p. 13). The back pain Scott complained of at this visit was caused by an intervening non-work related injury, and there is no indication that Dr. Head found this new injury to have aggravated his prior back condition.

Scott was initially seen by Dr. Powell on May 29, 2002. Dr. Powell testified by way of deposition that an earlier MRI scan performed on Scott's lower back on May 17, 2002, revealed only degenerative, as opposed to traumatic, conditions. Referring to these conditions, Dr. Powell testified that "the types of changes they show are what we commonly see as acquired degenerative changes for aging." (Gen. Ex. 4, p. 4). At that time, Dr. Powell did not make any recommendations regarding Scott's ability to return to work. Dr. Powell testified that Scott returned for a second visit on July 29, 2002, at which time he indicated he did not want to be treated by epidural injection. (Gen Ex. 4, p. 6). Scott was then a "no show" for an appointment with Dr. Powell on September 10, 2002. (Gen. Ex. 4, p. 9). As a result, Scott did not return to see Dr. Powell until June 4, 2003, almost one year later. On June 4, 2003, Dr. Powell noted improvement in Scott's condition and ordered him to return as-needed. (Gen. Ex. 2).

Scott returned to see Dr. Powell "as-needed" for the fourth and final time on July 26, 2005, over two years after his previous visit and more than three years after the date of the alleged accident. As of July 26, 2005, Scott still refused to undergo recommended epidural steroid injections, a modality which Dr. Powell testified is 85% successful. (Gen Ex. 4, pp. 8,

13). At this visit, Dr. Powell again instructed Scott to return on an as-needed basis. At no time during Scott's course of treatment with Dr. Powell did Dr. Powell ever restrict his ability to work. (Gen. Ex. 4, p. 16). In response to a request from Scott's attorney, Dr. Powell, on July 26, 2005, assigned an impairment rating of 11%, after only treating Scott four times over a span of more than three years. (Gen Ex. 4, p. 8).

Dr. Powell testified by way of deposition that if Scott had previously experienced periods where his pain had resolved completely, he would find it difficult to relate the pain described by Scott following the toolbox incident to the original alleged accident of 2002. (Gen Ex. 4, p. 26). Based on the fact that Dr. Head released Scott to work with no restrictions on January 22, 2003, Scott made no complaints of back pain at a visit on April 21, 2003, and Scott's next complaints of back pain were made May 12, 2003 following the toolbox incident lead Dr. Powell to opine this would be a "significant intervening event." (Gen. Ex. 4, pp. 18-19).

Dr. Head testified Scott requested a note releasing him to return to work following his "toolbox" incident. (Gen. Ex., p. 5). When Scott returned to Dr. Head on June 17, 2003, August 21, 2003, and May 26, 2004 for unrelated conditions, there is no indication that Scott received treatment for his back or complained of any back pain at any of these visits, all of which occurred during the time span for which the Commission has awarded Scott compensation. In fact, Dr. Head confirmed during his deposition testimony the last time Scott made any complaint regarding his back was on May 12, 2003, following the "toolbox" incident. (Gen. Ex. 5, p. 20). Incidently, Scott's back pain was no longer severe enough to warrant mentioning this incident to Dr. Powell less than a month later at his June 4, 2003 visit. (Gen. Ex. 4, p. 11).

Dr. Robert Weiss, who is located in Nashville, Tennessee, performed an Independent

Medical Examination of Scott on May 17, 2006. (Gen. Ex. 13, p. 3). Pursuant to that evaluation, Dr. Weiss indicated Scott did not have a "treatable" condition, and he was not disabled due to his "minor injury" which occurred over five years ago. (Gen. Ex. 13, pp. 12, 17). By deposition, Dr. Weiss testified that Scott's prior MRI study from May 2002, did not reveal any objective findings which would correlate with his continued complaints of pain. Additionally, he opined this MRI was more or less normal for a male over the age of 50. (Gen. Ex. 13, p. 7). He also performed a physical examination on Scott on May 17, 2006 and reported no neurological findings. (Gen. Ex. 13, p. 11).

