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

BRIEF OF THE APPELLANT

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

ORAL ARGUMENT REQUESTED

CRAIG N. ORR {MB [redacted]
RYAN J. MITCHELL {MB [redacted]
GHOLSON BURSON ENTREKIN & ORR, PA
POST OFFICE BOX 1289
LAUREL, MISSISSIPPI 39441-1289
TELEPHONE: (601) 649-4440
FACSIMILE: (601) 649-4441
ATTORNEYS OF RECORD FOR APPELLANT/CLAIMANT

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

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

I. 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. Norman Ray Smith, Appellant/Claimant
2. Craig N. Orr & Ryan J. Mitchell, Attorneys for Appellant/Claimant
3. Masonite Corporation, Appellee/Employer
4. Brett W. Robinson, Attorneys for Appellee/Employer
5. Lumbermen's Underwriting Alliance, insurance carrier for Appellee/Employer, Masonite Corporation
6. Honorable Cindy Wilson, Administrative Judge, Mississippi Workers' Compensation Commission
7. Honorable Billy Joe Landrum, Jones County Circuit Court Judge

CRAIG N. ORR {MB #[redacted]
RYAN J. MITCHELL {MB #[redacted]
GHOLSON, BURSON & ENTREKIN & ORR, PA
POST OFFICE BOX 1289
LAUREL, MISSISSIPPI 39441-1289
TELEPHONE: (601) 649-4440
FACSIMILE: (601) 649-4441
ATTORNEYS OF RECORD FOR APPELLANT

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Page

IV. INTRODUCTION

On September 9, 2004, Norman Ray Smith (hereinafter "claimant") sustained admittedly compensable bilateral knee injuries caused by his twenty two years of climbing ladders at his job as an instrument technician at Masonite Corporation in Laurel, Mississippi. Claimant's treating physician (Dr. Keith Melancon) diagnosed the claimant with bilateral patellafemoral chondromalacia, assigned claimant a 37% impairment rating to each lower extremity and permanently restricted the claimant from working at any job that required kneeling, crawling, squatting, stooping, stair climbing or ladder climbing. (Exh. CL-6) Dr. Melancon also informed the claimant that in the future he will need total knee replacements on both of his knees. (Id.) The two doctors who saw the claimant at the request of the employer and carrier (Dr. Steven Nowicki and Dr. Kendall Blake) also placed permanent work restrictions on the claimant that prevented him from returning to his usual employment at Masonite. (Exh. E/C-1 and Exh. CL-3) Dr. Nowicki stated the claimant "should have a permanent ladder restriction as far as his work is concerned," and Dr. Blake stated the claimant should do sedentary work that does not require squatting, climbing or heavy lifting. (Id.)

It is undisputed that these restrictions prevented the claimant from returning to his usual employment as an instrument technician at Masonite. The Administrative Judge and the Full Commission erred as a matter of law by finding the claimant only sustained a 15% loss of use to each lower extremity considering the claimant's treating physician assigned a 37% impairment rating and considering the claimant is permanently disabled from the usual occupation he has held for over twenty years.

As for claimant's temporary disability, he became temporarily disabled when Dr. Nowicki told him not to return to work on September 13, 2004. The employer and carrier admitted as much by paying claimant temporary disability benefits from September 13 through April 10, 2005 and from February 13, 2006 through February 11, 2007, the date they learned the claimant had reached maximum medical improvement. The Administrative Judge and the Full Commission erred by not finding the claimant to have been temporarily disabled continuously from September 13, 2004 through January 2, 2007 (the date claimant reached maximum medical improvement.)

V. STATEMENT OF ISSUES

1. Whether the Administrative Law Judge and the Full Commission erred by awarding the claimant only a fifteen percent (15%) loss of use to each lower extremity after finding that the evidence proved the claimant's work-related injuries prevented him from performing the job he had at the time he sustained his injuries.
2. Whether the Administrative Judge and the Full Commission erred by failing to make a finding as to the claimant's percent of medical impairment.
3. Whether the Administrative Law Judge and the Full Commission erred by finding all temporary disability benefits had been paid.

VI. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On August 27, 2007, a Hearing on the Merits was conducted by Administrative Law Judge Cindy Wilson in Laurel, Mississippi. On February 26, 2008, the Administrative Judge issued an Order finding a preponderance of the evidence proved the claimant's injuries prevented him from performing the job he had at the time of his injuries. Despite

this finding, Judge Wilson only found the claimant to have sustained a "permanent partial impairment to each lower extremity of 15%." Judge Wilson did not make a finding as to the claimant's medical impairment rating.

