

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO.: 2010-WC-01627-COA

SANDY BALL

APPELLANT

VS.

ASHLEY FURNITURE INDUSTRIES
AND
EMPLOYEES INSURANCE OF WAUSAU

APPELLEES

BRIEF OF APPELLEES

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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 disqualifications or recusals.

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Employer
4. Employers Insurance of Wausau
Carrier
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Respectfully Submitted,

ASHLEY FURNITURE INDUSTRIES AND
EMPLOYERS INSURANCE OF WAUSAU,
EMPLOYER AND CARRIER/APPELLEES

BY:

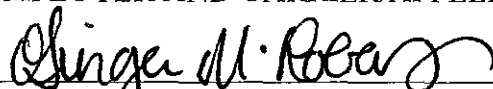

DANIEL COKER HORTON & BELL, P.A.

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STATEMENT OF THE ISSUES

I. Whether the administrative judge erroneously exceeded the announced scope of the hearing;

II. Whether the administrative judge, as affirmed by the Commission, erroneously determined that Claimant's work injury was a temporary aggravation of her pre-existing condition and that Employer and Carrier were no longer liable for worker's compensation benefits once the temporary aggravation subsided;

III. Whether the administrative judge erred in striking medical evidence offered by the Claimant that did not comply with the Commission's Procedural Rules.

I. STATEMENT OF THE CASE

A. Nature of the Case and the Course of the Proceedings and its Disposition in the Court below.

On April 15, 2004, Claimant filed a Petition to Controvert alleging that she sustained work related injuries to her chest and right knee on October 16, 2003. Record ("R") at p. 1. On April 28, 2004, Employer and Carrier filed an Answer to the Petition to Controvert, admitting that the injury occurred but disputing the nature and severity of the injury. R at p. 3. On November 22, 2004, Claimant filed a Motion to Compel Medical Treatment, and Employer and Carrier thereafter filed a timely response. R at pp. 4-12. On December 16, 2004, Employer and Carrier filed an Amended Answer, clarifying their defenses that there was no causal connection between Claimant's symptoms at that time and the work injury of October 16, 2003. R at p. 13.

On January 6, 2005, Employer and Carrier filed their prehearing statement along with a Motion to Require Setting of Hearing. R at pp. 14-22. On January 13, 2005, the Commission issued a Notice of Hearing, setting the hearing for February 18, 2005. R at p. 23. However, on February 9, 2005, the Commission issued a Notice of Cancellation of Hearing. R at p. 24. On June 10, 2005, a motion hearing took place on Employer and Carrier's Motion to Require Setting and Claimant's Motion to Compel Medical Treatment. R at p. 27. On July 11, 2005, the administrative judge issued an Order holding both motions in abeyance pending the deposition of Dr. Johnny Mitias. R at p. 28.

On November 2, 2005, Employer and Carrier filed a renewed Motion to Require Setting of Hearing. R at pp. 30-32. On November 21, 2005, Employer and Carrier filed a Motion to Dismiss, due to Claimant's failure to file a prehearing statement. R at pp. 35-36. On November 28, 2005, Claimant filed a prehearing statement. R at pp. 38-42. On February 2, 2006, the Commission issued an official Notice of Hearing, setting this matter for a hearing on the merits to take place on May 9, 2006. R at p. 45.

A prehearing conference was held by the administrative judge on May 5, 2006. R at p. 46. During this conference, counsel for both parties agreed that the sole issue in controversy was whether Claimant had sustained a permanent and compensable aggravation of a preexisting condition while employed with Ashley Furniture Industries. The parties agreed that this was an issue to be solely resolved by the medical testimony of Dr. Johnny Mitias. Claimant's counsel then suggested that the case be decided by the administrative judge based on the testimony of Dr. Mitias and Claimant's medical records as opposed to having a "live" hearing. The administrative judge and defense counsel agreed to this arrangement. Consequently, the hearing on the merits was cancelled by notice of the Commission issued on May 8, 2006. R at p. 47.