In Dr. Weiss' opinion, all of Scott's complaints at the time of his evaluation were subjective, without any objective basis to support them. (Gen. Ex. 13, p. 9). He indicated Scott probably did not need any additional medical treatment for his alleged symptoms. (Gen. Ex. 13, p. 17). Dr. Weiss further indicated Scott may have been unable to work for up to four to six weeks after the subject incident occurred, although no longer than that, and he did not believe Scott would be entitled to any anatomical impairment rating (based on the AMA Guidelines) or any work restrictions. (Gen. Ex. 13, p. 11).

For reasons unrelated to his alleged impairment, Scott was terminated by KLLM in August 2002, when he violated a company policy by failing to account for his absence after not showing up to work for three consecutive days. (R. 137). Scott admitted in his testimony he never contacted KLLM to inquire about his employment or their willingness and ability to accommodate any work restrictions he may have received. (Tr. 19). Jackie Cooper, a representative for KLLM, testified at the hearing that KLLM has "light duty" position available for those employees who received work restrictions from a physician. (Tr. 55-56). The

circumstances of Scott's unemployment were discussed by the Commission, who found "he could have returned to work at KLLM by all accounts in other suitable jobs, and his job search was less than enthusiastic, and was wasted in significant part on his pursuit of the same type of employment as he had before his injury." (R. 139). The Commission further found Scott's claims of being completely and totally unable to work due to his back injury were not credible. (R. 137).

The Commission reversed the Order of the Administrative Judge and required KLLM to pay Scott temporary total disability benefits from May 5, 2002, through July 26, 2005, and permanent partial disability benefits for a period not to exceed 450 weeks. The Commission further found the Scott's injury caused an 20% loss of wage earning capacity on a permanent basis.

SUMMARY OF THE ARGUMENT

The Full Commission's award of 20% permanent and total loss of wage earning capacity is not based on substantial evidence. Scott's effort to obtain employment was not diligent and was not reasonable. Scott has been released to work by all physicians who have evaluated him. His inability to work is simply based upon *his subjective* belief that he is unable to work, and not based on the overwhelming weight of credible medical evidence. Although Scott has continued to allege complaints of pain, there are no objective medical records to substantiate these complaints. The Commission found Scott's allegations that he was totally unable to work due to his back injury were not credible. KLLM likewise should not be penalized for Scott's failure to earn wages due to his self-imposed work restrictions.

Furthermore, KLLM should not be penalized for Scott's unreasonable refusal to undergo simple, conservative medical treatment. This unreasonable refusal could have potentially reduced or even eliminated the need for temporary total disability benefits. Scott's rejection of procedures which are 85% effective, is clearly unreasonable in light of his claims of "debilitating" pain. A commentator summarized this by stating, "a special situation arises when an employee refuses recommended surgery, which, if performed, would likely reduce or eliminate disability...the disability, pending corrective surgery, is to be classed as temporary in quality." *See* Dunn, *Mississippi Workmen's Compensation,* 3rd ed., § 75 (1982) (emphasis added) (citing ***Triangle Distributors v. Russell***, 268 So.2d 911 (Miss. 1972)). Dr. Weiss, the most recent physician to examine Scott, opined there is nothing wrong with him, there should be no work restrictions, and he would not assign an impairment rating based on Scott's "trivial" alleged work-related accident, which occurred over five years ago.

The Commission erred by requiring KLLM to pay compensation to Scott during a time when he was not complaining of back pain and was not seeking treatment for his alleged back injury. The Commission in finding Scott suffered a loss of wage earning capacity due to the fact that Scott is out of work as a result of his noncompliance with company policy by failing to call or show for work more than three consecutive days. Scott continues to be unemployed as a result of his own subjective complaints of pain and "unenthusiastic" job search.

