IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-TS-01284

MARTHA KAY STANFORD **APPELLANT**

VS

V.F. JEANSWEAR, LP AND
FIDELITY & GUARANTY INSURANCE COMPANY **APPELLEES**

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 Justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. William O. Rutledge III and Valarie B. Hancock of Rutledge, Davis and Harris, PLLC, Counsel for Martha Kay Stanford, Appellant;

2. M. Reed Martz, Freeland Shull, PLLC Counsel for Appellants;

3. Honorable Andrew K. Howworth,
Circuit Court Judge;

4. Honorable Virginia Mounger,
Administrative Law Judge

Respectfully submitted, this the 10th day of ~~February 18~~ March, 2011.

WILLIAM O. RUTLEDGE III,

ATTORNEY FOR
MARTHA KAY STANFORD, APPELLANT

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STATEMENT OF THE ISSUES

1. The ALJ showed a clear bias against the claimant by ignoring factual medical evidence that showed a work related injury occurred. The ALJ should have placed more weight on the factual medical evidence that was given by the Claimant's own treating neuro-surgeon rather than an unsubstantiated opinion of a physician who only saw the Claimant once.

3. The ALJ showed a clear bias in favor of the Employer and Carrier by her treatment of the parties' witnesses. The Claimant called five witnesses, all of whom were under subpoena. Several of these witnesses were completely disinterested and had no interest in the outcome of the case. Yet, the ALJ placed much greater weight on the testimony of the two biased witnesses who were called by the Employer and Carrier, including a manager as well as an employee who was not under subpoena and who had been ordered to appear and testify by her employer (and was likely being paid for her time).

4. The Commission acted in an arbitrary and capricious manner in questioning the Claimant's credibility with no basis.

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ORAL ARGUMENT REQUESTED

The Appellant herewith requests oral argument on the issues at hand before this Court.

Respectfully submitted, this the 10th day of ~~February~~ March, 2011.

WILLIAM O. RUTLEDGE III,

ATTORNEY FOR
MARTHA KAY STANFORD, APPELLANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
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APPELLANT'S BRIEF OF LAW AND FACT
ORAL ARGUMENT REQUESTED

COMES NOW, the Appellant, Martha Kay Stanford, by and through counsel, and submits her Appeal Brief to the Court as follows. Appellant requests **oral argument**.

PREAMBLE

The law in Mississippi, as established by the Supreme Court is that:

> **"undisputed testimony of a claimant which is not so unreasonable as to be unbelievable, given the factual setting of the claim, generally ought to be accepted as true."**

White v. Superior Prods., Inc., 515 So.2d 924, 927 (Miss. 1987). Such testimony may be acted upon even when disputed by other witnesses, and if undisputed and not untrustworthy, **must be taken as conclusive proof of the fact**. Vardaman S. Dunn, *Mississippi Workmen's Compensation* § 264 (3d Ed. 1982)(Emphasis added).

In the case *sub judice*, Claimant's testimony that she was injured while working for the Employer/Carrier was not unreasonable or unbelievable. **The Employer/Carrier never showed any evidence that Stanford was injured in any other manner**. There is no proof or evidence whatsoever that Martha Kay Stanford was not injured while at work as a truck driver for her employer. To the contrary, there is more than ample evidence, including that of eyewitnesses that Stanford was injured while performing her duties for her employer. Several witnesses testified

concerning Stanford's on-the-job injury or her condition before and after the injury. Not one witness testified Stanford was not injured while working.

The Commission's decision was based on the Administrative Law Judge's opinion, which it affirmed, questioning the credibility of Stanford rather than the proven facts. Therefore, "the Commission" and "ALJ" will be used interchangeably in this brief.

The ALJ relied solely on circumstantial evidence and one biased witness who admitted she was "required" to testify at the hearing by the Employer. There is also one incorrectly answered interrogatory response prepared by counsel for Stanford which in part slightly conflicts with Stanford's sworn testimony at her deposition and hearing. That conflict does not go to the essence of the claim or the injury itself and the mistake was explained to the Commission..

The findings in this case are simply contrary to all the facts, biased, and unable to withstand the substantial basis test. Stanford did, in fact, sustain an injury on the job as she claims. All of the evidence on the part of the Employer and Carrier was circumstantial and biased while all of the evidence presented by the Claimant was factual. In placing all of the weight on the circumstantial evidence and biased testimony, and none on the factual evidence, the ALJ's decision is flawed and does not come close to following the intent of the Act.

COURSE OF PROCEEDINGS AND DISPOSITION

Claimant filed her Petition to Controvert with the Mississippi Workers Compensation Commission on or about January 4, 2007. (Record Excerpt, Page 1). A hearing on the matter was held before Administrative Law Judge Virginia Mounger on March 31, 2009 with an order entered on June 16, 2009. (R.E. 3). The Claimant appealed the ALJ's unfavorable ruling to the Full Commission. The Full Commission entered an order upholding the ALJ's decision on November 18, 2009, which was then appealed to the Circuit Court of Union County. (R.E. 22). The Circuit Court Judge entered an opinion on July 28, 2010, stating only that the Commission's findings were based on

substantial evidence and were not arbitrary and capricious. (R.E.72). The Claimant then appealed that decision to this Court on or about August 4, 2010. (R.E. 73).

STATEMENT OF THE FACTS

Martha Stanford was employed as an over-the-road team truck driver when she was injured. She has a 7th grade education, received a GED, and attended vocational training in interior decoration as a young woman. (ALJ Order, P. 3, Hearing Record, P.19 (R.E. 5). All of Stanford's relevant employment has been as an over-the-road truck driver. (Id.). She was employed as such by Defendant V.F. Jeanswear for 14 years prior to her injury, but has since been terminated due to being unable to return to work. (Hearing Transcript, 12:29)(R.E. 24).

Late in the evening of February 7, 2006, Martha Stanford was pulling into a truck scales location in the suburbs of New Orleans with her husband William Stanford, who was her team driver. Stanford was ill and decided to rest until morning. After parking the truck, Stanford was exiting the driver's seat to enter the sleeper area, where her husband was, when she tripped over a cooler located between the truck's seats. This resulted in Stanford's falling backward into the sleeper of the truck and injuring herself. (ALJ Order, P. 3)(R.E. 5).