On February 27, 2008, claimant petitioned the Mississippi Workers Compensation Commission for review. The Employer/Carrier did not file a cross-appeal.

On July 3, 2008, the Mississippi Workers Compensation Commission issued an Order affirming Judge Wilson's findings.

On July 14, 2008, the Claimant filed a Notice of Appeal to the Circuit Court of Jones County.

On March 9, 2009, Circuit Court Judge Billy Joe Landrum entered an Order affirming the decision of the Mississippi Workers Compensation Commission.

On April 3, 2009, the Claimant filed his Notice of Appeal to the Mississippi Supreme Court because the Administrative Law Judge and the Commission (1) misapplied the law by only awarding a 15% loss of use to each lower extremity, (2) failed to make a finding as to claimant's permanent medical impairment rating and (3) erred by finding the employer/carrier had provided claimant all temporary disability benefits due.

B. Statement of Facts

At the time of the hearing, the claimant was a 50-year-old male who lived in Laurel, Mississippi, with his wife, their two year old daughter Jessica and his 10-year old stepson Michael. (T.6) After graduating high school in 1975, the claimant attended Jones County Junior College and graduated with an associate's degree in electronics technology. (Id.) The claimant worked at Masonite for approximately twenty-two years (1982 through the date of his injury, Sept. 9, 2004) as an instrument technician. (T.7)

During the course of his employment at Masonite, the claimant began to experience worsening pain in his knees. (T.10)

On September 9, 2004, the claimant told his supervisor that the pain he was having in his knees would not allow him to continue climbing ladders. (Id.) The claimant's supervisor sent him to the nurse's station where he was examined by the company nurse, Lynn Mahaffey, and a physician. (Id.) The physician recommended the claimant be seen by a specialist so Ms. Mahaffey set up an appointment for the Claimant with Dr. Nowicki at Laurel Bone & Joint. (T.11)

MEDICAL TESTIMONY

Dr. Steven Nowicki

Claimant saw Dr. Nowicki on one occasion, November 13, 2004. (Exh. Cl-3) Dr. Nowicki ordered x-rays on claimant's knees and diagnosed him with patellofemoral syndrome. (Id.) Dr. Nowicki noted the claimant's condition was "definitely aggravated and/or caused by his work climbing ladders" and stated the claimant "should have a permanent ladder restriction as far as his work is concerned." (Id.) Dr. Nowicki ordered no further diagnostic testing and recommended no treatment for claimant's condition. (Id.)

Dr. Keith Melancon

Claimant subsequently requested the employer and carrier provide medical treatment with his choice of physician, Dr. Keith Melancon at Southern Bone & Joint. (Exh. Cl-6) The employer and carrier rejected this request, forcing the claimant to file a Motion to Compel asking the Commission to compel the employer and carrier to provide medical treatment with a physician of the claimant's choosing. On January 26, 2006,

the Commission granted the claimant's motion and ordered the employer and carrier to provide medical treatment to the claimant with his choice of physician, Dr. Keith Melancon. On February 13, 2006, claimant was finally able to see his chosen treating physician, Dr. Melancon, for evaluation and treatment for the knee injuries he suffered at work. Dr. Melancon diagnosed the claimant with bilateral patellafemoral chondromalacia, ordered MRI's on both of claimant's knees and instructed claimant not to return to work. (Id.)

On March 7, 2006, after reviewing the MRI results, Dr. Melancon recommended five weekly Hyalgan injections to both knees. (Id.) Claimant had injections to his right knee on March 15, March 22, March 29, April 5, April 12 and injections to his left knee on May 24, May 31, June 7, June 14 and June 21. (Id.)

Claimant continued having problems with his knees, and on July 27, 2006, Dr. Melancon injected the claimant's right knee with marcaine, lidocaine and celestone. (Id.)

On October 24, 2006, Dr. Melancon again began another series of Hyalgan injections into both of claimant's knees. (Id.) This second series of injections was completed on November 22, 2006. (Id.) At that time, Dr. Melancon ordered a Physical Work Performance Evaluation to determine claimant's ability to return to work. (Id.)