ARGUMENT

I. Standard of Review

KLLM respectfully asks this Court to overturn the ruling of the Mississippi Workers' Compensation Commission. In ***J.R. Logging v. Halford***, the Court of Appeals described its role of review in the appeals process by stating "[w]e hold that judicial review of findings of the Commission extends to a determination of whether they are clearly erroneous. And a finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act." 765 So.2d 580, 583 ¶13 (Miss. Ct. App. 2000) (quoting ***Evans v. Continental Grain Co.***, 372 So.2d 265, 269 (Miss.1979)). This standard of review was recently applied by the Court of Appeals when the court was faced with an appeal regarding the causal relationship of the claimant's injury in ***Wade Short v. Wilson Meat House, LLC***, 2009 Miss. App. LEXIS 333, ¶ 20 (Miss. Ct. App. 2009). The Court in *Short* noted they "carefully read the entire record," not solely evidence submitted by the claimant, to make their decision. As such, it is the Court should review all evidence provided when determining whether the Commission's decision was clearly erroneous.

The Workers' Compensation Commission is the finder of fact in a compensation case. However, the Commission's finding can be overturned when the appellate court finds there has been an error of law or an unsupported finding of fact. ***Georgia Pac. Corp. v. Taplin***, 586 So.2d 823, 836 (Miss. 1991). In fact, the Court of Appeals has held "[w]here no evidence or only a scintilla of evidence supports a Worker's Compensation Commission decision, this Court does not hesitate to reverse." ***Guy v. B.C. Rogers Processors, Inc.***, No. 2007-WC-01784-COA, ¶ 7

(Miss. Ct. App. 2008) (quoting ***Foamex Prods., Inc. v. Simons***, 822 So. 2d 1050, 1053 (¶11) (Miss. Ct. App. 2002)).

II. The Commission erred in awarding a 20% permanent and total loss of wage earning capacity.

A. Scott's alleged unemployability is not supported by the evidence.

"To determine whether the claimant has suffered a loss of wage-earning capacity, the Commission evaluates the claimant's training, education, ability to work, failure to be hired elsewhere, pain, and other medical circumstances." ***DeLaughter v. South Cent. Tractor Parts***, 642 So.2d 375, 379 (Miss.1994)); ***Walker Mfg. Co. v. Cantrell***, 577 So.2d 1243 (Miss. 1991). The Supreme Court has held an employee cannot base his claim for permanent disability on a termination which is wholly unrelated to his impairment. ***Sibley v. Unifirst Bank for Savings***, 699 So.2d 1214 (Miss. 1997). The Court stated "[i]f the record shows no more than that the employee, having resumed regular employment after his injury, was fired for misconduct, with the impairment playing no part in the discharge, it will not support a finding of compensable disability." *Id.* at 1220 (citing Larson, *Worker's Compensation Law* (1992) § 57.64(a)).

The fact that the claimant has been terminated from his employment does not entitle him to compensation payments. "The claimant has the burden of proof to establish [his] right to compensation under the law, and the Mississippi Supreme Court has held that, even in the case where the claimant cannot return to [his] former employment, an unexcused failure to show an effort to explore other employment opportunities more suited to the claimant's post-injury condition is fatal to a claim for permanent disability." ***Wagner v. Hancock Med. Ctr.***, 825 So. 2d 703, 706 (Miss Ct. App. 2002) (citing ***Compere's Nursing Home v. Biddy***, 243 So. 2d 412, 414

(Miss. 1971)). Additionally, the Court in ***Wagner*** affirmed the Commission's position that the claimant's "post-injury unemployment arose due to her unwillingness to carry out tasks she was physically capable of performing, rather than from a permanent diminished physical ability perform in the workplace arising out of her neck injury." ***Id.***

In his brief, Scott attempts to place the burden on the employer, KLLM, to prove that his job search efforts were unreasonable citing ***Entergy v. Pickens***, 732 So.2d 276, 284 (Miss. Ct. App. 1999). However, this duty of the employer does not arise until Scott has shown he "made a diligent effort, but without success, to obtain other gainful employment." ***Wal-Mart Stores, Inc. v. Patrick***, 5 So.2d 1119 (Miss. Ct. App. 2008) (quoting ***Adolphe Lafont USA, Inc. v. Ayers***, 958 So.2d 833, 839(¶ 18) (Miss. Ct. App. 2007)).

