IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NORMAN RAY SMITH ..... APPELLANT/CLAIMANT

VS.

MASONITE CORPORATION ..... APPELLEE/EMPLOYER

AND

LUMBERMEN'S UNDERWRITING ALLIANCE CARRIER

CAUSE NO.: 2209-WC-00549-COA

EMPLOYER AND CARRIER'S BRIEF

Appeal of the Decision of the Circuit Court
Second District, Jones County, Mississippi

ORAL ARGUMENT NOT REQUESTED

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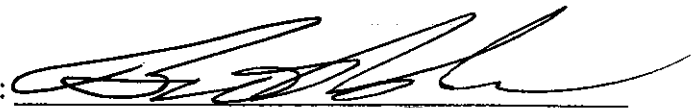
NORMAN RAY SMITH	**APPELLANT/CLAIMANT**
VS.	**CAUSE NO. 2009-WC-00549-COA**
MASONITE CORPORATION	**APPELLEE/EMPLOYER**
AND	
LUMBERMEN'S UNDERWRITING ALLIANCE	**APPELLEE/CARRIER**

I. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellee/Employer, Masonite Corporation, and Appellee/Carrier, Lumbermen's Underwriting Alliance, certify that the following listed persons have an interest in the outcome of this case.

1. Norman Smith, Appellant/Claimant;
2. Ryan J. Mitchell, Attorney for Appellant/Claimant;
3. Masonite Corporation, Appellee/Employer;
4. Brett W. Robinson, Attorney for Appellees/Employer/Carrier;
5. Lumbermen's Underwriting Alliance, insurance carrier for Appellee/Employer, Masonite Corporation;
6. Honorable Cindy Wilson, Administrative Judge, Mississippi Workers' Compensation Commission; and
7. Honorable Billy Joe Landrum, Jones County Circuit Court Judge

By: 

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6. Honorable Cindy Wilson, Administrative Judge, Mississippi Workers' Compensation Commission; and
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By: _____

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IV. STATEMENT OF THE CASE

A. Course of Proceeding and Disposition in the Court Below

Claimant filed a Petition to Controvert on May 2, 2005, alleging a work-related bilateral injury to his knees on September 9, 2004, during the course and scope of his employment with Masonite Corporation. Following an investigation, the Employer and Carrier admitted the compensability of the injury and provided medical treatment and temporary total disability benefits. However, the parties disagreed concerning the extent of temporary and permanent disability and, therefore, a hearing was held on August 16, 2007, in Laurel, Mississippi. At the hearing of this matter, the parties stipulated to the following:

1. Claimant sustained a work-related injury to his knees on September 9, 2004;
2. At the time of injury, Claimant's average weekly wage was $612.00;
3. Temporary total disability benefits in the amount of $25,123.19 were paid from September 14, 2004 through April 10, 2005, and from February 13, 2006 through February 11, 2007;
4. Permanent partial disability benefits in the amount of $9,488.88 were paid from February 12, 2007 to the date of the hearing and continue; and
5. To date, Claimant has undergone no surgeries;

Following the hearing, the Administrative Judge and the Full Commission on appeal properly found that:

1. Claimant reached maximum medical improvement on January 2, 2007, and all temporary total disability benefits have been paid.

2. A preponderance of the evidence demonstrated that the Claimant has suffered a permanent partial disability. The record reflects that Claimant cannot perform the job he was

performing at the time of his injury. The medical records and testimony of Dr. Stephen Nowicki, Dr. Kendall Blake, Dr. Keith Melancon, including the Functional Capacity Examination, Claimant's post-injury employment, Claimant's inadequate job searches, his training, age, work history, and education, evidence as a whole, rebut the presumption of a total occupational loss of Claimant's knees. Considering all the facts and medical evidence, the Administrative Judge and the Full Commission found that Claimant has sustained permanent partial disability to each lower extremity of 15%. For that reason, Claimant is entitled to permanent partial disability benefits of $341.11 per week beginning on January 2, 2007 and continuing for a total of fifty two and a half (52.5) weeks. Of course, the Employer and Carrier is entitled to credit for previously paid permanent disability benefits[1].