On November 9, 2006, Employer and Carrier filed a Motion to Strike and Motion to Compel. R at pp. 48-50. This motion was based on claimant's counsel's failure to execute the stipulation which was circulated following the agreement to postpone the hearing on the merits. Instead of executing the stipulation, Claimant's counsel had solicited additional medical proof from Dr. William Rice and attempted to submit this supplemental report to the

administrative judge. On November 22, 2006, Claimant filed her Response to Employer and Carrier's Motion to Strike and Motion to Compel. R at p. 54. A hearing on the pending motion took place on January 22, 2007. R at p. 57. On March 29, 2007, the administrative judge issued an Order granting the Motion to Strike and Motion to Compel. R at pp. 58-60.

On July 18, 2008, the administrative judge issued her Order on the contested issue in the case. R at pp. 61-71; Appellant's Record Excerpts ("RE") Section I.3 In this Order, the administrative judge determined that Claimant sustained a temporary aggravation of her pre-existing condition, the temporary aggravation subsided on December 23, 2003 and that Employer and Carrier were not responsible for benefits after that date. R at pp. 70-71. On August 7, 2008, Claimant filed a Petition for Review of Order of the Administrative Law Judge. R at pp. 72-74. On August 21, 2008, Employer and Carrier filed their Response to Claimant's Petition for Review. R at pp. 77-79. A hearing before the Full Commission took place on December 1, 2008. R at p. 81. On December 10, 2008, the Full Commission issued an Order affirming the decision of the administrative judge. R at p. 82; RE I.4. On December 18, 2008, Claimant filed a Notice of Appeal, appealing this matter to the Circuit Court of Pontotoc County. R at pp. 83-84. The Circuit Court issued its Order on September 23, 2010, affirming the Full Commission. RE I.2. Claimant filed her appeal to this Court on September 24, 2010.

B. Facts Relevant to the Issues Presented for Review

1. Facts Relating to Procedural Issues

Claimant sustained an admitted right knee injury while working for Ashley Furniture Industries (hereinafter "Ashley") on October 16, 2003. It is not contested that Claimant had preexisting right knee problems. Claimant contended that her work injury with Ashley constituted a permanent aggravation of a preexisting condition and that Employer and Carrier are responsible for further medical treatment and benefits for this injury. Employer and Carrier, on the other hand, have contended throughout the course of this action that the injury of October 16, 2003, was a temporary aggravation of a preexisting condition, that this temporary aggravation has resolved and that all of Claimant's right knee problems after December 23, 2003 are related solely to the preexisting degenerative condition.

This matter was set for a hearing on the merits on May 9, 2006. On May 5, 2006, a prehearing conference took place during which the attorneys for the parties agreed that the issue pending before the Commission was distinctly a medical issue. The parties had previously taken the deposition of Dr. Johnny Mitias, who was Claimant's primary treating physician. The parties agreed that Dr. Mitias' testimony would be dispositive of the issue of whether Claimant's aggravation was temporary or permanent. Claimant's counsel suggested that a live hearing was not necessary and defense counsel concurred. Both parties agreed to enter into a stipulation, waiving their right to a hearing on the merits and allowing Administrative Judge Cindy Wilson to render a decision based on what both

parties represented to be the dispositive evidence, the deposition of Dr. Mitias and Claimant's medical records that had been filed with prehearing statements.

On May 12, 2006, counsel for Employer and Carrier forwarded a proposed stipulation to counsel for Claimant. In the letter forwarding the proposed stipulation, counsel for Employer and Carrier requested that counsel for Claimant inform him of any problems with the stipulation, and, if there were no problems, it was requested that Claimant's counsel sign the document so that it could be submitted to the administrative judge. However, on May 23, 2006, instead of signing the proposed stipulation, counsel for Claimant forwarded to counsel for Employer and Carrier an additional written medical opinion obtained from Dr. William Rice.¹ Despite being contacted numerous times, counsel for Claimant refused to enter into the stipulation. By letter of August 9, 2006, counsel for Claimant indicated that he had been "intermittently reviewing" the proposed stipulation but also had been developing new medical evidence, primarily the new opinion of Dr. William Rice. RE II.2.