In the instant case, Scott is 57 years old, is high school educated and has worked as a truck driver most of his life, although he has also been employed as an apartment manager and home builder. Scott was hired by KLLM on January 11, 2002, approximately two months prior to his alleged injury. He was then terminated on August 2002 pursuant to a company no call, no show policy, which forbids employees from failing to call or show for work more than three consecutive days without explanation. (R. 137).

Scott alleges KLLM made no efforts to accommodate his restrictions, however it is not the duty of the employer to contact the claimant regarding a claimant's restrictions and work status. Scott admitted he did not contact KLLM to keep them informed of his treatment, status, or any restrictions. (Tr. 19). He also did not contact KLLM to inquire about employment opportunities that would accommodate his restrictions. Any complaints by Scott regarding potential location, duty, or salary of an accommodated position are based on nothing more than

mere speculations as he did not contact KLLM and update them regarding his work status. KLLM cannot accommodate conditions of which they are not aware, and should not be punished for not having made those accommodations.

Additionally, a representative from KLLM testified they would have been able to provide accommodating work if KLLM had been made aware of the situation. While KLLM does not keep a list of "light duty" positions, they are willing to match an employee's job duties with restrictions given to him by a doctor. (Tr. 55-56). This includes modified duties for a tractor trailer driver, the position previously held by Scott. The Commission acknowledged that Scott had not returned to the "type of work he was accustomed to performing," however they also found Scott could have returned to KLLM in a suitable position. (R. 139).

Scott's subsequent job search does not constitute a diligent effort. Scott contends he is unable to work as a truck driver, however from May 9, 2005 through May 23, 2005 he allegedly contacted at least 15-20 other trucking companies seeking employment. (R. 138). If he is truly unable to perform the required duties of a truck driver, then these applications were not legitimate attempts to obtain employment. These acts alone create substantial evidence that he is employable, and raise serious concerns as to Scott's authenticity and veracity in regard to his alleged inability to work and continuance of pain. Also, it demonstrates an "an unexcused failure to show an effort to explore other employment opportunities more suited to the claimant's post-injury condition," which the Court in ***Wagner*** has determined to be fatal to a claim for permanent disability.

The Commission found "[w]hile we do not discount [Scott's] loss of access to the type of work he was accustomed to performing, he could have returned to work at KLLM by all accounts

in other suitable jobs, and his job search was less than enthusiastic, and was wasted in significant part on his pursuit of the same type of employment as he had before his injury." (R. 139). If Scott had exercised reasonable diligence and simply called to inform KLLM of his absence, it is highly likely he would still be employed by KLLM today. Scott's termination was solely due to his own misconduct. A finding of permanent and total loss of wage earning capacity based on Scott's alleged unemployability is an unsupported finding of fact.

B. The finding of an 11% impairment rating and restrictions are not based on substantial evidence.

Scott places great emphasis in his brief on the difference between "primary treating physicians" and "IME" physicians and the deference which should be afforded to "primary treating physicians." Scott alleges there is a "long recognized principal" that the "treating physician's opinions are generally afforded more credibility and weight than those of physicians who examine the claimant solely for purposes of testifying and do not establish a physician/patient relationship." (Appellant's Br. 5). However, based on current Mississippi precedent, the Administrative Law Judge is not required to give any preference to the "treating" physician. In fact, the Mississippi Court of Appeals has rejected this distinction between the two physicians. The Court of Appeals stated "[a]lthough the workers' compensation statute gives the claimant the right to select their primary physician, it never refers to that physician as a 'treating' physician, and we see no reason why a physician examining a patient in an independent medical examination requested by an employer or carrier is not 'treating' the patient." ***Manning v. Sunbeam,*** 979 So.2d 736, 741 (Miss. Ct. App. 2008). The Court of Appeals, relying on an earlier Mississippi Supreme Court case, stated the ruling in "***Hardaway*** clearly indicates that

administrative law judges are not required to defer to 'treating' or patient selected physicians when they are presented with credible countervailing evidence." *Id.* at 743. *See* ***Hardaway Co. v. Bradley,*** 887 So. 2d 793 (Miss. 2004) (emphasis added).