Stanford's fall knocked her unconscious. She was revived by her husband's putting cold water on her face. After she regained consciousness, she went to lay down in the sleeper to rest until morning. (ALJ Order, P.4)(R.E. 6). Prior to sleeping, Stanford attempted to contact her dispatcher to notify him of her injury, but was unable to reach anyone because of the time of night. Even though there was no absolute requirement that she even had to call her dispatcher, Stanford called Tom Swinton, the lead dispatcher, the next morning to report she had fallen and was injured and needed to return home to seek medical treatment. (Id.).

Swinton instructed Stanford to contact the terminal manager, Keith Horton, to report her injury. Horton arranged for a trip back for Mrs. Stanford's team partner, her spouse. They proceeded

directly back to her home terminal in Saltillo, Mississippi, as instructed, possibly dropping a load in Gulfport which was on the route home. (Id.). During the trip home, Stanford placed a phone call to two of her sisters and a friend to inform them about her injury. (Id.).

Upon returning home on February 8, 2006, Stanford went to Dr. Allie Prater in New Albany for treatment of her injuries. Dr. Prater's clinic was full that day and the physicians were unable to treat everyone that arrived. (See Motion to Admit Dr. Jason Dees' Affidavit as New Evidence, Attached as Exhibit "A"). Upon orders of the physicians, the clinic nurses sent everyone home, including Stanford, who returned the next day, February 9, 2006, and was treated by Dr. Jason Dees at the same clinic.[1]

Since the accident, Stanford has undergone four surgeries: a cervical spine fusion, a second back surgery, carpal tunnel surgery, and a procedure to remove infection which developed following the carpal tunnel surgery. (ALJ Order, P. 5)(R.E. 7). Prior to the injury at issue, Stanford never had any significant medical problems nor had she filed a workers' compensation claim.

Stanford has been unable to return to work since the date of her injury and is now unable to work as a truck driver because of permanent restrictions against lifting and/or bending. (ALJ Order, P. 4)(R.E. 6). She is unaware of any work she would be able to perform even though she would like to work if she were able and has applied for work at six or more places but has not been able to find employment. (ALJ Order, P. 5)(R.E. 7).

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[1] Claimant can petition the Court to allow new evidence at any time up to and including a final appeal in workers compensation cases. Should this Court hold that the doctor's affidavit is not admissible as new evidence, it is still within its authority to take legal notice of the fact that Claimant went to the doctor on the first day of her return, but was not allowed to see him until the next day. This was a critical point in the ALJ's decision and equity and the spirit of the Workers' Compensation Act allows this for a court seeking the truth.

A hearing was held before Administrative Law Judge Virginia Mounger on March 31, 2009, concerning the question as to whether or not Stanford suffered a work-related injury, and if so, the existence, nature and extent of disability that could be attributed to that injury. (ALJ Order, P. 1)(R.E. 3). The fact, however, that so many other irrelevant issues were included in the order shows clear bias on the ALJ's behalf. Even though the ALJ stated **the "one issue" to be considered was whether Stanford suffered a work-related injury**, she showed a total lack of regard for the very issue she identified, and hardly addressed that "one issue."

The ALJ and the Commission found Stanford to be not credible without specifying any reason, or identifying any proof they found to be not credible. The ruling by the ALJ and the Commission was clearly erroneous, arbitrary and capricious, with no substantial basis, and in violation of the case law in Mississippi. *Adolphe Lafont USA, Inc. v. Ayers,* 958 So. 2d 833 (Miss. Ct. App. 2007).

II. SUMMARY OF THE ARGUMENT

This case is on appeal before the Court solely on the question of whether a work related injury occurred. The Claimant met her burden of proof in showing that there was a work related injury through factual evidence with unbiased witness testimony along with medical testimony from the Claimant's treating neuro-surgeon. The Administrative Law Judge showed clear bias in ignoring the Claimant's proof and by placing great weight upon that of the Employer and Carrier when the Employer and Carrier's evidence consisted wholly of circumstantial evidence and testimony of their own employees who were under orders to appear and testify rather than under subpoena.

The ALJ acted in an arbitrary and capricious manner in finding no work injury existed. There was no substantial basis nor supporting facts for her decision, only weak and biased circumstantial evidence. Appellees previously set forth more than ten different points to be considered, all of which were either

non-probative, biased or innuendo only. Appellant asks this court to consider the following points, all of which are fact-based only:

- In addition to her other witnesses, Stanford put on two completely disinterested and unbiased witnesses to corroborate her case establishing a work injury; the Employer/Carrier put on only one manager for the Employer and an employee who was "ordered" to testify for the Employer/Carrier;

- Stanford's work injury was substantiated by an eyewitness.

- The only medical proof, to a reasonable degree of medical certainty, was by Dr. Glen Crosby, Stanford's primary treating physician, whose opinion was that Stanford sustained a work injury as she claims. He also opined that Stanford is truthful.

- There was no explanation from the Employer/Carrier for how Stanford could have sustained her injuries other than from work as she testified, and no testimony at all of an intervening injury or injury other than as Stanford testified.

- The ALJ and Commission never stated any basis for disputing Stanford's work injury other than they did not believe her.

- The ALJ and Commission completely misquoted Dr. Johnny Mitias about his being told by Stanford that she did not have a work injury, and Dr. Mitias never testified. No statement by him was qualified as being to a reasonable degree of medical certainty.

- Stanford's live testimony in her deposition and at her hearing were 100% consistent as to how her work injury happened. Only one part of one interrogatory prepared by her attorney was in conflict as to how Stanford's work injury happened, yet the ALJ and Commission took as most probative that one small conflict.

- Although the ALJ and Commission found Stanford to be less than credible, there was never any finding of any possibility of an injury that was contrary to her testimony.

- Stanford was working with no restrictions until the date of, and at the time of, her work injury, and has not worked one day since. The ALJ and Commission had no explanation for this, and never commented on it.

- There is no example in the opinion of the ALJ and Commission where Stanford is found to be telling less than the truth although she was found to be less than credible.

- The ALJ and Commission attempted to offer their own medical proof and opinions in place of that of Dr. Glen Crosby, Stanford's primary treating neuro-surgeon. This point alone clearly shows bias, and that their opinion was arbitrary and capricious.