On November 7, 2006, Employer and Carrier filed a Motion to Strike and Motion to Compel, requesting that the medical records of Dr. Rice be stricken and that Claimant's counsel be compelled to sign the stipulation or that the Administrative judge issue an order consistent with the stipulation. R at pp. 48-50. After considering the motion and

¹The written medical opinion from Dr. Rice, dated May 22, 2006, was never filed with the Commission along with a medical records affidavit.

Claimant's counsel's response, Judge Wilson granted Employer and Carrier's Motion. R at pp. 58-60.

2. Facts Relating to Substantive Issues

Dr. Mitias' deposition was taken on April 17, 2006. The deposition and the corresponding medical records were introduced into evidence as General Exhibit No. 1. At the onset of the deposition, the parties stipulated to Dr. Mitias' qualifications as a board certified orthopedic surgeon. Exhibit 1, p. 4. Dr. Mitias testified that he initially saw Claimant on October 21, 2003, at which time Claimant reported that she slipped on some wet paint, lost her balance and landed on her right knee. *Id.* Dr. Mitias reviewed Claimant's x-rays, and based on this review along with his evaluation and physical examination, determined that Claimant had a patellofemoral chondromalacia, which is roughly defined as arthritis in the front of the knee under the kneecap. *Id.* at p. 5. Dr. Mitias diagnosed a patellofemoral contusion and treated Claimant conservatively by injecting her knee with cortisone, sending her for therapy and prescribing a knee brace. *Id.* Dr. Mitias saw her again in November and December 2003.

On December 23, 2003, Dr. Mitias reviewed an MRI which confirmed his diagnosis of mild early patellofemoral chondromalacia. *Id.* He indicated that it was his opinion that Claimant's knee problems were the result of a degenerative condition which was present before her work injury and would be there after the work injury subsided. *Id.* He released Claimant PRN, to return to regular duty and assigned 0% medical impairment.

Claimant did not return to Dr. Mitias until October 7, 2004. At that time, she reported right knee pain. Her x-rays showed that her patellofemoral space was narrower.

Dr. Mitias last saw Claimant on October 28, 2004, at which time the doctor gave Claimant the option of a surgery, though indicating he did not estimate the surgery would have a high probability of improving claimant's condition. *Id.* at pp. 5-6. Dr. Mitias also referred Claimant to Dr. William Rice due to a change in Claimant's health insurance carrier. *Id.* at p. 6.

Dr. Mitias testified that the problems that Claimant was having in October of 2004 were not related to her work injury but were rather solely related to the degenerative process he had identified. *Id.* at p. 7. Throughout the deposition, Dr. Mitias continually confirmed that Claimant would not have an impairment rating or restrictions related to the work injury. *Id.* at pp. 7-8. Dr. Mitias concluded " the problem she [claimant] had was an architectural problem in the way she was made. It had nothing to do with her work injury." *Id.* at p. 8.

When asked about the fact that Claimant's problems began at work, Dr. Mitias replied as follows:

With this type of problem, I think she could have bumped it at home, could have, you know, taken a step off the curb on the street, I mean, it was going to be a problem eventually, even - - maybe the next day or two days or two years. It is very - - it is extremely variable when this starts to be a problem for them, but, you know, just because she really fell at work, I mean, we got her back to her baseline, which is where I think she would have been regardless and at that point you have to say that's all you can do.

Id. at pp. 8-9.

Dr. Mitias further expressed his opinion that Claimant had sustained a temporary aggravation and confirmed that as of the last time he had seen Claimant, she was at the same point she would have been regardless of the work injury. *Id.* at p. 9. Dr. Mitias then confirmed that all of his opinions had been based on a reasonable degree of medical probability. *Id.*

On questioning from Claimant's counsel, Dr. Mitias was asked the ultimate question of whether Claimant's work injury had contributed to her patellofemoral chondromalacia becoming symptomatic. *Id.* at p. 12. He responded as follows:

I think all we can say is that subjectively, she complained of more pain afterwards, but objectively, she only had mild early patellofemoral chondromalacia per the MRI and per my x-rays and even on my physical exam. It did get worse over a period of a year, but it would have probably gotten worse regardless.