On December 7, 2006, claimant underwent a Physical Work Performance Evaluation performed by Anna Katherine Moore, PT, at ErgoScience in Hattiesburg. (Id.) The claimant participated fully in all of the tasks requested and did not self-limit in any way. (Id.) This evaluation determined that the claimant's functional abilities did not match the job description provided by Masonite. (Id.) Specifically, the claimant was

"unable to perform ladder climbing and upper range of weight required for lifting and carrying demands of the job." (Id.)

On January 2, 2007, Dr. Melancon determined the claimant had reached maximum medical improvement and released the claimant to work at a job that did not require any kneeling, crawling, squatting, stooping, stair climbing or ladder climbing. (Id.) Dr. Melancon also stated the claimant could lift up to 30 pounds on a regular basis. (Id.) Dr. Melancon assigned claimant a 37% permanent impairment rating to his right lower extremity and a 37% impairment rating to his left lower extremity and stated "[the claimant] will need a total knee arthroplasty on each knee, which costs approximately $50,000 in today's dollars." (Id.) To date, this surgery has not occurred, but the claimant continues to take Mobic and other medications on a regular basis to relieve the pain he experiences in his knees.

Dr. Kendall Blake

The medical records of Dr. Blake show that he saw the claimant on November 29, 2005 and February 13, 2007 at the request of the employer and carrier. (Exh. E/C-1) Dr. Blake testified that claimant's job climbing ladders on a daily basis at Masonite was a responsible factor in causing his bilateral patellofemoral degenerative joint disease. (Id.) Dr. Blake also testified that the claimant should do sedentary work that does not require squatting, climbing or heavy lifting. (Id.) Dr. Blake offered the opinion that the claimant's permanent medical impairment was no more than 5% to each lower extremity; however, on cross-examination Dr. Blake conceded that the assigning of a permanent impairment rating to a person with degenerative joint disease is very difficult and very subjective, particularly on a patient such as the claimant. (Id.) Dr. Blake also

admitted on cross-examination that there is no treatment that can be provided to the claimant to reverse the anatomical changes that have occurred due to the degenerative joint disease in his knees. (Id.)

In summary, all three of the physicians who saw the claimant, including two who saw the claimant at the request of the employer and carrier, testified that the claimant could not return to a job that requires climbing.

CLAIMANT'S JOB DESCRIPTION

The claimant's job description provided by Masonite and entered into evidence as **Exhibit CL-2** indicates the claimant was required to perform, *inter alia*, the following tasks as part of his employment at Masonite:

(1) climb to heights of 120 feet
(2) bend/stoop
(3) squat
(4) crawl
(5) crouch
(6) kneel
(7) balance
(8) use feet for repetitive movements in operating foot controls

Claimant testified this job description was generally accurate with the exception that he was sometimes required to climb to heights of greater than 120 feet. (T.8)

Masonite also produced a document from the claimant's personnel file which was admitted into evidence as **Exhibit CL-10** that further elaborates on the climbing requirements associated with claimant's job. In this document, Masonite states the following:

> We have a wide verity (sic) of Electrical and Instrument control devices, which are often times, located above ground level. **Therefore we require that all our E/I employees be able to climb both ladders and stairs.**
>
> When E/I personnel are assigned to Fire and Explosion protection

> equipment PM'S there is always climbing involved. The overwhelming majority of the devices are located such that ladder climbing will be required by one or more of the people assigned to the job. This particular task is performed once a quarter and involves all three dry processes and all our dust recovery systems.
>
> On a day-to-day basis it would be hard for me to associate a climbing percentage number with E/I job assignments. The climbing of ladders and stairs strictly depends on the nature of the task and where the devices are located.
>
> **Climbing is an integral part of the E/I trade and one must be able to exercise this task in order to complete a job at any given time.**

(emphasis added).

All three of the doctors who examined the claimant in this case, including the specialist hired by the Employer/Carrier to provide testimony, Dr. Blake, agreed that the claimant could not return to any job that required climbing. Masonite did not call a representative to testify at the hearing, but it admitted through its job description that climbing was "an integral part" of the claimant's job. Because of the medical restrictions, the claimant could not have returned to the job he had held for twenty years at Masonite prior to his injury.