Based upon the lay testimony, medical testimony and evidence presented and the application of relevant case law, the Administrative Judge's and the Full Commission's findings were properly affirmed by the Jones County Circuit Court.

B. Statement and Summary of Facts

1. Claimant Testimony:

Claimant is a 50-year old resident of Laurel, MS (T.10). He graduated high school from West Jones High School in 1975 (T.6). He subsequently attended Jones County Junior College and obtained a two-year Associate Degree in Electronic Technology (T.6).

Following college, Claimant worked as a truck driver of an eighteen wheeler with a Class A license for Halliburton (T.9). Claimant testified that he first became employed with Masonite Corporation in 1979 for 2½ years as an instrument technician. Following that employment, he

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[1] Employer and Carrier have paid the 15% permanent partial disability benefits to Claimant.

worked for Laurel Community Antenna in the field of line maintenance of cable, cable television construction, and installation within Mississippi for approximately a year (T.33). Claimant then worked for another company installing cable television lines for about a year (T.33). Claimant testified he then returned to employment with Masonite Corporation where he worked for the following twenty-two (22) years as a maintenance technician.

Claimant testified that for some time period prior to September, 2004, he had experienced pain in his knees while climbing or going upstairs or ladders. However, he continued to work. On September 9, 2004, Claimant stated that he informed a co-worker that he could not climb the ladders to perform his duties, and at that time, informed his supervisor (T.10). Claimant did not report the knee complaints or injury as a work-related injury at that time (T.31). Claimant underwent treatment by Dr. Nowicki on September 13, 2004 (T.11). Claimant testified that, following his initial treatment with Dr. Nowicki, he informed Dr. Nowicki that the injury was not work related (T.31). Claimant further testified that, at that time, he did not know that the injury was a cumulative type injury and therefore, could be work-related (T.31). Claimant applied for, and was granted, short term disability payments from his employer, Masonite Corporation (T.13). Claimant testified that he received short term disability benefits for twenty-six (26) weeks (T.14). Claimant testified that in late March or early April, 2005, he became aware that his condition had, at some point, been noted in Dr. Nowicki's records of being work-related (T.15). Upon learning this information, Claimant testified that he returned to Masonite for a meeting and reported the injury as being work related (T.16). Claimant obtained counsel and filed the Petition to Controvert in this matter. Claimant testified that he received treatment from Dr. Keith Melancon, who took him off work on or about February 13, 2006 (T.20). Dr. Melancon treated Claimant with injections for both knees, which consisted of five (5) weekly injections (T.19). Claimant testified that Dr. Melancon released him

on January 2, 2007, with restrictions of no bending, crawling, stooping or climbing stairs. Claimant further testified that he had sought employment, but had been unable to obtain employment.

On cross examination, Claimant testified that he had told Dr. Nowicki a few days after September 13, 2004, that he had not suffered a work-related injury (T.31). He had received short term disability payments for twenty- six (26) weeks. During the time he was on disability, Claimant stated that he did not seek medical treatment, since he was not having any pain since he was not climbing (T.38). Claimant's short-term disability was approaching its end in March 2005. Claimant testified that in April 2005 he went to a meeting at Masonite, and at that time reported his injury as being work related (T.38). Claimant testified he provided a record from Dr. Nowicki at that meeting which stated the injury was work related. Claimant stated that Employer stated that was the first time it had been provided that record. Claimant testified that at the meeting, Masonite did state that a job was available for him at that time (T.38). Claimant testified that he informed Masonite that "coming back down there was not an option" (T.39).

Claimant testified that since the date he last worked at Masonite in September of 2004, he had obtained employment with other employers (T.33). Claimant testified that he worked for Swift Transportation as a truck driver in November and December of 2004 (T.34). He worked for five weeks and left that employment voluntarily and for reasons unrelated to his work-related injury at Masonite (T.34). Upon being employed by Swift, Claimant testified he underwent a physical examination in which he was required to be in a deep squat and touch the ground for ten (10) repetitions and also to remain in a crouch position for one minute, which he passed (T.34). Claimant testified he was paid approximately $500 a week at Swift (T.34). Following that employment, Claimant did not work again until becoming employed by Federal Express in Hattiesburg in May 2005 as a delivery driver (T.34). Claimant's territory included Ovett, Moselle, Soso, Stringer,

Sandersville, and some of Wayne County, Mississippi (T.33). Claimant was paid over twenty thousand ($20,000) dollars by Federal Express in 2005 (T.35). Claimant left his employment with Federal Express due to inadequate pay and costs (T.35). Claimant also attempted to start his own business of building steps for mobile homes and identified an advertisement placed by him for that business (T.36). However, the business was not profitable and he discontinued it (T.36).