Id. at pp. 12-13.

Claimant's counsel followed up by asking the doctor whether it would be more likely than not that Claimant's work injury "lightened or rendered symptomatic" the preexisting patellofemoral chondromalacia. *Id.* at p. 13. Dr. Mitias responded:

It could have, yes. I'm not going to say a fall wouldn't make your knee hurt. ...but it would go back to the baseline where she was going to be anyway. ...let's say you fell...you bruised it. You inflamed it. You get it back to baseline. Well, then, that's where it would normally stay. You know, she wouldn't - - the tricky part is how much of this pain would she have had... regardless of this injury... And my feeling is when I got her back to where she was at baseline, she was going to be there regardless of whether she hurt herself at work or at home, makes no difference, because she was going to have this pain regardless. It was just coincidence that it happened at work.

Id. at p. 14.

Dr. Mitias did testify that he could not “rule out” the work injury as being a contributing factor in the development of the ongoing symptoms, but nonetheless, he was steadfast in his opinion that Claimant would probably be in the same condition today, regardless of whether the work injury occurred. *Id.* at p. 22.

Exhibit 2 of the Record contains Dr. Rice’s record from one visit of November 19, 2004. Dr. Rice diagnosed Claimant with ongoing patellofemoral pain. He did not address causative issues in this record related to his visit. Claimant’s physical therapy records were attached as Exhibit 3. These records indicate that Claimant was seen for a total of six visits and reported that the therapy decreased her pain by 70%.

II. SUMMARY OF THE ARGUMENT

The issue before the administrative judge was whether Claimant’s work injury of October 16, 2003, resulted in a temporary or permanent aggravation of Claimant’s pre-existing right knee condition and to what extent the Employer and Carrier are liable for worker’s compensation benefits.

Based on the testimony of Dr. Johnny Mitias, who was Claimant’s primary treating physician, the administrative judge correctly determined that Claimant sustained only a temporary aggravation of a preexisting condition while employed with Ashley Furniture Industries, that on December 23, 2003 Claimant’s condition improved to a baseline point where Claimant’s condition would have been regardless of the work injury, and that Employer and Carrier were not liable for worker’s compensation benefits after that point.

Further, the administrative judge and the Commission were correct in refusing to allow Claimant's counsel to submit additional medical evidence in the form of an unsworn letter from Dr. William Rice as said evidence was not admissible pursuant to the Procedural Rules adopted by the Commission regarding the admissibility of medical records.

The Commission correctly upheld the Order of the administrative judge, which was supported by substantial evidence and was neither arbitrary nor capricious, and therefore, Employer and Carrier request this Court to affirm the same.

III. Argument

A. The Commission is the ultimate finder of fact; Because its findings are supported by substantial evidence and the applicable law and are neither arbitrary nor capricious, this Court should uphold the Commission Order.

The standard of review to be utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well established. The Mississippi Supreme Court has stated that "the findings and order of the Workers' Compensation Commission are binding on the Court so long as they are supported by substantial evidence." *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314,317 (Miss. 1988)). The Circuit Court, as well as this Court, should not review the facts on appeal to determine how it would resolve the factual issues if it was the ultimate trier of fact, but instead, should only determine whether the Commission's factual determinations were supported by substantial credible evidence. *South*

Central Bell Tel. Co. v. Aden, 474 So.2d 584, 589 (Miss. 1985). Further, as in this case, when the Commission adopts the findings and conclusions of the administrative judge, this Court will review those findings and conclusions as if they were determined by the Commission. *McDowell v. Smith*, 856 So. 2d 581, 585 (Miss. Ct. App. 2003). The Court of Appeals should not overturn the Commission's decision unless it is based on a misapplication of law or if it is unsupported by the clear facts presented. *J.R. Loggins v. Halford*, 765 So. 2d 580 (Miss. Ct. App. 2000). Because the Commission properly applied the law and because its findings are supported by substantial evidence, its decision should be affirmed.