JOB SEARCH

At the hearing, claimant testified he had been unable to locate employment despite many attempts. (T.22-24) He submitted a job search log documenting his efforts to find employment. (Exh. CL-9) Prior to being treated by Dr. Melancon, the claimant did get a commercial driver's license and worked as a truck driver trainee for Swift Transportation for several weeks and for FedEx Ground for several months; however, claimant's employment at Swift and FedEx is not relevant to the issue of claimant's permanent disability because the claimant had not yet received treatment

from Dr. Melancon at the time he was trying to perform these jobs. (T.26-28)

Once Dr. Melancon began treating the claimant, he took him off work completely until January 2, 2007, and at that time only released the claimant to perform work that did not require any kneeling, crawling, squatting, stooping, stair climbing or ladder climbing. (Exh. CL-6) At his deposition, Dr. Melancon specifically stated the claimant should not be doing any work driving a commercial truck. (Exh. CL-5) Furthermore, the physician hired by the employer and carrier, Dr. Blake, also stated at his deposition that the claimant should not be driving a truck. (Exh. E/C-1) Therefore, any work the claimant did as a truck driver prior to receiving treatment from Dr. Melancon is not relevant to a determination of the extent of his permanent disability.

VOCATIONAL REHABILITATION

Pete Mills, vocational rehabilitation expert, testified at the hearing as to some jobs in claimant's locality that were within his restrictions and had openings from time to time. (T. 52-64) However, Mr. Mills did not question the credibility of claimant's job search and admitted that Dr. Melancon's final restrictions precluded claimant from performing the substantial acts of his usual employment with Masonite. (Id.) Mr. Mills also admitted he was unable to locate any employment for the claimant in his usual occupation of instrument technician because of the permanent restrictions assigned by Dr. Melancon. (Id.)

VII. ARGUMENT

A. Proper Standard of Review is De Novo

The standard of review in a worker's compensation appeal is limited. The Court of Appeals must determine only whether the decision of the Commission is supported

by substantial evidence. ***Casino Magic v. Nelson***, 958 So.2d 224, 228(¶ 13) (Miss.Ct.App.2007) (citing ***Westmoreland v. Landmark Furniture, Inc.***, 752 So.2d 444, 447(¶ 7) (Miss.Ct.App.1999)). "The Commission sits as the ultimate finder of facts; its findings are subject to normal, deferential standards upon review." ***Id.*** (citing ***Natchez Equip. Co. v. Gibbs***, 623 So.2d 270, 273 (Miss.1993)). Because the review is limited, the Court "will only reverse the Commission's rulings where findings of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision was arbitrary and capricious." ***Id.*** (citing ***Westmoreland***, 752 So.2d at 448(¶ 8)). Though the Court is required to defer to the Commission's findings of fact, it should review the Commission's application of the law de novo. ***Univ. of Miss. Med. Ctr. v. Smith***, 909 So.2d 1209, 1218(¶ 30) (Miss.Ct.App.2005) (citing ***ABC Mfg. v. Doyle***, 749 So.2d 43, 45(¶ 10) (Miss.1999)). "Certainly the legal affect [sic] of the evidence, and the ultimate conclusions drawn by an administrative tribunal from the facts ... are questions of law, especially where the facts are undisputed or the overwhelming evidence reflects them. The question depends then upon application of established legal principles to such facts." ***Cent. Elec. Power Ass'n v. Hicks,*** 236 Miss. 378, 388-89, 110 So.2d 351, 356 (1959).

B. The Administrative Judge and the Commission Erred By Awarding Claimant Only Fifteen Percent (15%) Loss Of Use To Each Lower Extremity After Finding The Evidence Proved Claimant's Work-related Injuries Prevented Him From Performing The Job He Had Held For Over Twenty Years.

In a scheduled member case, if a claimant presents evidence that he is unable to continue in the position that he held at the time he suffered an injury, that evidence creates a rebuttable presumption that the claimant suffered a total occupational loss of the scheduled member. ***Walker v. Delta Steel Bldgs.***, 878 So.2d 113(¶ 9)

(Miss.Ct.App.2003). Put differently, if a partial impairment of a scheduled-member causes the worker to be unable to perform substantial acts required in the worker's usual occupation, benefits for the permanent injury are not limited to the proportion of medical impairment of the scheduled-member. Instead, the extent of loss of use of the member in the worker's usual occupation is the greatest factor in deciding whether the worker has lost all or only part of the use of the member. The inability to perform the substantial work activity demonstrates that the actual occupational effect of this partial impairment has substantially the same effect as total loss of use of the member. ***McGowan v. Orleans Furniture, Inc.***, 586 So.2d 163 (Miss. 1991); ***Piggly Wiggly v. Houston***, 464 So.2d 510 (Miss. 1985); ***Smith v. Jackson Const. Co.***, 607 So.2d 1119 (Miss. 1992); ***Bill Williams Feed Service v. Mangum***, 183 So.2d 917 (Miss. 1966); ***McManus v. Southern United Ice Co.***, 138 So. 2d 899 (1962); ***Tyler v. Oden Const. Co.***, 130 So. 2d 552 (1961).