This holding was most recently affirmed in ***Ruth Wooten v. Franklin Corporation and Liberty Mutual Insurance Company,*** 9 So. 3d 1182 (Miss. Ct. App. 2009). In ***Wooten***, the Court of Appeals upheld ***Manning*** and ruled against the claimant, who relied on ***South Central Bell Telephone Co. v. Aden***, 474 So.2d 584 (Miss. 1985) (also cited by Scott in support of his argument) to argue the ALJ must defer to the treating physician when faced with opinions from two equally competent physicians. The Court stated "[u]pon reading ***Aden***, this Court found no rule dictating that the ALJ is required to defer to the opinion of a patient-selected or treating physician. Thus, this Court found no merit to the claimant's argument that a treating physician's opinion should be given more weight." ***Wooten***, 9 So.3d at 1185, ¶ 11 (citing ***Manning***, at 742-44).

Scott also relies on ***Stewart v. Singing River Hospital System***, 928 So.2d 176 (Miss. Ct. App. 2005). Previously, in response to a claimant arguing for deference to a "treating" physician and relying on ***Stewart,*** among other cases, the Court of Appeals stated "[a]gain, these cases do not show that the Commission must abide by a treating physician's opinion." ***Richard v. Johnson Elec. Automotive***, 962 So.2d 146, 150 (Miss. Ct. App 2007). The Court went on to state that the Supreme Court had indicated a requirement that the Commission always follow the treating physician's opinion would be contrary to Mississippi Workers' Compensation Laws, and "[i]n light of ***Aden,...Stewart,*** and ***Bradley,*** it is clear that, while a treating physician's opinion is without question of great import, the Commission is not required to abide by it or required to

give it any greater weight than other physicians' opinions." *Id.* at 152 (citing ***Hardaway***, at ¶ 19; Miss. Code Ann. § 71-3-15 (Rev. 2000)). *See also* ***Washington v. Woodland Village Nursing Home***, 2009 Miss. App. LEXIS 108 (Miss. Ct. App. 2009); ***Martinez v. Swift Transp.***, 962 So.2d 746 (Miss. Ct. App. 2007); ***Doyle v. PERS***, 808 So.2d 902, 907 (Miss. 2002) (holding that Mississippi law requires no such deference to a treating physician's opinion).

The Court of Appeals has previously upheld the Commission's finding that the claimant's complaints of disabling pain were not credible. ***Wagner v. Hancock Medical Center***, 825 So.2d 703, 706 (Miss. Ct. App. 2002). The Court of Appeals stated "[n]either does it appear open to genuine dispute that the only evidence supporting [claimant's] claim of inability to perform her duties after returning to work consists of her subjective complaints of pain when performing duties that would not appear to violate or exceed the restrictions imposed by her treating physicians." *Id.* The Commission in ***Wagner*** appropriately determined the claimant's testimony regarding her symptoms was not credible and denied permanent disability benefits.

Due to the fact the Commission's Order was issued in August 2007, the Commission ruled on this case without the clarification of some of the more recent case law, such as ***Manning*** or ***Wooten***. The Commission, in the instant case, was presented with credible countervailing evidence that the "treating" physician's assessment was incorrect. According to ***Hardaway***, the Commission was not required to defer to Dr. Powell. Instead, the Commission should have deferred to Dr. Weiss' opinion because although Dr. Weiss was an IME physician, he is a highly-respected neurosurgeon with the benefit of the following information: a patient consultation, Dr. Powell's medical records, Dr. Head's medical records, a lumbar MRI and a general neurologic examination encompassing an evaluation of Scott's overall physical characteristics, etc. (Gen.

Ex. 13 p. 5-6). Dr. Weiss' opinion was based on virtually all medical records and facts surrounding the alleged injury. Likewise, Scott's reference to Dr. Weiss' opinion as "limited and illogical" is simply incorrect.

