IN THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

NORMAN RAY SMITH	APPELLANT/CLAIMANT
VS.	CAUSE NO. 2008-935-CV7
MASONITE CORPORATION	APPELLEE/EMPLOYER

REPLY BRIEF OF APPELLANT

Appeal of the Decision of the Full Commission
of the Mississippi Workers' Compensation Commission

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A. The Administrative Judge and Commission Erred by Basing Their Determination of Claimant's Permanent Disability on the Claimant's Post Injury But Pre-Maximum Medical Improvement Employment at Swift Transportation and Federal Express.

The Administrative Judge and the Commission misapplied the law when they based their determination of the percentage of claimant's permanent disability on employment the claimant had prior to reaching maximum medical improvement. In their brief, the employer/carrier argue the Administrative Judge and the Commission were correct in relying on **post injury** employment. However, the employer/carrier's argument is misguided because the claimant's post injury employment came before the claimant had even started treatment with his physician of choice, Dr. Melancon. Claimant has not been successful in finding employment since he began treatment with Dr. Melancon in February 2006.

Claimant worked at Swift Transportation for five weeks in 2004 and worked at Federal Express for six months in 2005. But the Claimant did not begin treatment with Dr. Melancon until February 13, 2006 and was not placed at maximum medical improvement until January 2, 2007. This is an extremely important point that has been misinterpreted by the Administrative Judge, the Commission and the employer/carrier. Post-injury employment is only relevant if it also occurred after the claimant received permanent restrictions and reached maximum medical improvement. Dr. Melancon did not assign permanent medical restrictions to the claimant until January 2007. Any employment the claimant had prior to this date is irrelevant to the analysis of the percentage of permanent disability the claimant sustained.

Furthermore, both Dr. Melancon and Dr. Blake recommended the claimant avoid

the exact type of work the claimant had at Swift Transportation and Federal Express. First, Dr. Melancon testified he "certainly would not recommend [the claimant] go back to either one of those jobs that he had since he went to Masonite, because they can make it worse." (Exh. CL-5 at pg. 16) Then the employer/carrier hired a physician of their choosing, Dr. Kendall Blake, to conduct an employer's medical examination. Dr. Blake testified at his deposition that the claimant "should do sedentary work" and "I wouldn't recommend his driving a truck." He further testified "[I think he could do a job that had a fair amount of standing in the day if he had enough flexibility for frequent position changes and the opportunity to sit down whenever he found the need. However, I think he would be better served by a sitting job rather than a standing job." (Exh. E/C-1 at pgs. 26-27)

In essence, when the Administrative Judge and the Commission based their rulings on the claimant's short term pre-maximum medical improvement employment at Swift Transportation and Federal Express, they inappropriately disregarded the unchallenged medical testimony of Dr. Melancon and Dr. Blake.

It is totally illogical and unreasonable in this case to consider employment the claimant had in 2004 and 2005 when the treatment with Dr. Melancon did not even begin until February 2006 and permanent restrictions were not given until January 2007. Neither the employer/carrier, the Commission or the Administrative Judge cite any Commission rule or statutory or case law to support the contention that this Court should consider claimant's employment prior to the date he reached maximum medical improvement. To further emphasize the point, the prehearing statement currently in use by the Mississippi Workers Compensation Commission requires information from the parties regarding the claimant's "post-MMI employers and wage rate" and "work search list identifying post-MMI

prospective employers and dates contacted." The prehearing form does not request information regarding employment that a claimant may have had prior to his date of maximum medical improvement. (See MWCC Prehearing Statement Form attached hereto)

Similarly, the Administrative Judge and the Commission relied heavily on the evidence that the employer had asked the claimant to come back to work in April 2005. First, the employer only made this offer after the claimant learned his injury was work-related. During the initial six months after the injury, when the claimant was unaware Dr. Nowicki had given the opinion that the injury was caused by his employment at Masonite, the employer told the claimant they had no work available for him. Then, once the claimant reached maximum medical improvement in January 2007 and had finally been given his permanent restrictions, the employer did not make any offer for the claimant to return to employment. Finally, after Dr. Blake conducted his medical examination and testified the claimant should only do sedentary work, Masonite failed to offer the claimant any employment within those restrictions. There is simply no evidence in the record that the employer made any effort to rehire the claimant after Dr. Melancon placed permanent restrictions of no kneeling, crawling, squatting, stooping, stair climbing, ladder climbing or lifting over thirty pounds. Despite repeated attempts to find employment, claimant has not worked in any capacity since being released at maximum medical improvement in January 2007.