The burden is on the claimant to establish that the occupational impact of the partial impairment is greater than the proportion of medical impairment. For the claimant to meet this burden, the Mississippi Supreme Court has stated the test 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). In ***McGowan***, the court reversed the Commission's award for 40% industrial loss of use of the leg and ruled as a matter of law that McGowan had a 100% industrial loss of use of the leg because he could no longer perform "substantial acts required of him in the performance of his job." ***Id.*** In this case, the "Opinion of the Administrative Judge", which was adopted in its entirety by the Full Commission, correctly found that the claimant "could not perform the job he was performing at the time of his injury." This finding should have ended the

inquiry, and the Administrative Judge and Commission should have applied the law set forth in ***McGowan*** and awarded the claimant 100% loss of use to each of his lower extremities.

Instead, the Administrative Judge and Commission erred by awarding the claimant only 15% permanent partial impairment. Neither the Administrative Judge nor the Commission cite any case law upon which to base their 15% award. The Administrative Judge incorrectly bases her opinion on "claimant's post-injury employment which demonstrates his ability to obtain employment" and "claimant's failure to conduct an adequate job search." First, the post-injury employment the claimant had was pre-treatment and pre-maximum medical improvement. The claimant has not been able to earn any wages after he began treatment with Dr. Melancon. Dr. Melancon specifically instructed the claimant not to return to his previous employment driving trucks because of the damage it would cause to his knees.

As for conducting a job search, the clamant has conducted a thorough job search and has been unable to locate employment as evidenced by the job search logs and testimony offered by the claimant at the hearing. The employer/carrier's vocational rehabilitation consultant testified he could find no employment for the claimant as an instrument technician due to the claimant's restrictions.

Furthermore, the Administrative Judge and Commission misapplied the law by even analyzing whether the claimant had conducted an adequate job search. It is not necessary for a claimant seeking benefits for a schedule member injury to prove that he looked for work outside of his pre-injury employment. This analysis is simply an incorrect application of the law and resulted in the claimant being denied benefits equal to a total

loss of use of his lower extremities. ***Levi Strauss & Co. vs. Studaway***, 930 So.2d 481, ¶17 (Miss.Ct.App. 2006).

Prior to his injury, the claimant worked at Masonite as an instrument technician for twenty two years. There is simply no dispute in this case that the claimant's usual occupation is instrument technician. As discussed previously, Exhibit CL-2 is a job description produced by Masonite setting forth the job duties of an instrument technician. All of the physicians who have examined the claimant, including the physician hired by Masonite (Dr. Kendall Blake) have opined the claimant should not do any climbing. Thus, the claimant's injuries have clearly prevented him from performing substantial acts required of him in his usual employment as an instrument technician. This should have been an easy decision for the Administrative Judge and the Commission that the claimant had sustained a total occupational loss of use of both lower extremities.

Professor John Bradley and Administrative Judge Linda Thompson explained the current law regarding permanent partial disability benefits for loss of use of a scheduled-member in the following way in §5:47 of their Mississippi Workers' Compensation treatise:

> A test for "usual employment" should respect the loss-of-use context by taking into account age, training, education, experience, and **ability to continue the same work, but without jumping into the 450-week, "incapacity-to-earn" definition which requires showing loss of wage-earning capacity.**

(emphasis added.)

The Administrative Judge's Opinion and the Commission's Decision incorrectly applied Mississippi case law by placing a burden of proof on the claimant that he prove a total loss of wage-earning capacity in order to receive benefits for a total loss of use of a scheduled-member. This is simply not the state of the law in Mississippi, and the

Commission's Decision should be reversed. This court should apply the law in ***McGowan*** and its progeny, and award the claimant 100% loss of use for each lower extremity.

C. The Administrative Judge and the Full Commission erred by failing to make a finding as to the claimant's percent of medical impairment.