Claimant also testified that he had not been treated by a physician for his knees since January 2007, when he was released by Dr. Melancon, was not taking any prescriptions for his knees, had undergone no physical therapy [and none had been prescribed], and was not instructed to do any at-home exercises (T.42).

2. Dr. Steven Nowicki:

Dr. Nowicki is a Board Certified Orthopaedic Surgeon who testified by deposition (E/C Ex. 4). Dr. Nowicki examined Claimant on September 13, 2004. At that time, Dr. Nowicki noted that anterior knee pain was his chief complaint. After obtaining a history, physical examination and x-rays, Dr. Nowicki's impression was patellofemoral or anterior knee pain syndrome. Dr. Nowicki's plan of treatment for Claimant at that time was conservative therapy, including hamstring and quadriceps strengthening, support with a patello knee sleeve, and a decrease in the activities that caused a lot of stress across the knee.

Dr. Nowicki stated that on October 12, 2004, he wrote a letter for Claimant. Dr. Nowicki was unsure of the circumstance of why the letter was written, but assumed he was asked to write it at the request of the patient seeking employment. Dr. Nowicki testified that at that particular point and time, the Claimant was doing very well and did not have any complaints. Dr. Nowicki further testified that the letter stated that he was going to release Claimant to drive a truck, automatic or

standard-type transmission. If at any point in the future the Claimant developed discomfort with driving a standard type transmission, Dr. Nowicki requested that the Claimant be accommodated with an automatic-type transmission truck to drive.

Dr. Nowicki did not provide an opinion as to maximum medical improvement or an impairment rating in his deposition. As to future medical treatment, Dr. Nowicki testified that Claimant's condition, to a reasonable medical probability, would not require any type of surgery in the future. Dr. Nowicki testified that he could rule out surgery completely in the future in a case like Claimant's case.

3. Dr. Kendall Blake:

Dr. Blake is a Board Certified Orthopedic Surgeon and is Board Certified in Arthroscopy. Dr. Blake testified that over the years, he has done primarily arthroscopy of shoulders and knees and total knee replacements (E/C Ex. 1). Dr. Kendall Blake testified that he examined Claimant on two occasions pursuant to an Employer's medical examination. Dr. Blake testified that his records show that he first examined Claimant on November 29, 2005. Dr. Blake testified that the Claimant provided a history of working at Masonite since May, 1983, until September, 2004. Dr. Blake stated that in the last two to three years of employment at Masonite, Claimant began to experience discomfort in his knees. Claimant informed Dr. Blake that since September, 2004, he had no longer worked at Masonite. Dr. Blake testified that Claimant stated that since leaving his employment at Masonite, he had worked as a truck driver for Swift Transport, which lasted approximately five (5) weeks from about October through the end of November, 2004. Subsequent to that employment, he worked as a truck driver and delivery man for Fed Ex beginning in March, 2005, which lasted about six (6) months.

Dr. Blake performed a physical examination on that date and stated that the pertinent findings basically were limited to an overweight condition and that Claimant was substantially overweight. Dr. Blake's examination, which he described as fairly exhaustive, revealed that Claimant's knee examination was essentially normal, and that the examination at that point and time was unremarkable.

During this initial examination, Dr. Blake reviewed a set of x-rays from September 13, 2004, and November 4, 2005, both from the Laurel Bone & Joint Clinic, and noted an abnormality on the side-to-side view which was described as mild degenerative change noted on the patello, left greater than right. Dr. Blake stated that his impression was that Claimant had mild early degenerative joint disease in the knee cap joint at both knees. When asked his opinion concerning future medical treatment, Dr. Blake stated that he did not think anyone could state that Claimant would require a knee replacement in the future. Dr. Blake further testified that as of November 29, 2005, to a reasonable medical probability, his opinion was if Claimant did not undergo weight loss he had reached maximum medical improvement from his knee condition and his work-related injury at Masonite as of the point he stopped working at Masonite on September, 2004.