B. Claimant Sustained a Partial Loss of Use of His Lower Extremities With the Effect of Total Loss of Use.

It is undisputed in this case that the claimant's bilateral knee injuries resulted in a loss of use of both of his lower extremities. It is also undisputed that the permanent

medical restrictions assigned to the claimant as a result of his knee injuries prevented him from performing the substantial acts of his occupation as an instrument technician. The Administrative Judge found as much in her Opinion when she stated "the record reflects that claimant cannot perform the job he was performing at the time of his injury." (T-158) This finding was adopted by the Commission, and the employer/carrier has not appealed this determination that the claimant's injuries prevented him from performing the substantial acts of his usual occupation as an instrument technician. Claimant had continuously worked as an instrument technician for the past twenty years. This Court has said the test for loss of use is whether the worker can perform the substantial acts required of him in the performance of his job. ***McGowan v. Orleans Furniture, Inc.***, 586 So.2d 163 (Miss. 1991). Therefore, once the Administrative Judge found the claimant could not perform the substantial acts of the employment in which he had been engaged in for the past twenty years, the proper application of the law should have resulted in a finding of 100% loss of use of each lower extremity and benefits commensurate with the statutory schedule should have been awarded. However, the Administrative Judge misapplied the law and found only a fifteen percent loss of use.

In their brief, the employer/carrier cite several body as a whole cases (***Coulter v. Harvey***, 190 So.2d 894 (Miss. 1966), ***Ford v. Emhart***, 755 So.2d 1263 (Miss. Ct. App. 2000) and ***Compere's Nursing Home v. Biddy***, 243 So.2d 412 (Miss. 1971)) for the proposition that in order to receive permanent disability benefits, a claimant has 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. This is arguably a correct statement of the law in a body as a whole case where disability is defined under Miss. Code Ann. § 71-3-3(i). However,

the Miss. Code Ann. § 71-3-3(i) definition has no applicability or relevance to a scheduled member injury. ***Cook v. President Casino***, 740 So.2d 963 (Miss. Ct. App. 1999). Loss of wage-earning capacity is not the legal standard for entitlement to benefits in a scheduled member injury. In fact, there is not a single word in the scheduled-member statute about "incapacity to earn" or about wage-earning capacity. Instead "loss of" and "loss of use" are the statutory tests for entitlement to benefits in the scheduled-member category. This is where the Administrative Judge, the Commission and the employer/carrier have misinterpreted the law. In ***Cook***, the Court of Appeals explicitly rejected application of the ***Coulter*** case to a scheduled-member case. The 1991 decision in ***McGowan v. Orleans Furniture***, 586 So.2d 163 (Miss. 1991) also clearly mandates that the standard of proof of occupational effect for the scheduled-member category of benefits is different from the standard of proof for the "body as a whole" category of benefits.

IV. CONCLUSION

The Administrative Judge and the Commission erred by misapplying the law of body as a whole cases to this scheduled-member case and by basing their decision on employment the claimant had prior to receiving treatment for his work-related injuries. The claimant sustained bilateral knee injuries that will require total knee replacement in the future and those injuries resulted in his inability to perform the substantial acts of his usual employment. Therefore, the Administrative Judge and the Commission erred by not finding the claimant had sustained a 100% loss of use to each lower extremity, and the claimant respectfully requests the Court of Appeals reverse the Order of the Circuit Court affirming the Decision of the Full Commission and make the following conclusions consistent with Mississippi law:

(1) Claimant is entitled to temporary total disability benefits in the amount of $351.14 per week commencing on September 9, 2004 and concluding through January 2, 2007 with proper credit to be given for any and all monies, wages and benefits previously paid to the claimant during this time frame, and

(2) Claimant has suffered a 100% total loss of use to his right lower extremity and a 100% loss of use of his left lower extremity due to his inability to perform the substantial acts of his usual employment.