As stated previously, when an employee suffers an injury to a scheduled member that results in a permanent partial disability to that member, he is entitled to the greater amount of compensation determined under two alternate theories of computation." ***Hollingsworth v. I.C. Isaacs and Co.,*** 725 So.2d 251(¶ 10) (Miss.Ct.App.1998). First, a determination of functional disability of the member must be made. *Id.* Then, alternatively, "an industrial disability must be determined that is based, not just on the medical evidence, but upon evidence of how the limited function of the member affects the employee's ability to perform those duties normally associated with the claimant's job." ***Hollingsworth,*** 725 So.2d at (¶ 10). Stated differently, 'medical' disability is the equivalent of functional disability and relates to actual physical impairment. After reviewing the results of the functional capacity evaluation, Dr. Melancon determined the claimant's medical impairment to be 37% to each lower extremity. Dr. Blake, the physician hired by the Employer/Carrier to perform a medical examination and provide testimony, admitted he found it difficult to assign an impairment rating, but ultimately assigned a 5% permanent disability rating to each of claimant's lower extremity.

'Industrial' disability is the functional or medical disability as it affects the claimant's ability to perform the duties of employment. ***Walker Mfg. Co. v. Butler,*** 740 So.2d 315(¶ 44) (Miss.Ct.App.1998) (quoting ***Robinson v. Packard Elec. Div., General Motors Corp.,*** 523 So.2d 329, 331 (Miss.1988). Because the claimant is

entitled to the higher of these two alternate theories of computation, the Administrative Judge and the Full Commission should have made a finding as to the claimant's percent of medical impairment.

In most cases, the percent of medical impairment is not vital to the analysis of how many weeks of permanent partial disability benefits are payable because in most cases the Administrative Judge and the Commission find an occupational disability that is equal to or exceeds the medical impairment rating assigned by the treating physician. However, in this case where the finding of 15% occupational disability is significantly less than the 37% medical impairment rating assigned by Dr. Melancon, the Judge and the Commission should have made a finding adopting Dr. Melancon's 37% impairment rating. If this Court determines the claimant's occupational disability is less than 37%, then it should adopt the medical impairment rating of 37% assigned by the claimant's treating physician of choice, Dr. Melancon, and order the Employer/Carrier to pay benefits commensurate with a 37% permanent partial disability.

D. The Administrative Judge and the Full Commission erred by finding all temporary disability benefits had been paid.

The Administrative Judge and the Full Commission correctly found the claimant reached maximum medical improvement on January 2, 2007 for the injuries he sustained on September 9, 2004, but inexplicably found that all temporary disability benefits had been paid despite the fact that it was stipulated the employer and carrier only paid temporary disability from September 14, 2004 April 10, 2005 and from February 13, 2006 through February 11, 2007. The Administrative Judge and the Full Commission made no finding that the claimant ever reached maximum medical improvement at any time prior to January 2, 2007. The employer and carrier have not

appealed the Commission's finding that the claimant's sole date of maximum medical improvement was January 2, 2007. Therefore, the employer and carrier should be ordered to pay temporary disability benefits from the date of claimant's injury through the date of claimant's maximum medical improvement with proper credit for all monies, wages and benefits previously paid. Miss. Code Ann. §71-3-17(b).

VIII. CONCLUSION

Based on the foregoing, 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.

Alternatively, if the Court of Appeals finds the Claimant has sustained less than a 37% loss of use to his left and right lower extremities, Claimant request the Court adopt the finding of his chosen treating physician that he has sustained a percentage of medical impairment of 37% to each lower extremity.

Respectfully submitted, this the 10th day of July A.D., 2009.

NORMAN RAY SMITH, Claimant

By: _____

CRAIG N. ORR {MB[redacted]
RYAN J. MITCHELL {M[redacted]
GHOLSON BURSON ENTREKIN & ORR, P.A.
POST OFFICE BOX 1289
LAUREL, MISSISSIPPI 39441-1289
TELEPHONE: (601) 649-4440
FACSIMILE: (601) 649-4441

ATTORNEY FOR CLAIMANT

* * *

CERTIFICATE OF SERVICE

I, Ryan J. Mitchell, do hereby certify that I have this day filed the above and foregoing **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 10th day of July, 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 Appellant's 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
Post Office Box 249
Jackson, MS 39205-0249

Said Appellant Brief was mailed, postage prepaid, on the 10th day of July, 2009.

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