B. The administrative judge did not exceed the scope of the hearing on Claimant's motion to compel medical benefits, and thus, the Commission did not commit reversible error by affirming the ruling.

The procedural background in this case shows that Claimant filed a motion to compel further medical treatment for her right knee. It was the Claimant's position that the additional treatment was causally related to her work injury of October 16, 2003. To the contrary, Employer and Carrier took the position that Claimant had sustained only a temporary aggravation of her pre-existing right knee condition, patellofemoral chondromalacia, as a result of the work injury, that Claimant had returned to baseline for her work related aggravation and that the Employer and Carrier were not responsible for any additional medical treatment. Initially, a hearing on the merits was set for May 9, 2006. However, when the administrative judge conducted a prehearing conference with the parties on May 5, 2006, the parties agreed that the issue before the judge was whether Employer and Carrier were liable for further worker's compensation benefits for Claimant's right knee.

The parties further agreed that the issue would be determined based on the medical evidence, filed with the Commission with the parties' prehearing statements, which included the medical records affidavit and deposition testimony of Claimant's treating physician, Dr. Johnny Mitias, the medical records affidavit of Dr. William Rice² and Claimant's therapy notes. Further, the administrative judge noted that the parties were in agreement that all medical evidence had been developed, and that the record would be closed on the day of the pre-hearing conference, May 5, 2006. The administrative judge advised counsel for Employer and Carrier to draft a Stipulation, outlining the issue before the administrative judge for determination. Claimant's counsel would not agree to the proposed Stipulation, and instead, in August 2006, offered new evidence in the form of a handwritten note from Dr. William Rice, which was dated May 22, 2006. Employer and Carrier moved to strike the "new" evidence, with this motion being heard by the administrative judge and an order issued on March 29, 2007. The administrative judge granted Employer and Carrier's motion to strike the new evidence offered by the Claimant as being untimely and not complying with the Commission's Procedural Rules. The Order further outlined the underlying issue before the judge, being whether Employer and Carrier were responsible for further medical treatment for Claimant's right knee. RE II.3. Thereafter, the administrative judge made a ruling in the case, as evidenced in her Order dated July 18, 2008. The judge's ruling held that Claimant suffered from a pre-existing condition and had sustained only a temporary

²The medical records affidavit of Dr. Rice contained records for the one visit of November, 19, 2004, and was accepted into the Records as Exhibit 2.

aggravation as a result of her work injury of October 16, 2003. Further, the administrative judge ruled that Claimant's temporary aggravation ended on December 23, 2003, and Employer and Carrier were not responsible for any benefits subsequent to December 23, 2003, including the proposed surgery. The parties were further instructed to inform the judge of any other disputes over the payment of benefits for the work related temporary aggravation.

Claimant relies on the cases of *Monroe v. Broadwater Beach Hotel*, 593 So. 2d 26 (Miss. 1992), and *Washington v. Woodland Village Nursing Home*, 25 So. 3d 341 (Miss. Ct. App. 2009), claiming that the administrative judge exceeded the limited scope of the hearing, and thus, should be reversed. On the contrary, the record is clear that the administrative judge gave the Claimant notice that the hearing would resolve the issue of whether Claimant was entitled to further medical benefits relating to her knee injury of October 16, 2003. The judge's order confirms that any other issues were reserved for further determination. Contrary to *Monroe* and *Washington*, here there was no misleading by the judge as to what issues would be determined at hearing. In fact, the judge issued an order on March 29, 2007, specifically setting forth the issue to be considered i.e. whether Employer and Carrier were responsible for further medical treatment relating to Claimant's right knee. This case is clearly distinguishable from *Monroe* and *Washington*, and contrary to what the Claimant contends, there is no evidence that the administrative judge went beyond the announced scope of the hearing.