Even with all of these occurrences pointed out, the Circuit Court stated only that the Commission's findings were based on substantial evidence and were not arbitrary and capricious. There

was no finding of fact or any explanation at all about where this substantial evidence could be found. To repeat, there has **never** been any finding of specific substantial evidence.

Regardless of how many points have been briefed and argued, the ALJ only listed one issue in her initial decision - **whether or not Claimant suffered a work injury**. After considering clear factual evidence that there was, indeed, a work injury, the ALJ should have found in favor of the Claimant. Instead, the ALJ exhibited various occurrences of bias when questioning the Claimant's credibility. The bias against the Claimant led to an arbitrary and capricious decision with no substantial basis. There was, in fact, no basis for the ALJ to find there was not a work related injury.

ARGUMENT

A. Standard of Review.

This Court reviews the decision of the Commission, not that of the circuit court. *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991) (quoting Vardaman S. Dunn, Mississippi Workmen's Compensation § 286 n.39 (1982) ("While appeals to the Supreme Court are technically from the decision of the Circuit Court, the decision of the Commission is that which is actually under review for all practical purposes.")).

In reviewing an agency's rulings, the Court must consider four rules. The agency ruling must remain undisturbed unless the ruling (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional or statutory rights. *Public Employees' Ret. Sys. v. Dearman*, 846 So. 2d 1014, 1018 (Miss. 2003) (quoting *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999).

Review is limited to a determination of whether or not the decision of the Commission is supported by substantial evidence. The Court has the "substantial evidence standard," as follows:

> Substantial evidence . . . means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as

> reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

Id. (Citing *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971)(Quoting *Johnson v. Ferguson*, 435 So. 2d 1191 (Miss. 1983)); *Babcock & Wilcox Co. v. McClain*, 149 So. 2d 523 (Miss. 1963); *State Oil & Gas Bd. v. Miss. Mineral & Royalty Owners Ass'n*, 258 So. 2d 767 (Miss. 1971)).

Where no evidence or only a scintilla of evidence supports a Worker's Compensation Commission decision, the courts have not hesitated to reverse. *Metal Trims Industries v. Stovall*, 562 So. 2d 1293, 1297 (Miss. 1990); *Universal Manufacturing Co. v. Barlow*, 260 So.2d 827 (Miss. 1972). Where the matter may be an even question, the Mississippi Supreme Court has found and will likely continue to find in favor of the injured worker. *Metal Trims Industries v. Stovall*, 562 So. 2d 1293, 1297 (Miss. 1990); *Jackson v. Bailey*, 234 Miss. 697, 107 So.2d 593 (1959); *Big '2' Engine Rebuilders v. Freeman*, 379 So.2d 888 (Miss. 1980).

The second rule states that a reviewing court may reverse if the Commission's order was "arbitrary or capricious." *Public Employees' Ret. Sys. v. Dearman*, 846 So. 2d 1014, 1018 (Miss. 2003). To some extent, this test overlaps the substantial-evidence standard. The Commission decision must be supported by substantial evidence, rather than arbitrary and capricious. *Walker Mfg.*, 577 So. 2d at 1247; *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1261, 1264 (Miss. 1990); *Georgia-Pacific Corp. v. Veal*, 484 So. 2d 1025, 1027-28 (Miss. 1986). The Court has explained, "'If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious.'" *Dearman*, 846 So. 2d at 1019 (quoting *Fulce v. Pub. Employees' Ret. Sys.*, 759 So. 2d 401, 404 (Miss. 2000)).

The definitions of arbitrary and capricious are listed below:

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending on the will alone, -

> absolute in power, tyrannical, despotic, non-rational, -implying either a lack of understanding of or disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without a reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles...

City of Petal v. Dixie Peanut Co., 2008 WL 2098031 (Miss.App.) at *2 (Citing *Harrison County Bd. v. Carlo Corp.*, 833 So.2d 582, 583 (Miss. 2002) (Quoting *McGowan v. Miss. State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992)). Black's Law Dictionary defines arbitrary and capricious as "Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle."

The third rule involves questions of law when determining whether the Commission exceeded its authority. A Commission decision can be overturned for an error of law. *Walker Mfg Co. v. Cantrell*, 577 So.2d 1243, 1247 (Miss. 1991); V. Dunn, Mississippi Workmen's Compensation § 272 (3d ed. 1982), or an unsupportable finding of fact, *Metal Trims Industries v. Stovall*, 562 So.2d 1293, 1297 (Miss. 1990). If prejudicial error is found, the matter shall be reversed and the circuit court shall enter such judgment as the Commission should have entered. *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991)(Citing Mississippi Code Annotated § 71-3-51 (1972)).

The fourth rule concerns constitutional and statutory rights. The Court can review alleged violations of rights under both the state and federal constitutions. *Warren v. Miss. Workers' Comp. Comm'n*, 700 So. 2d 608 (Miss. 1997); *Georgia-Pacific Corp. v. McLaurin*, 370 So. 2d 1359 (Miss. 1979); *Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell*, 216 Miss. 358, 62 So. 2d 383 (1953). The Court uses a de novo standard of review when passing on questions of law. *Tupelo Pub. Sch. Dist. v. Parker*, 912 So. 2d 1070 (Miss. Ct. App. 2005)(Citing *Ellis v. Anderson Tully Co.*, 727 So. 2d 716, 718 (Miss. 1998)).

1. Medical evidence and testimony of witnesses show that a work related injury occurred and there is no proof or evidence to the contrary.

The Mississippi Supreme Court has held disability need not be proved by medical testimony as long as there is medical testimony which will, at least, support a finding of disability. *Frito-Lay, Inc. v. Leatherwood*, 908 So. 2d 175 (Miss. Ct. App. 2005). Even though testimony in a workers' compensation case may be somewhat ambiguous as to causal connection between an employment-related injury and a claimed disability, all that is necessary is that the medical findings support a causal connection. *Moore v. Indep. Life & Accident Ins. Co.*, 788 So. 2d 106 (Miss. Ct. App. 2001). Dr. Crosby's record absolutely supports a connection between Stanford's accident and her injury.