Scott would prefer the Court to consider the 11% impairment rating and restrictions he received from Dr. Powell, his "treating physician," as opposed to Dr. Weiss's determination that Scott was capable of returning to work full duty and with no restrictions. He alleges that to change the ruling of the ALJ, the Commission would have to find some credibility in Dr. Weiss's opinion and "completely ignore" Scott's multiple treating doctors. However, Dr. Weiss's determination of full duty is supported by the January 5, 2003 work release without restrictions by Dr. Head, Scott's general physician. (Gen. Ex. 5, p. 16). Dr. Head was unable to recall ever restricting Scott from working due to his back pain and at no time assigned him permanent restrictions. Dr. Powell, as Scott's "treating physician," assigned an impairment rating and restrictions after only seeing Scott four times over the three year span since the alleged injury in this case.

After Scott was allegedly injured on March 19, 2002, he proceeded to work a full 45 days prior to seeking medical attention. Scott initially sought treatment at St. Dominic Hospital on May 5, 2002, almost two months after injuring himself in a work related accident, complaining of leg pain. He then followed up with his "regular physician," Dr. James Head, on May 9, 2002. An MRI study completed by Dr. Head on May 17, 2002 indicated no grossly herniated nucleus pulposus and degenerative change at L5-S1 with a left paracentral bulge. He continued to follow up with Dr. Head regarding his back pain until September 9, 2002. Then Dr. Head signed a certification on January 21, 2003, releasing Scott to return to work with no restrictions on

January 5, 2003. The certification makes no qualifications regarding Scott's ability to return to work, and states"[t]his individual is now able . . . to return to his usual work." (Gen. Ex. 3). This certification did not limit the release to only certain medical conditions. Instead, the release was a blanket release, taking into consideration any and all of Scott's medical conditions.

Scott returned to Dr. Head numerous times for unrelated symptoms of blood pressure, pain in his lower left arm, and a cough. However, the only time he mentioned back pain was on May 12, 2003, complaining of pain related to a pop he felt in his lower back when lifting a toolbox the day before. The pain was not severe enough for Scott to feel he was unable to work, as he requested a letter from Dr. Head releasing him to return to work.

After an initial evaluation by Dr. Powell on May 29, 2002, a series of lumbar epidural steroid injections were scheduled. However, Scott decided he did not want the treatment, which Dr. Powell stated were 85% effective. (Gen. Ex. 4, p. 8). In a letter dated February 14, 2003, Dr. Powell indicated the claimant may not be able to work due to pain, although he had not seen Scott since July 2002. Scott did not return to see Dr. Powell again June 4, 2003, until almost a year after his prior visit. When he again returned"as-needed" two years later on July 26, 2005, Dr. Powell reported conservative or surgical therapies may improve Scott's pain, allowing Scott to return to work, stating "he was optimistic that the patient would show some improvement with lumbar epidural steroid injections." However, Scott again rejected treatment in the form of injections or surgery recommended by his primary physician. At this time, Dr. Powell indicated Scott had reached MMI and assigned an anatomical impairment rating of 11% to the body as a whole and restrictions on repetitive bending and lifting, lifting more than 15 pounds, and sitting or standing without the ability to change positions at will. (R. 124).

Scott was evaluated by Dr. Weiss for an independent medical evaluation on May 17, 2006. Dr. Weiss reported, "this is a man with no impairment, according to the most recently published AMA guidelines, for what at most, may have been some arthritic disease, coupled with a musculoligamentous strain/sprain." Dr. Weiss did not feel permanent restrictions were necessary and Scott had reached maximum medical improvement. Dr. Weiss also noted there were no objective signs of neurologic disease at that time. By deposition, Dr. Weiss testified that Scott "had an injury that would normally not be incapacitating, which has incapacitated him." (Gen. Ex. 13, p. 8-9). He also reported, "I cannot make much further sense as to why he has been incapacitated for the last four years, from what appears to have been a relatively trivial injury."