Respectfully submitted, this the 21st day of August A.D., 2009.

NORMAN RAY SMITH, Claimant

By: _____

RYAN J. MITCHELL {MB [redacted]
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ATTORNEY FOR CLAIMANT

* * *

CERTIFICATE OF SERVICE

I, Ryan J. Mitchell, do hereby certify that I have this day filed the above and foregoing **Reply Brief of the Appellant**, along with three copies as required by the Mississippi Rules of Appellate Procedure, with the Secretary of the Supreme Court of Mississippi and have mailed, postage prepaid, a true and correct copy same to:

BRETT W. ROBINSON, ESQ.
HORTMAN HARLOW, ET AL.
Post Office Box 1409
Laurel, Mississippi 39441
Attorney for Appellee/Employer

HONORABLE BILLY JOE LANDRUM, CIRCUIT JUDGE
Jones County Circuit Court
Post Office Box 685
Laurel, MS 39441-0685

This, the 21st day of August, A.D., 2009.

RYAN J. MITCHELL

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

NORMAN RAY SMITH **APPELLANT/CLAIMANT**

VS.

MASONITE CORPORATION **APPELLEE/EMPLOYER**

CAUSE NO.: 2009-WC-00549-COA

CERTIFICATE OF FILING

I, Ryan J. Mitchell, attorney for Appellant/Claimant, Norman Ray Smith, do hereby certify that I have mailed the original and three copies of the Reply Brief of Appellant 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
Post Office Box 249
Jackson, MS 39205-0249

Said Appellant Brief was mailed, postage prepaid, on the 21st day of August, 2009.

RYAN J. MITCHELLL, Attorney for
Appellant/Claimant, Norman Ray Smith

PREHEARING STATEMENT OF _____

1. *STYLE:*

2. *CLAIMANT DOB:* **3.** *ADDRESS:*
4. *EDUCATION:*
5. *PRIOR JOBS/OCCUPATIONS:*

6. *DATE OF INJURY:* *7. ADMITTED INJURY: YES; NO* *8. AWW:*
9. *CLAIMANT'S OCCUPATION ON DATE OF INJURY:*
10. *HOW INJURY OCCURRED and BODY PARTS FOR WHICH CLAIM IS MADE:*

11. *DATES and RATES OF TTDB and PDB PAID TO DATE:*

12. *SURGICAL PROCEDURES PERFORMED and DATES OF SURGERY PER SURGEON:*

13. *MMI DATE(S); PERMANENT IMPAIRMENT RATINGS and PERMANENT WORK RESTRICTIONS PER DOCTOR:*

14. *EXPERTS WHO HAVE OR WILL BE DEPOSED and DEPOSITION DATES:*

15. *ISSUES, INCLUDING AFFIRMATIVE DEFENSES and DISPUTES OVER UNPAID MEDICALS:*

16. *COUNSEL HEREBY VERIFIES TO THE COMMISSION THAT HE/SHE HAS*
- *a. SUPPLEMENTED DISCOVERY RESPONSES PER MRCP RULE 26,*
- *b. CONFERRED WITH OPPOSING COUNSEL AND WITH HIS/HER CLIENT REGARDING THE PROSPECTS FOR SETTLING THIS CASE THROUGH MEDIATION, AND*
- *c. CONCLUDED THAT MEDIATION WOULD/WOULD NOT EXPEDITE SETTLEMENT.*

17. *IF NOT, WHY NOT?*

18. *ATTACH COPIES OF:*
1. *Final medical report(s) documenting ratings and restrictions as Attmt. 1 (should be 1 page per expert),*
2. *Work search list identifying post-MMI prospective employers and dates contacted as Attmt. 2,*
3. *Any post-MMI employers and wage rate/AWW as Attmt. 3,*
4. *Any vocational/labor market reports available to date as Attmt. 4,*
5. *Stipulations (especially regarding AWW and MMI) as Attmt. 5,*
6. *Proposed Exhibits, which must include all medical records affidavits, as Attmt. 6, and*
7. *Proposed Witness List, which must include all notices of expert depositions, as Attmt. 7.*

_____ _____
Sign, State Bar No., and Identify Party Represented *Date*

Attach Certificate of Service