One of the main issues the ALJ expressed concerning Stanford's credibility was that Stanford was unsure of the date she saw the doctor after her injury. As shown in Exhibit "A," Mrs. Stanford went to the doctor on February 8, 2006 and was unable to receive treatment due to the number of patients that were already there. She was sent home by Dr. Jason Dees and returned the next day and saw Dr. Al Prater. (Exhibit "A").

Even though Dr. Prater's records do not mention the accident was work related, this does not mean Stanford intentionally withheld information from the doctor. Neither does it mean the injury was not work related. Even had she discussed the cause of her injury, there is no guarantee there would be mention of this in the doctor's records. Requiring otherwise defeats any workers' compensation claim where the claimant does not specifically explain to the claimant's initial treating physician that he or she was hurt on the job. What claimant can guarantee a physician will put that information into his records regardless?

It is quite understandable that, after being knocked unconscious and seeking medical treatment, only to be sent home until the next day, Mrs. Stanford was not likely to think of explaining about a work related injury to doctors who were already busy. It is also very probable she could have

informed the doctors' staff as to what happened when she appeared the first time and was sent home. She is not required to offer this information if not asked, and after the initial visit, there would be an even lesser likelihood of the nature of the accident's being mentioned in subsequent visits.

The medical records in this case do not contradict Stanford's claims of a work related injury. In fact, they support the causal connection between her employment and her injury. None of the doctors list any source other than a work related accident for Stanford's injuries. Had the physicians **asked** Stanford how she hurt herself, they would obviously have put it in their records if something else had caused the injuries. **The records simply do not list the source of injury at all.** This fact alone supports Stanford's never saying her injuries were not work related.

Dr. Glenn Crosby, a board-certified neurosurgeon and treating physician for Stanford, stated he believed Mrs. Stanford's complaints to be genuine. (Deposition of Glenn Crosby 9:6-11)(R.E. 50). When Dr. Crosby was asked for his professional and medical opinion as to the causation of Mrs. Stanford's condition, he replied, "I feel it was related to the fall she had when she fell back in the cab and struck her head and back on the cooler." (Id. at 9:17-10:1)(R.E. 50).

He further testified that a fall of the nature reported by Mrs. Stanford would be consistent with the problems for which he was treating her. (Id. at 10:2-4)(R.E. 51). Dr. Crosby also stated he had no reason whatsoever to suspect Mrs. Stanford was injured in any way other than in a work-related injury in her truck. (Id. at 35:20-24.)(R.E. 59). Due to the injury, Dr. Crosby believed Stanford would have a permanent impairment. (Id. at 10:17-18)(R.E. 51).

Even though the Employer denied any injury ever happened and denied knowledge of any such injury, he never could explain how Stanford was fine before she left on her truck trip, working with no restrictions, and was injured when she returned. (Hearing Testimony, 95:15-25)(R.E. 33). Employer has **never** established or produced **any** records or evidence of another injury that might

have caused Stanford's condition. Defendants offer nothing other than circumstantial evidence or implications with no factual basis.

The Employer went on to contend that, if there was an injury at all, it was slow in developing over a length of time, and would not have been caused by an accident/injury. This is totally irrelevant, and the Employer/Carrier should not have been allowed to offer its own unprofessional opinion as medical proof which the ALJ accepted incorrectly. When considering a hypothetical identical to Stanford's fact pattern, Dr. Crosby stated the injury would have accelerated and aggravated any pre-existing condition. (Dr. Crosby Deposition at 16:15-25) (R.E. 57).

Stanford was working at the time of her injury with zero restrictions. The fact that Stanford had no impairment rating or restrictions indicates she had no loss of wage-earning capacity prior to her injury. The Employer and Carrier failed to produce any records of any prior injuries or restrictions, and the fact that Stanford was approved to drive on the date of her injury clearly indicates she was not impaired at the time. Stanford left the Employer's terminal in good health. She returned injured, unable to work, and in need of surgery and has not worked since. No evidence has been produced to dispute this or to show how Claimant could have otherwise been injured, other than complete conjecture which the judge erred in crediting as evidence.

Additionally, Stanford had an eye witness. The Commission discredited William Stanford's testimony because he only saw the last part of Claimant's fall because he was lying down in the sleeper section of the truck. It is irrelevant how the fall began when an eye witness testified the fall occurred and saw the Claimant land, strike her head, and pass out. (Hearing Testimony 98:16-24)(R.E.35).

The ALJ misquoted Dr. Mitias' medical records by stating that his records say the Claimant "expressly denied" an injury. This is incorrect and complete evidence of bias. The records state the condition was not caused by an injury, but they do **NOT** say Stanford made this statement. Why

would the ALJ make such a blatant error by misquoting a medical doctor? This is merely one doctor's conjecture, who saw Stanford only one time. No basis was given for Mitias's opinion and the Employer/Carrier did not take his deposition, which they could have done.

The Claimant has clearly shown that Stanford gave notice of her injury to the Employer/ Carrier. No evidence has been presented that shows the Employer/Carrier did not have this knowledge other than their unabashed denials without proof. This was easy for the Employer/Carrier to claim after they destroyed any records that could show they received notice of the injury, a classic example of spoliation. (Horton Deposition: 169:9-18).

The Commission is not within its authority in assuming Stanford's injury was **not** work related simply because no one labeled it as such. Stanford met her requirement of showing she suffered an injury, while at work, under the employment of the Employer/Carrier. This, in and of itself, should have resolved the entire question posed by the ALJ of whether a work related injury occurred. Anything else illustrates bias.

2. <u>The ALJ showed clear bias against the Claimant and in favor of the Employer/ Carrier throughout her decision.</u>

When bias on the part of the ALJ is shown, the question of credibility must be determined in favor of the Claimant. *Barham v. Klumb Forest Products Center, Inc.,* 453 So.2d 1300, 1304 (Miss. 1984); *Reichhold Chemical, Inc. v. Sprankle,* 503 So.2d 799, 802 (Miss. 1987); *Miller Transporters, Inc. v. Guthrie,* 554 So.2d 917, 918 (Miss. 1989)*; Adolphe Lafont USA, Inc. v. Ayers,* 958 So.2d 833, 839 (Miss. Ct. App. 2007)*; Frito-Lay, Inc. v. Leatherwood,* 908 So.2d 175, 179 (Miss. Ct. App. 2005).