Dr. Blake's records and testimony revealed that he saw Claimant a second time on February 13, 2007. Dr. Blake noted that during the time between his examinations of Claimant, Dr. Melancon had performed a series of visco supplementation injections and had performed MRIs of Claimant's knees. Dr. Blake testified that to a reasonable medical probability, the MRIs were not medically necessary for the treatment of Claimant's condition. Dr. Blake testified that his examination of Claimant on February 13, 2007, revealed that his examination was completely unchanged from his earlier examination, with the exception of the fact that Claimant had gained weight. Dr. Blake again

reviewed the two sets of x-rays from the Laurel Bone & Joint Clinic and also reviewed the MRIs dated February 15, 2006.

Dr. Blake's impression at that time was the same as before--mild degenerative joint disease in his knee cap joints, both knees and overweight condition. Dr. Blake testified that based upon the AMA Guide to Impairment Ratings, Claimant would rate out at zero percent (0%) impairment for his knee condition. However, Dr. Blake testified that he thought that was unreasonable and that he would give him a minimal rating of five percent (5%) and restrict his work to sedentary work. Dr. Blake testified that he disagreed with the thirty seven percent (37%) impairment rating given by Dr. Melancon since, as long as Claimant avoids heavy activity, he is completely symptom free, and if he were to complete the treatment program as outlined, he has a very good chance that this will never progress.

4. Dr. Keith Melancon:

Dr. Keith Melancon is a Board Certified Orthopaedic Surgeon. Dr. Melancon first examined Claimant on February 13, 2006 (E/C Ex. 6). Dr. Melancon stated that Claimant provided a history of pain in his knees for some time. Dr. Melancon's examination noted that Claimant had pain on the anterior aspect of the knee and patello and that his impression was that Claimant had chondromalacia. Dr. Melancon testified that Claimant would not be able to return to his employment at Masonite. Dr. Melancon began with a series of Hyalgan injections on March 15, 2006, beginning with a series of one injection a week for five weeks on the right knee. Dr. Melancon performed a series of once-a-week injections for five weeks on the left knee beginning May 15, 2006, and concluding on June 21, 2006.

Following the initial series of injections, Dr. Melancon did a second series of injections in

both knees beginning on October 24, 2006, and completing them on November 22, 2006. On December 7, 2006, an FCE which had been requested by Dr. Melancon was performed, which found that Claimant was capable of performing physical work at medium level. The FCE reported that Claimant participated fully in seventeen out of seventeen tasks and did not demonstrate any self-limiting behavior. Further, it was found that, according to the job description provided by Masonite, the Claimant's abilities do not match the job requirements. Specifically, he is unable to perform ladder climbing in upper range of weight required for lifting and carrying demands of the job. The FCE found that the maximum safe level of performance for lifting was in the 30 lb. range. The position tolerance portion of the FCE found that the Claimant could sit, stand, and perform lowered work standing constantly which is listed two-thirds (2/3) to a full day. The mobility portion of the FCE found that the Claimant could perform stair climbing and crawling occasionally, which is listed up to one-third (1/3) of the day; walking was listed as frequently or up to one-third (1/3) to two-thirds (2/3) of a day; and repetitive squat and ladder climbing never. Further, the FCE found that in the balance portion, Claimant performed adequately on walking on level and uneven surfaces and inadequately on ladder climbing, beam and scaffold walking.

Dr. Melancon's records showed that on January 2, 2007, he determined Claimant to be at maximum medical improvement and released him to return to work. Dr. Melancon's review of the FCE found that Claimant had trouble with ladder and stair climbing and difficulty with kneeling, crawling or squatting. Dr. Melancon stated that Claimant was able to "lift 30 lbs. and carry this some distance. Other than that, he is not limited". Dr. Melancon released Claimant to return to work on January 3, 2007, with restrictions of no kneeling, crawling, squatting or stooping, stair climbing or ladder climbing. Dr. Melancon further stated Claimant was able to carry 30 lbs. on a regular

basis. Dr. Melancon further stated that Claimant had an impairment rating of the right lower extremity of 37% and an impairment rating of the left lower extremity of 37%. Dr. Melancon further stated that "he will need total knee arthroplasty on each knee which costs about $50,000.00 in today's dollars." Dr. Melancon records also state that Claimant would return to the clinic in one (1) year.