C. The Commission appropriately upheld the administrative judge's ruling that Claimant's work injury was simply a temporary aggravation of a preexisting condition.

As stated by the administrative judge in her order, the case of *Rathborne, Haire and Ridgeway Box Co., v. Green*, 115 So. 2d 674, (Miss. 1959), sets out the seminal rule regarding the compensability of work related aggravations of preexisting conditions:

The rule in this state is that when a pre-existing disease or infirmity of an employee is aggravated, lighted up, or accelerated by work-connected injury, or if the injury combines with the disease or infirmity to produce disability, the resulting disability is compensable. A corollary to the rule just stated is that when the effects of the injury has subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable.

Rathborne, 115 So. 2d at 676.

The second part of this ruling, addressing the subsiding of the work injury, is often referred to as the *Rathborne* corollary.

Claimant makes the argument that the *Rathborne* corollary does not apply in this matter and contends that Claimant's ongoing knee problems are the direct result of the work injury. However, the substantial weight of the medical evidence shows otherwise. In reviewing the medical records of Dr. Johnny Mitias, Claimant's treating physician, he initially began treating Claimant on October 21, 2003, diagnosing a patellofemoral contusion. He met with the Claimant on December 23, 2003, to review her MRI. Dr. Mitias' records reflect that the MRI revealed no contusions or meniscal damage, but instead, showed early patellofemoral compartment degeneration. On that date, Dr. Mitias advised that this condition would slowly but surely progress given it is a degenerative process. He stated, "It

really doesn't have that much to do with her injury." He released her PRN, to return to regular duty, and with 0% medical impairment.

Dr. Mitias' testimony was even more clear and unequivocal in his deposition that her ongoing disability was not attributable to her work injury. Dr. Mitias testified that it was inevitable that Claimant's preexisting condition would become symptomatic, and further, that regardless of whether the work injury occurred, he would have expected Claimant's condition to have progressed to its October 2004 status. Dr. Mitias testified that the functional loss did not continue after December 23, 2003. This is further evidenced by the gap in Claimant seeking treatment between December 23, 2003 and October 7, 2004.

A number of Mississippi cases have refused to apply the *Rathborne* corollary when a claimant still suffers from the effects of the aggravation, as opposed to the underlying injury. However, those cases can be distinguished from this case. In *McNeese v. Cooper Tire and Rubber, Co.*, 627 So. 2d 321, (Miss. 1993), the Mississippi Supreme Court found that claimant had sustained a compensable aggravation and was entitled to permanent disability benefits when there was medical support for the proposition that claimant's ability to function was permanently affected by the aggravation. *McNeese*, 627 So. 2d at 324-326. The *McNeese* court relied heavily on the case of *Bolton v. Catalytic Const. Co.*, 309 So. 2d 167, (Miss. 1975). In that case, the claimant, despite having a congenital spinal abnormality, had been able to work for years performing heavy labor until a work related aggravation of the congenital condition. *Bolton*, 309 So. 2d at 171-172. The *Bolton* court set out the following holding:

Where one enjoys functional ability to perform his work in spite of any existing congenital defect and suffers an injury which aggravates the existing congenital defect, thereafter causing a loss of his functional ability, then **as long as the functional loss continues** the corollary to the *Rathborne* rule will not apply as a bar to compensation. Simply stated, when an injury causes loss of functional ability, it is compensable.

Id. at 172.

In both *Bolton* and *McNeese*, there was substantial proof to support the fact that the loss of functional use was related to the aggravation. In the present case, the sole evidence is to the contrary. Dr. Mitias testified that because of Claimant's preexisting condition, he would have expected her to have been suffering from the same type of problems and with the same pain and possibly limited function, as she was actually suffering from in October of 2004, even if she had not been involved in a work related accident. Dr. Mitias testified that by October 2004, Claimant had returned to a baseline, being the reasonably expected progress of Claimant's degenerative condition.