The Commission overreached while trying to justify the ALJ's finding that Stanford was not credible. At no point did the Commission show any untruth or deception on the part of Stanford. Each and every point that was used to try to defeat Stanford's credibility could be and, in fact, was easily explained.

The injury occurred three years prior to the hearing, and Stanford was knocked unconscious when she fell. Yet, because Claimant was somewhat confused on a few points, the Commission decided to disregard her entire testimony as not credible and place all of its faith in the Employer and Carrier instead.

One indication of the Commission's bias was in giving such a great weight to Dr. Mitias' medical records. The Commission incorrectly took Dr. Mitias' unsubstantiated opinion as to possible causation and used it to put words into the mouth of the Claimant. (Medical Record of Dr. Johnny Mitias)(R.E. 61). The records never once stated the Claimant herself said the injury was not work related as the ALJ claimed.

Employer/Carrier never showed a basis for Mitias' opinion. There was no evidence Mitias conducted tests or x-rays and they did not present any history of treatment or statements given to him. Even though Dr. Mitias' statement was never shown to be anything other than his personal opinion, and not to a reasonable degree of medical certainty, the Commission still based a large part of its decision on that misreading of the records of a physician who only saw the Claimant one time.

On the other hand, Dr. Glenn Crosby, a board certified neuro-surgeon was Stanford's primary treating physician and surgeon. His testimony substantiated everything Stanford contended in her claim. The Commission's actions, in crediting an unsubstantiated opinion of a physician who saw the Claimant once and disregarding the testimony of her highly qualified, treating physician, where testimony was to a reasonable degree of medical certainty, shows clear prejudicial bias.

The Commission was concerned about the lack of mention in the medical records that the injury was work related. It is not necessary that a physician clearly identify the injury as work related in his or her records if it is otherwise shown to be work related, and it is certainly not an injured Claimant's duty to instruct a physician what information to include in his records. Dr. Crosby is qualified to give his opinion on whether Stanford's personal activities on a cruise were in excess of

what was medically reasonable for her condition. The ALJ was not, nor is the Employer/Carrier who had zero medical proof to support them.

Regardless of the ALJ's opinion and bias against Stanford, there was no question about Stanford's surgeries and Dr. Crosby's opinions. The ALJ ruled against Stanford based solely on credibility stating such things in the Order as, "The overwhelming weight of the medical evidence is remarkable in its uniformity that no work injury was reported until well over two years after the date of injury...." This is a mis-characterization of the evidence.

There is no mention of Stanford's making such a report in the records, but a lack of evidence does not prove the existence, or lack thereof, of information shared verbally. Dr. Crosby was treating Martha Stanford for what he understood to be a work injury.

The ALJ stresses that Dr. Crosby said if Stanford's medical history was false, his opinion "might not" be the same while conveniently ignoring Dr. Crosby's testimony that he **had no reason to doubt** Stanford's history as told to him by Stanford herself and found her to be truthful. (Dr. Crosby Deposition, 35:20-24)(R.E. 59). Unlike Dr. Mitias' out-of-the-blue statement of opinion, Dr. Crosby's opinion was based upon a history given to him by Stanford as well as various tests that had been performed. Dr. Crosby's statements are all within a reasonable degree of medical certainty, unlike Mitias, and should have been credited by the ALJ.

The ALJ goes on to state that reporting a work-related injury to the first medical provider after the injury occurs is crucial to the claim and absence of same is probative to a great extent. (ALJ Order, P. 16)(R.E. 18). The ALJ failed to cite any authority in support of this statement which makes it purely non-binding *dicta* upon which an opinion should never be based. Where did she come up with such a statement with no basis?

The legal requirements are to report to the employer. There is no requirement that Stanford must report her injuries to the physician as work-related. If a Claimant is not asked, he or she is not

required to report the cause of an injury. In fact, the Court in *Short v. Wilson Meat House, LLC* held it is not even necessary for a Claimant to report to the Employer that a "work related" injury occurred if the Employer has reason to know the Claimant has suffered an injury. 2009 Miss. App. LEXIS 333 (reversed on other grounds).

If the ALJ is relying upon a regulation or statute to demand this requirement, it should have been cited in the Order. Stanford clearly showed she suffered an injury and the Employer not only had reason to know about it, but did **in fact** know about it despite denials. Stanford met the reporting standard required of her. If the mere failure to specifically report an injury as "work related" to a knowing employer was enough to refute a claim, then a claimant who was injured and left comatose in an accident with the employer's watching, would be unable to prove a work related injury. This would be the same notifying a medical provider that an injury was work related as well. If an injury left a Claimant mentally incapacitated and they were unable to inform any of their physicians that the injury was work related, the Claimant would be unable to prove a work related injury. This is not a reasonable requirement.

3. The ALJ showed a complete bias in favor of the Employer and Carrier by her treatment of the parties' witnesses.

The Commission accepted biased testimony on the part of the Employer and Carrier's witnesses. One witness was a V.F. Jeanswear manager and the other one was a paid employee who was not under subpoena but who had been **ordered** to testify on behalf of her employer. (Hearing Transcript 141:20-142:7)(R.E. 44). Sally Jo Rupley was essentially being paid for her testimony, and the Commission completely ignored the fact that **Rupley recanted her testimony on several occasions**, testimony that was contrary to that of every subpoenaed and disinterested witness who testified. This testimony concerned both a telephone call when Stanford was injured and her medical condition.

After first testifying that she had not had a conversation with Stanford after the injury, Rupley then testified that she was unable to remember whether or not she had. Stanford's counsel asked, "You were asked about a conversation and you said you didn't have a conversation with her. And am I correct that now your testimony is you don't know if you had a conversation with her or not whatever the content of it was?" Rupley answered, "Well, if you want to get specific and say what day it was, I cannot tell you how many days – what day I talked to somebody on the phone."(Hearing Transcript 145:18-146:5)(R.E.46-47).

Yet, the ALJ completely ignored Rupley's conflicting answers and gave her testimony more weight than that of any of Stanford's witnesses, who were under subpoena and disinterested. At the same time, the ALJ used Stanford's own confusion as to dates of three years earlier to claim Stanford was not credible.