5. Pete Mills:

Pete Mills testified at the hearing and provided written copies of his reports as evidence (T.53-64, E/C Ex. 8) . The rehabilitation report of vocational expert, Pete Mills, shows he was retained by the Employer/Carrier to perform a vocational rehabilitation assessment and labor market survey. Mills met and interviewed Claimant on February 12, 2007 (T.53-64). Mills stated that Claimant and his wife have a daughter, age 3, and one step-son, age 11. He stated his wife was self-employed babysitting children. Mills reported that Claimant was a native of Jones County. However, he stated that his wife was originally from the Franklin County area and that her family lived approximately between Brookhaven and McComb. Claimant stated that there is a possibility they may be moving to that area sometime in the future. Regarding physical abilities, Claimant stated that he could stand for about forty-five (45) minutes to one (1) hour, walk slowly for a couple hours and could sit and bend with no problems. He stated that he would rather not squat because of the pain that it causes his knees. Also getting into a kneeling position is difficult to him. Mr. Mills stated that Claimant informed him that he currently takes no medication for his knees and does not take any over-the-counter medication for his knees. Further, Mr. Mills found that Claimant was not engaged in a formal therapy program at that time and had been given no home exercises.

Mr. Mills found that Claimant had a valid commercial driver's license with a hazardous

materials endorsement. Mills found that Claimant, since leaving Masonite, had some jobs driving large trucks. Claimant stated that he did not really have a problem at that time driving the truck, but feels that now he would probably have more difficulty getting in and out of the truck, as well as on and off of the trailers. Mr. Mills found that Claimant went to truck driving school and obtained his CDL after leaving Masonite in 2004. He then took a job with Swift Transportation of Memphis, TN. Claimant worked for them for five (5) weeks, and during that time, traveled through about twenty-two (22) states. Claimant informed Mills that he determined that his expenses were too great and there were some other problems associated with the company, and he terminated his employment with them. Claimant informed Mills he then went to work for Fed Ex Ground of Hattiesburg, MS, where he was employed as a truck driver/delivery for seven (7) months. Based on the number of hours that he was on the job, Claimant did not think he was being paid enough money. He terminated his employment with this company due to those expenses. Claimant did relay that he also had some problems getting in and out of the back of the Fed Ex truck because it was higher and this caused problems with his knees.

Following this initial consultation, Mr. Mills provided Claimant with a list of employers who were found to have openings or anticipate hiring soon for positions which fell within Claimant's vocational profile. A list of these employers was provided by Mr. Mills to Claimant on February 27, 2007, and April 4, 2007. The February 27, 2007 letter identified jobs, including security guard through the WIN Job Center, telephone service representative with Answer Call, assembler at the Solar Group, assembler at Howard Industries, and cashier at the Home Depot. The April 4, 2007, report by Mr. Mills identified jobs including a dump truck driver through the WIN Job Center, school bus driver through Summit Learning Center, cashier at Junior Food Mart, delivery driver at

Domino's Pizza. At the hearing of this cause, Claimant provided a job search log evidencing his job attempts. The job search log shows that Claimant applied to four (4) of the potential jobs provided by Mr. Mills, including Customer Service Rep with Conway Freight, Sales Associate at Radio Shack, Electronic Technician at Howard Industries, and Customer Service Manager at Schwann Food Company. The overall majority of Claimant's job attempts, according to his job search log, involved the review of the Impact Paper and Career Builder web site which shows that he reviewed these sites on numerous occasions but did not apply for any jobs.