The Commission should not have relied on Dr. Powell's opinion, as had not seen Scott for a span of over two years prior to addressing restrictions. In this interim two year span, Scott was seen on three occasions by Dr. Head, without ever mentioning back pain. In the most recent medical opinion, Dr. Weiss' stated, "this is a morbidly obese, middle-aged male with no findings on neurological exam repeatedly, a negative imaging study, and four years to rest and recoup after what I would consider to be a trivial injury. And in the face of all that, there is absolutely no way I could provide him with any impairment or restrictions. *It makes no sense.*" (Gen. Ex. 13 p. 11-12). Based on a review of the evidence, the Court should find Scott is capable of full duty work without restrictions and overturn the Commission's finding of a 20% loss of wage earning capacity.

Upon review of the entire record, it becomes clear the Commission's award of compensation benefits to Scott was improper and not based on substantial evidence. It is undisputed that Scott did not seek medical treatment until almost two months after his injury,

which he alleges caused him "chronic" and "debilitating" pain. For this allegedly severe pain, Scott sought medical treatment a mere eleven times over the span of five years. His "primary" physician never restricted him from working. (Gen. Ex. 5, p. 16). Upon reviewing these facts, the Commission stated "it does not seem credible to us that the Claimant is completely and totally unable to work because of his back injury...This *certainly* suggests Scott's complaints of chronic disabling pain are *suspect*." (R. 137). As such, a finding that Scott has an 11% anatomical impairment is not based on substantial evidence.

Conclusion

Scott has not suffered a permanent and total loss of wage earning capacity. KLLM should not be faulted for Scott's current status of unemployment. Scott is no longer employed with KLLM, not because of his back injury and impairment, but because he failed to show up to work or call in to account for his absence. He alleges that no work accommodations were offered to him. However, he also admits that he never contacted KLLM to inform them of his restrictions. Scott's "job search" did not constitute diligent effort to find gainful employment. He spent the majority of his time contacting potential employers regarding trucking positions, a job he alleges he is physically incapable of performing. As such, this Court should find Scott has not suffered a loss of wage earning capacity due to his back injury.

Scott's anatomical condition is not unusual for a man of his age, height, and weight; a fact that was confirmed by both Dr. Powell and Dr. Weiss. The only evidence linking Scott's symptomatology to the accident in question is his assertion that his symptoms did not appear until after the alleged accident, of which there are no eye witnesses, on March 19, 2002. Upon review of the entire record, it is apparent Scott's allegations are refuted by all of the objective evidence. He did not seek any medical treatment for his "debilitating" back pain until almost two months after the alleged accident. His treatment over the course of his alleged injury was inconsistent and sporadic. He only treated with Dr. Powell a mere four times and Dr. Head a total of seven times. He also unreasonably refused to undergo highly-effective treatment, which would have relieved his pain and allowed him to return to work. He failed to mention an intervening non-work related back injury to Dr. Powell. All of this, notwithstanding his most recent medical evaluation by Dr. Weiss, contradicts all of Scott's assertions.

The Court of Appeals must review the findings of the Commission, overturning their

decision when there has been an error of law or an unsupported finding of fact. The Commission's finding was not supported by substantial evidence, instead it is only supported, at most, by slight evidence, which is countered by credible evidence, rendering the finding clearly erroneous. The Commission issued an award of permanent and total loss of wage earning capacity, focusing its ruling on the medical testimony of a physician who had not seen Scott in over two years. The Court as well has been presented with substantial evidence that Scott's current unemployment is in no way related to his injury on March 19, 2002, instead it is due to an unrelated termination and his own failure to perform a diligent and reasonable job search. Furthermore, no objective evidence is offered by Scott to support any loss of wage earning capacity whatsoever. Therefore, KLLM respectfully requests this Court overturn the Order of the Commission, as the Order of the Commission is not supported by the overwhelming weight of credible evidence.

WHEREFORE, PREMISES CONSIDERED, KLLM respectfully requests that this Court overturn the ruling of the Full Commission, as its decision was based upon less than the substantial weight of the credible evidence, and find Scott has not suffered any loss of wage earning capacity.

RESPECTFULLY SUBMITTED THIS THE 21ST DAY OF AUGUST, 2009.

KLLM, INCORPORATED
BY: MARKOW WALKER, P.A.

BY: _____

Richard M. Edmonson, Jr.
MS Bar No. [redacted]

Courtney Titus
MS Bar No. [redacted]

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