The ALJ focused on the fact that Stanford went on a cruise, rode a horse, and judged a "hairy chest" contest. The term "disability" does not equate to "crippled." There is absolutely no reason a disabled person cannot participate in any and all of these activities. In fact, most cruise ships are equipped to deal with much more severe disabilities than those of Stanford, including wheelchair bound guests. Dr. Crosby, Stanford's treating physician, testified, even with permanent restrictions, it was within her ability, and in fact would not harm her, to do these activities. (Deposition of Dr. Glenn Crosby, 35:2-5)(R.E. 59).

He stated riding a horse was something which Stanford was capable of doing with no restrictions and was not unexpected. He also stated it was completely acceptable for her to judge the "hairy chest" contest which required nothing more of her than watching male cruise passengers parade around without shirts on, and at one point, rubbing ice on their chests. (Deposition of Dr. Glenn Crosby, 35:2-5)(R.E. 59). While the ALJ may have found this activity to be distasteful, Stanford was not involved in any activity that exceeded the physical limitations her treating physician had placed on her.

It is a well established rule that a self-serving statement of a party, whether oral or written, is not admissible in evidence in his favor. The ALJ allowed this very type of testimony in this case for the Employer/Carrier. Such declarations are equally inadmissible when offered by the declarant's representatives, and the rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf. *Bullard v. Citizens Nat'l Bank*, 177 Miss. 735 (Miss. 1937)(Citing *Presley v. Quarles*, 31 Miss. 151; *Wilkerson v. Moffett-West Drug Co.*, 21 So. 564; *Memphis Grocery Co. v. Valley Land Co.*, 17 So. 232; *Johnson v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274; *Whitfield v. Whitfield*, 40 Miss. 352; *Nye v. Grubbs*, 16 Miss. 643.

The Employer called two clearly biased witnesses, its only witnesses, to testify on its behalf while Stanford called five different witnesses, two of whom were totally impartial and disinterested. The ALJ, however, spent more time discussing the Employer/Carrier's two hired witnesses than she spent discussing all five of the Claimant's witnesses, including William Stanford, an eye witness to the work injury. (ALJ Order, Pp. 6-9; H.R., Pp. 22-25)(R.E. 8-11).

Initially, the ALJ should have disregarded the testimony of Sally Jo Rupley. If the ALJ considered Rupley's testimony at all, she should have viewed it as clearly biased, considering Rupley was ordered to testify on behalf of her employer and was likely being paid for her time in Court. Rupley's opinion about Stanford's intent was obviously influenced by her employer and was not disinterested and unbiased. Any statements she made were certainly self-serving statements that benefitted the Employer/Carrier, and through them, benefitted Rupley herself.

The ALJ allowed Rupley to testify that Stanford had previously suffered problems with her back, neck and head, the "same things" she is complaining of in this suit. She also allowed Rupley to testify that none of these conditions appeared problematic during the cruise. (ALJ Order, P. 8)(R.E. 10). This testimony should have been wholly disregarded as there is no factual proof of any prior

physical conditions, only Rupley's testimony. Rupley is also not qualified to give an opinion on Stanford's medical condition while she was on the cruise, but the ALJ accepted her opinion as gospel.

TheV.F. Jeanswear manager, Horton, testified about trip logs, trips scheduled for after the accident, and the report of the accident itself. Yet, Horton himself admitted the company had destroyed these records after the Employer/Carrier knew Stanford was injured. (Hearing Testimony, 169:9-18)(R.E. 48). This, in and of itself, should have made the ALJ at least somewhat suspicious. Instead, she accepted the testimony of the witnesses for the Employer/Carrier as being unbiased and credible. The Employer/Carrier is not entitled to profit from its destruction of records and influence over its employees as witnesses.[2]

William Stanford testified as an eye witness to the actual work injury as it took place as well as to each point the ALJ questioned in Martha Stanford's testimony. The ALJ discredited his testimony due to a workers' compensation claim Mr. Stanford had against the Employer/ Carrier in an unrelated matter. His claim involved an MVA and an admitted, by the employer/carrier, workers compensation claim. The only reason Mr. Stanford's claim was even controverted was to prevent the statute of limitations from expiring. (Hearing Testimony 108:28 - 109:19)(R.E. 36-37). That should never have been used as a reason to discredit his testimony.

Stanford's step-father and sister both testified concerning Stanford's telephone call, informing them of the work injury and her condition. The ALJ does not explain why she did not find these two witnesses credible as she only wrote three sentences in her order about each.

2

It is a general rule that the intentional spoliation of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator. *The Estate of Perry v. Mariner Health Care, Inc.*, 927 So.2d 762 (Miss.App. 2006); *Dowdle Butane Gas Company, Inc. vs. Moore*, 831 So.2d 1124 (Miss. 2002); *Stahl v. Wal-Mart Stores, Inc.*, 47 F.Supp.2d 783 (S.D. Miss. 1998); *Wilson v. State*, 661 So. 2d 1109, 1115 (Miss. 1998); *Tieken*, 1997 U.S. Dist. LEXIS 9854, *10, 1997 WL 88180, at *3; *Williams v. CSX Transp., Inc.*, 925 F. Supp. 447, 452 (S.D. Miss. 1996).

Most confusing was the ALJ's disregard for the testimony of witnesses Rhonda Butler and Jack Fanning. These witnesses are not related to Stanford, nor have they been employed by the Employer/Carrier. They were impartial and unbiased witnesses with absolutely no stake in this claim.

Butler testified that immediately prior to the date of Stanford's work injury, she had hosted a cookout at her home. Stanford was present at the cookout and even beat Butler at a game of washers. (Hearing Testimony, 115:22-29)(R.E. 38). Stanford and her spouse stayed a couple of hours and then had to leave on the truck run for the Employer/Carrier during which the injury occurred. (Id.). When Stanford left, she had no physical problems. (Hearing Testimony, 116:4-6)(R.E. 39). After the work injury, when Butler saw Stanford, she would be on the couch or in bed in pain. (Hearing Testimony 116:16-23)(R.E. 39). Even though Stanford still attended

Butler's yearly cookouts, she would sit in the living room in a recliner rather than participating in any activities. (Hearing Testimony 120:18-121:4)(R.E. 40). Butler was a completely disinterested witness who was present under subpoena, and her testimony should have been given much more consideration than it received from the ALJ, certainly more than Rupley's.