V. ARGUMENT

A. Standard of Review

The standard of review for decisions of the Full Workers' Compensation Commission is very differential and Appellate Court will only reverse when the findings of the Full Commission are not supported by substantial evidence. *Levy v. Miss Uniforms*, 909 So. 2d 1260 (Miss App. Ct. 2005). The weight and credibility to be given to medical evidence and doctor's testimony are factual issues to be decided by the Workers' Compensation Commission, not the Appellate Court. *Id.* The Appellate Court's task is not to second guess the factual conclusions of the Workers' Compensation Commission. *Id.*

The standard of review in workers' compensation cases is limited. *Mississippi Baptist Medical Center v. Dependents of Mullet*, 856 So. 2d 612, 616 (Miss Ct. App. 2003). The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. This Court will reverse the Commission's Order only if it finds the Order clearly erroneous and contrary to the overwhelming weight of the evidence. *Id.*

If the Workers' Compensation Commission's findings are supported by substantial evidence, all Appellate Courts are bound by the Commission's findings, even if the evidence would persuade

the Court to find otherwise if it were the fact finder. *Jansen Pharmaceutical, Inc. v. Stuart*, 856 So. 2d 431 (Miss App. Ct. 2003).

The findings of the Full Commission in this matter are clearly supported by substantial evidence. The Administrative Judge and the Full Commission fully and completely weighed the factual and medical evidence, determined the credibility of the evidence, properly applied the law to the evidence and rendered the decision in this case. As such, the Order of the Full Commission should be affirmed.

B. The Administrative Judge and Full Commission Properly Found Claimant Suffered a Permanent Partial Disability to Each Lower Extremity of 15%

The Administrative Judge and Full Commission's Orders clearly states that the claimant suffered a permanent partial disability. Further, the Administrative Judge and Full Commission properly found that based upon the medical records and testimony of Dr. Stephen Nowicki, Dr. Kendall Blake, Dr. Keith Melancon, the Functional Capacity Examination, Claimant's post-injury employment which demonstrates his ability to obtain employment, Claimant's inadequate job searches, his training, age, work history, and education, the evidence as a whole rebutted the presumption of a total occupational loss of Claimant's knees. Considering all the facts and medical evidence, the Administrative Judge and Full Commission found that Claimant has sustained permanent partial disability to each lower extremity of 15%.

To determine whether or not a claimant has suffered a permanent disability, the court must consider what types of jobs may be included in his "usual employment" and whether the claimant is capable of engaging in those types of employment. *Walker Mfg. Co. v. Butler,* 740 So. 2d 315 (Miss. Ct. App. 1998). In answering this question, a court should consider: "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." *Id.* It is these factors that the court indicated that the Commission should look to when considering the evidence as a whole. *Id.* In other words, the determination should be made only after considering the evidence as a whole. *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d. 163, 167 (Miss. 1991). When there is a finding of permanent partial disability, the Claimant bears the burden of making a prima facie showing that he has sought and has been unable to find work in the same or other employment. *Coulter v. Harvey,* 190 So. 2d 894 (Miss. 1966) "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 permanent disability solely because of total incapacity to engage in the same or similar work." *Ford v. Emhart, Inc.,* 755 So. 2d 1263 (Miss. Ct. App. 2000); *see also Compere's Nursing Home v. Biddy,* 243 So. 2d 412, 414 (Miss. 1971); *V. Dunn, Mississippi Workers Compensation, Section 72 (2d ed. 1967).*

As required by case law, the Administrative Judge and Full Commission reviewed and considered the evidence as a whole and properly found an impairment of 15%. The medical evidence undeniably supports these findings. Dr. Kendall Blake testified that his impression was that Claimant had mild degenerative joint disease in his knee cap joints and an overweight condition. Dr. Blake further testified that based upon the AMA Guide to Impairment Ratings, Claimant would

be assessed a zero percent (0%) impairment rating. However, Dr. Blake gave him a minimal rating of five percent. Dr. Blake stated that he did not think anyone could state that Claimant would require a knee replacement in the future. Likewise, Dr. Stephen Nowicki testified that the only restriction he would have placed on Claimant was no climbing ladders. Further, Dr. Nowicki testified that Claimant's condition would not require any type of surgery in the future.