Fanning, also a truck driver, testified he had known Stanford for 30 years. (Hearing Testimony 130: 9-15)(R.E. 42). Prior to February, 2006, he had never noticed her having any physical problems that would affect her ability to drive a truck. (Hearing Testimony 130:19-24)(R.E. 42). He saw her after the injury and noticed many differences. He stated "She's not able to function right, her hands, her back, she just don't get around right. She's not the same–same woman that I know." (Hearing Testimony 131: 3-5)(R.E. 43).

All of Stanford's witnesses were present under subpoena and had no reason to tell untruths, and yet, their testimony was basically ignored. On the other hand, the ALJ placed a great deal of weight on the testimony of Rupley and Horton, the two clearly biased witnesses called by the Employer/Carrier, neither subpoenaed, and one ordered to testify.

4. The Commission Acted in an Arbitrary and Capricious Manner in Questioning the Claimant's Credibility.

The opinions of the ALJ, Commission and Circuit Court were based upon the issue of credibility, and not whether a work injury actually occurred. While an ALJ's determination on credibility is given a good amount of weight, it is not always the determining factor. The Commission is fully within its authority to accept a claimant's testimony, even without corroboration. *Penrod Drilling Co. v. Etheridge*, 487 So.2d 1330, 1333 (Miss. 1986); *Washington v. Woodland Village Nursing Home*, 2009 Miss. App. LEXIS 108, No. 2007-WC-02291-COA. In fact:

> The claimant's uncorroborated testimony **should be accepted** by the Commission unless it is inherently improbable, incredible, unreasonable, or shown to be untrustworthy; in that circumstance, the commission may reject it. *Id.*
>
> "[T]he undisputed testimony of a claimant which is not so unreasonable as to be unbelievable, given the factual setting of the claim, generally **ought to be accepted as true**."

White v. Superior Prods., Inc., 515 So.2d 924, 927 (Miss. 1987)(Emphasis added). Such testimony may be acted upon even when disputed by other witnesses, and if undisputed and not untrustworthy, **must be taken as conclusive proof of the fact**. Vardaman S. Dunn, *Mississippi Workmen's Compensation* § 264 (3d Ed. 1982)(Emphasis added).

Stanford is allowed to testify as to how the injury occurred and have her testimony credited. *Penrod Drilling Co. v. Etheridge*, 487 So.2d 1330 (Miss. 1986). There is also an eye witness to the fall. Nobody testified Stanford did not injure herself as she stated, nor explained any other reason for her injuries.

Stanford and her husband both testified that they had reported the injury not just to the dispatcher, but also to the manager. The testimony of the Employer should have been automatically suspect had the ALJ considered the fact that even though the Employer claimed no reports were

made, the Employer had already destroyed the records that would have shown the existence of any report being made through dispatch. The reports were "purged" after the Employer knew of the injury and after the Petition to Controvert had been filed. Their testimony on these matters should have been considered biased and untrustworthy.[3]

The Administrative Judge considered several other factors in making her decision that Stanford was not credible. Not a single one of those factors was actually relevant to the question of whether Stanford was injured while working and whether that injury was work related.

Stanford had applied for short term disability benefits through the Employer and Carrier. She was required to complete several forms while applying and at times after that as well. Some of the forms she had her neighbor help her complete because Stanford had carpal tunnel surgery and could not use her hands. (Hearing Testimony 73:7-75:2)(R.E. 29-31). Other forms she just signed after a representative for the Employer completed them for her. *Id.* The Employer/ Carrier never refuted that this was indeed what had occurred.

Stanford admitted she had no idea what some of the questions on the form meant and she did not read what the employer of VF Jeanswear filled out. She simply trusted her Employer to know what the correct answers were and signed her name to the document they prepared. (Hearing Testimony, 74:29-75:3)(R.E. 30-31). Yet the ALJ took exception to the fact that a box was checked on these forms stating the condition for which Stanford was seeking short term disability was not work related. (ALJ Order, 5-6 and 17)(R.E. 7-8). Stanford fully explained why and how this had occurred. (H.T., 73:7-9).

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[3] Spoliation of the evidence creates a presumption of credibility in favor of the Claimant and against the one who destroyed the documents. Spoliation or destruction of evidence relevant to a case raises a presumption, or inference, that the evidence would have been unfavorable to the spoliator. *Wilson v.* State, 661 So.2d 1109 (Miss. 1998); *DeLaughter v. Lawrence County Hosp.*, 601 So.2d 818 (Miss. 1992); *Tolbert v. State*, 511 So.2d 1368 (Miss. 1987)(quoting *Washington v. State*, 478 So.2d 1029 (Miss. 1985)); *Bott v. Wood*, 56 Miss. 136 (1878).

No average employee with a 7th grade education would know the difference in workers' compensation and short-term disability. This is a legal distinction that Stanford is not required to distinguish. She has never received workers compensation benefits from this injury and, had she completed the forms herself, would have been fully within her rights to check "no" when asked was she entitled to receive workers compensation benefits. This is a question that is phrased for the benefit of the Employer and Carrier. The short term disability benefits would not have been "reduced or unavailable" if the injury was reported as work related, so there was no reason for the Claimant to be untruthful about this.

The ALJ also found to be important some minor differences between one of Stanford's Interrogatory Responses and her live testimony, both through deposition and at trial. When Stanford was asked why her Interrogatory Response was different from her live testimony explaining the accident, she replied that she did not know. Stanford's own counsel asked who prepared her responses and she stated that her attorney did and she signed them without reading them. (H.T., 87). While attorneys attempt to have their answers completely correct, they are not infallible. Stanford's one slightly inconsistent interrogatory was clarified by her deposition and trial testimony.

In this case, the undersigned counsel for Stanford did not fully understand her response. Stanford should not be punished for her counsel's misunderstanding. In fact, during Stanford's deposition, counsel for the Employer and Carrier had difficulty himself in understanding Stanford's explanation of the manner in which the accident occurred. (Martha Stanford Deposition 22:10-28:24)(R.E. 65-71). After counsel for the Employer/Carrier asked repeatedly for further clarification, Stanford eventually had to physically demonstrate what occurred before her explanation was comprehensible. *Id.* This was also necessary at the actual hearing of this matter in order for the ALJ to understand what Stanford was attempting to say. (Hearing Transcript 42:1- 43:15)(R.E. 25-26).

This is not a matter of questionable credibility. It is a matter of a Claimant's having a significant lack of communication skills. That should not be held against her, especially as to her credibility.

More importantly, the trial and deposition testimony of Stanford do not contradict each other as to how the work injury occurred, and the interrogatory response reflects the same general process and result. They all show Stanford tripped over a cooler and fell into the sleeper of her truck, striking her head and injuring her back, neck, legs, and arms. Certainly, less weight should be given to written responses, prepared by someone other than Stanford than those verbal responses given by the Stanford herself on at least two occasions of sworn testimony.

CONCLUSION

In order to comply with the beneficial purpose of the Act, the Commission has a legal duty to determine any doubt in favor of Stanford. Doubtful cases should be resolved in favor of compensation, so as to fulfill the beneficial purposes of the workers' compensation statute. *Gill v. Harrah's Entm't, Inc.*, 35 So. 3d 1227 (Miss. Ct. App. 2010); *Adolphe Lafont USA, Inc. v. Ayers,* 958 So.2d 833, 839 (Miss. Ct. App. 2007); *Binswanger Mirror v. Wright,* 947 So. 2d 346 (Miss. Ct. App. 2006); *Univ. of Miss. Med. Ctr. v. Rainey,* 926 So. 2d 938 (Miss. Ct. App.2006); *Frito-Lay, Inc. v. Leatherwood,* 908 So.2d 175, 179 (Miss. Ct. App. 2005).

Where the matter may be an even question, this Court has found and will likely continue to find in favor of the injured worker. *Metal Trims Indus., Inc. v. Stovall,* 562 So. 2d 1293, 1297 (Miss. 1990)). The Commission refused to give Stanford any benefit of the doubt, instead requiring her to meet unjust and impractical standards of proof **not** required by law.

Statutory law, case law and the Full Commission's own findings in this case are all clear that the only question is: ***Whether or not the Claimant suffered a work related injury on or about the date alleged in the Petition to Controvert.*** (ALJ Order, P. 1)(R.E. 3). The only answer to that question is "Yes" based on all of the factual evidence in this case.

Stanford testified in her deposition and at her hearing that she fell over a cooler in her truck, was knocked unconscious, never worked another day, and ultimately had neurosurgery as a result, not once, but twice. Stanford's neurosurgeon testified at his deposition that Stanford's work injury, in his professional opinion, was the cause of her physical problems for which he had performed surgery.

The Commission, in adopting the ALJ's opinion, adopted findings that were not supported by anything other than bias and an unsubstantiated "feeling" that perhaps Stanford was not being truthful. Yet, the ALJ accepted as gospel the testimony of one witness working for the Employer, who was **required** to be at the hearing to testify, not subpoenaed, and was not certain if she was being paid to testify.

Stanford has proven she has a work-related injury and a corresponding loss of wage-earning capacity. None of the credibility questions answer the question, "Did a work related injury occur?" Nothing was produced to show Mrs. Stanford was not injured while in her truck and working for her employer as she claims. Considering the record as a whole, the Commission should find that the ALJ's decision is against the overwhelming weight of evidence and that Stanford is entitled to compensation benefits for permanent total disability and for all reasonable and necessary medical services and supplies under Miss. Code Ann. § 71-3-15.

Respectfully submitted, this the 10th day of March, 2011.

MARTHA KAY STANFORD, Appellant

BY: _____

William O. Rutledge, III, MSBN: 5753
Valarie B. Hancock, MSBN: 101203
RUTLEDGE, DAVIS & HARRIS
Post Office Box 29
New Albany, MS 38652
(662) 534-6421

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Respectfully submitted, this the _____ day of March, 2011.

MARTHA KAY STANFORD, Appellant

BY: _____

William O. Rutledge, III, MSB[redacted]
Valarie B. Hancock, MSBN: [redacted]
RUTLEDGE, DAVIS & HARRIS
Post Office Box 29
New Albany, MS 38652
(662) 534-6421

CERTIFICATE OF SERVICE

I, William O. Rutledge, III, attorney for the Appellant, do hereby certify that a copy of the above document has been served upon the following parties by placing said copies in the United States mail, postage prepaid, to their usual business addresses as follows:

M. Reed Martz
Freeland Shull, PLLC
Post Office Box 2249
Oxford, MS 38655

Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Sq., Suite 201
Oxford, MS 38655

Honorable Virginia Mounger
Administrative Law Judge
Mississippi Workers Compensation Commission
P.O. Box 5300
Jackson, MS 39296

SO CERTIFIED, this the 10th day of March, 2011.

WILLIAM O. RUTLEDGE, III

CERTIFICATE OF SERVICE

I, William O. Rutledge, III, attorney for the Appellant, do hereby certify that a copy of the above document has been served upon the following parties by placing said copies in the United States mail, postage prepaid, to their usual business addresses as follows:

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Administrative Law Judge
Mississippi Workers Compensation Commission
P.O. Box 5300
Jackson, MS 39296

SO CERTIFIED, this the ____ day of March, 2011.

WILLIAM O. RUTLEDGE, III

AFFIDAVIT OF JASON DEES, M.D.

COUNTY OF UNION
STATE OF MISSISSIPPI

1. My name is Jason Dees, M.D., and I am a physician at New Albany Medical Group, 300 Oxford Road, New Albany, Mississippi.

2. Martha Kay Stanford has been a patient of mine for many years.

3. At times, my practice is extremely busy. Such was the case on February 8, 2006.

4. On February 8, 2006, there were so many patients seeking treatment that we were unable to treat all of those present. Under my instructions, the office staff sent the ones that could not be seen that day home.

5. Martha Kay Stanford was one of those patients who were sent home and instructed to return the next day for treatment.

6. Martha Kay Stanford did, in fact, return the next day, February 9, 2006, at which time, she was treated by Allie Prater, M.D., another physician in the same office.

7. All of the statements in this affidavit are true and correct to the best of my knowledge.

JASON DEES, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME, this the 29th day of December, 2010.

Lisa D. Parker
NOTARY PUBLIC

My Commission Expires:
9-18-12

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 46919 LISA D. PARKER Commission Expires Sept. 18, 2012 UNION COUNTY

EXHIBIT "A"