Despite the Claimant's reliance on Dr. Melancon to support a contention of total permanent disability, the Functional Capacity Examination contained in Dr. Melancon's records demonstrates Claimant is not totally permanently disabled. The FCE found that the maximum safe level of performance for lifting was in the 30 lb. range. The position tolerance portion of the FCE found that the Claimant could sit, stand, and perform lowered work standing constantly which is listed two-thirds (2/3) to a full day. The mobility portion of the FCE found that the Claimant could perform stair climbing and crawling occasionally, which is listed up to one-third (1/3) of the day; walking was listed as frequently or up to one-third (1/3) to two-thirds (2/3) of a day; and repetitive squat and ladder climbing never. Further, the FCE found that in the balance portion, Claimant performed adequately on walking on level and uneven surfaces and inadequately on ladder climbing, beam and scaffold walking.

Dr. Melancon's records showed that on January 2, 2007 he determined Claimant to be at maximum medical improvement and released him to return to work. Dr. Melancon's review of the FCE found that Claimant had trouble with ladder and stair climbing and difficulty with kneeling, crawling or squatting. Dr. Melancon stated that Claimant was able to "lift 30 lbs. and carry this some distance. Other than that, he is not limited". Dr. Melancon released Claimant to return to work on January 3, 2007, with restrictions of no kneeling, crawling, squatting or stooping, stair climbing or ladder climbing. Dr. Melancon further stated Claimant was able to carry 30 lbs. on a regular

basis.

Additionally, Claimant testified that he has not been treated by a physician for his knees since January 2007, is not taking any prescriptions for his knees, has undergone no physical therapy and none has been prescribed, and has not even been instructed to do any at-home exercises (T.42).

Evidence of Claimant's post injury employment likewise supports the Administrative Judge's and Full Commission's findings. Claimant worked for Swift Transportation as a truck driver in November and December of 2004 and quit for reasons unrelated to his injury (T.34). Claimant worked for Federal Express and was responsible for an area covering Ovett, Moselle, Soso, Stringer, Sandersville and some of Wayne County (T.34). Again Claimant voluntarily quit this job for reasons unrelated to his injury (T.34). Not only did Claimant work for these two different employers post injury, but also engaged in a home business of building steps for mobile homes (T.36). It is undisputed that Claimant was able and did in fact obtain employment following his work-related injury. This fact alone should support the Administrative Judge's and Full Commission's refusal to grant permanent total disability benefits.

However, additional evidence further supports the Administrative Judge's and Full Commission's findings. Clearly, Claimant's job search was inadequate to support an increased occupational disability other than what was awarded. Claimant's own testimony and actual employment after ceasing his employment at Masonite demonstrate without question his inability to prove or support claims of one hundred percent permanent disability. First, Claimant was offered employment with Masonite once he claimed the injury to his knees was work related in April 2005 (T.39). However, Claimant refused that offer of employment and even stated that "coming back down there was not an option" (T.39). Furthermore, Claimant was able to find employment and

complete the requirements of those jobs, but voluntarily left those positions for reasons other than his work-related injury (T.33). Claimant worked for Swift Transportation for five weeks, and despite being paid approximately $500 a week, left that employment (T.34). In addition, Claimant was able to perform all the requirements of a physical examination for his job at Swift which included deep squats and crouching (T.34). Not only was Claimant able to perform for Swift, but he also was able to obtain employment with Federal Express where he was paid over twenty thousand dollars ($20,000) in 2005 (T.35). Again, Claimant quit that job for reasons unrelated to his work-related injury (T.35). Claimant was also involved in his own business of building steps for mobile homes. Again he quit doing that job due to reasons unrelated to his work related injury (T.36).

Claimant was also provided the services of an expert in the field of vocational rehabilitating by Employer and Carrier. Despite this fact and that Claimant was provided with numerous leads and positions to which he could apply for employment, Claimant wholly failed to conduct an adequate job search or even apply for numerous openings provided to him. Claimant applied to only four (4) of the positions provided to him by the vocational rehabilitationist (T.43-46). Overall, the majority of remaining job attempts presented by Claimant involved merely reviewing the Impact Paper and a Career Builder web site (T.43). However, Claimant admitted that he did not apply for the jobs listed in these two sources.

In *Ford v. Emhart, Inc.* 755 So. 2d 1263 (Miss. Ct. App. 2000), the claimant was denied her request for permanent total disability for injuries to both of her feet. In reviewing the evidence, the court stated that none of her physicians' reports alluded that she was permanently and totally disabled. Further, the claimant had worked following her injury and had voluntarily retired from that position together with the fact she did not try to find employment for months after leaving that

employment demonstrated she did not make reasonable efforts to obtain gainful employment. Therefore, the court found she was not entitled to permanent total disability benefits. Likewise, Claimant, Norman Smith, is not entitled to a finding of total disability. Claimant in the instant case refused the offer of employment by Masonite in April 2005 when he stated "coming back down there was not an option." Claimant was able to find employment following his leaving Masonite on two separate occasions. However, he voluntarily left those jobs for reasons unrelated to his injury. Claimant also failed as outlined above to conduct an adequate search and attempt to find other employment. Claimant has simply not provided the evidence necessary to support a finding of total disability.

C. The Administrative Judge and Full Commission properly found all temporary disability benefits had been paid

Employer and Carrier paid temporary disability benefits from September 14, 2004 through April 10, 2005 and from February 13, 2006 through February 11, 2007. Claimant's work-related injury occurred on September 9, 2004, and he reached maximum medical improvement on January 2, 2007. Claimant reported his injury as non-work related to not only his treating physician, Dr. Nowicki, but also to Employer. Due to the fact Claimant reported his injury as non-work related, Claimant was placed on and received short term disability benefits beginning in September 2004 for a twenty six (26) week period or to approximately April 2005. Claimant worked for Swift Transportation in November and December of 2004 (he was receiving also short term disability payments at that time), but quit that employment for reasons other than his injury. As shown by his own testimony, Claimant refused employment offered by Employer in April 2005. Employer and Carrier paid temporary total benefits for the period of September 14, 2004 through April 10, 2005.

Following his refusal to work for Employer, Claimant obtained employment with Federal Express in May 2005. Again Claimant quit for reasons unrelated to his injury. Claimant was not taken off work by a physician until February 13, 2006. Employer paid temporary benefits from February 13, 2006 to February 11, 2007. Claimant's maximum medical improvement date was January 2, 2007. Employer has fully met the requirements for payment of temporary disability benefits, and Claimant's request for any additional benefits should be denied.

VI. CONCLUSION

The Administrative Judge and Full Commission correctly found that Claimant sustained a permanent partial impairment to each lower extremity of 15%. Further, the Administrative Judge and Full Commission properly found that all temporary disability benefits had been paid by the Employer and Carrier. Claimant's contention that he is entitled to a finding of 100% total disability is simply not supported by the evidence. Therefore, the Employer and Carrier respectfully requests that this Honorable Court affirm the Full Commission's findings in this matter.

Respectfully submitted this the 4th day of August, 2009.

MASONITE CORPORATION AND
LUMBERMEN'S UNDERWRITING ALLIANCE

By: _____
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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been served upon Claimant's attorney by mailing the same by United States mail, postage prepaid, constituting legal service upon the Claimant herein, as follows:

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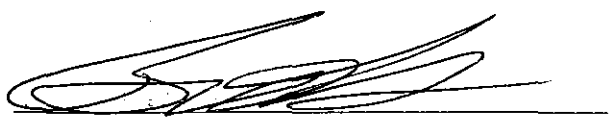
Honorable Billy Joe Landrum,
Circuit Court Judge
Post Office Box 685
Laurel, Mississippi 39441-0685

This, the 4th day of August, A.D. 2009.



BRETT W. ROBINSON

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NORMAN RAY SMITH ..... APPELLANT/CLAIMANT

VS.

MASONITE CORPORATION ..... APPELLEE/EMPLOYER

AND

LUMBERMEN'S UNDERWRITING ALLIANCE CARRIER

CAUSE NO.: 2009-WC-00549-COA

CERTIFICATE OF FILING

I, Brett W. Robinson, attorney for Appellees/Employer, Masonite Corporation and Carrier, Lumbermen's Underwriting Alliance, do hereby certify that I have mailed the original and three copies of the Appellees' Brief to the Supreme Court of Mississippi, Court of Appeals of the State of Mississippi at the following address:

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Betty W. Stephon, Supreme Court Clerk
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Jackson, MS 39205-0249

Said Appellees' Brief was mailed, postage prepaid, on the 4th day of August, 2009.

Brett W. Robinson, Attorney for
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