Claimant cites the cases of *M. T. Reed Construction Co. v. Garrett*, 249 Miss. 892, 164 So. 2d 476, (1964) and *Fulton v. Catalytic Construction Co.*, 309 So. 2d. 167 (Miss. 1975) as cases limiting the *Rathborne* corollary. In *McNeese*, the Supreme Court simply found that the facts of these cases did not fit within the *Rathborne* corollary, not that the legal doctrine was somehow limited. In the *M.T. Reed* case the court found that the *Rathborne* corollary did not apply "under these circumstances, when there is only slight evidence of a temporary aggravation, and the greater weight of the evidence indicates a permanent aggravation of the preexisting disease." *M. T. Reed*, 164 So. 2d at 178. In the case at hand,

the overwhelming evidence, and in fact the only medical evidence stated to a reasonable degree of medical probability, was the testimony of Dr. Mitias, who testified that Claimant's work injury had no effect on her physical condition after December 23, 2003. In *Fulton*, the Mississippi Supreme Court stated that the work injury must cause "a loss of [claimant's] functional ability" for the *Rathborne* corollary not to apply. *Fulton*, 309 So. 2d at 172. In the case at hand, Dr. Mitias continually testified that Claimant had no loss of functional ability due to the work injury after December 23, 2003. In fact, he released her to return to regular work duty with 0% medical impairment.

In every case cited by Claimant which supposedly weakened or questioned or limited the *Rathborne* corollary, the appeals court simply found that the facts did not fit the *Rathborne* corollary rather than that *Rathborne* was not good law or was in any way limited. It cannot be reasonably questioned that the law in the State of Mississippi is that "When the effects of the [work] injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable." *Rathborne*, 115 So. 2d at 171-172.

In attempting to address Dr. Mitias' testimony, Claimant selectively cites cases in an apparent assertion that the liberal standard of workers' compensation results in different burdens of proof for claimants as opposed to employers and carriers, when presenting medical expert testimony. Claimant then proceeds to embrace the implied notion that all a claimant must do is present testimony regarding the possibility of causal connection in order to establish compensable injury. These are clearly inaccurate statements. "[O]nly opinions

formed by medical experts upon the basis of credible evidence in the case **and which can be stated with reasonable medical certainty have probative value.**” *Magnolia Hospital v. Moore*, 320 So. 2d 793, 799 (Miss. 1975) [emphasis added]. In her brief, Claimant lists six portions of Dr. Mitias’ testimony in which the doctor addresses potential causation from the *possibility* standpoint rather than the *probability* standpoint. However, in Dr. Mitias’ deposition, when Claimant’s counsel attempted to get the doctor to state to a reasonable degree of medical probability that the work aggravation was permanent and/or permanently accelerated the development of the patellofemoral chondromalacia, the doctor refused to do this. R. at pp. 12-13. When addressing this particular case as opposed to general questions regarding patellofemoral chondromalacia, Dr. Mitias was consistent in his testimony that, by October of 2004, Claimant’s condition was at a baseline, where it would have been regardless of whether Claimant had ever sustained a work related aggravation. R. at p. 14. Claimant also asserts that Dr. Mitias “admitted and opined that Sandy’s injury was the trigger for her symptoms in the knee.” Claimant’s brief, p. 17. However, Dr. Mitias indicated that the work injury was the trigger for only a temporary aggravation of claimant’s condition. The doctor continually maintained that the work injury was not the trigger for Claimant’s symptoms after December 23, 2003.

Unlike the *McNeese* and *Bolton* cases, the present case falls squarely within the *Rathborne* corollary: Dr. Mitias testified that the effects of the work injury had subsided, the work injury was no longer combining with the underlying degenerative condition to produce disability and the disability after December 23, 2003 was attributable solely to the disease or

infirmity. Therefore, applying the *Rathborne* corollary, Claimant's work injury is compensable only as a temporary aggravation, and the administrative judge correctly determined that Claimant is not entitled to any worker's compensation benefits subsequent to December 23, 2003. Because the administrative judge correctly applied the controlling law, and because the factual conclusions are supported by substantial evidence, the order of the administrative judge should be affirmed.

D. The Commission correctly determined that the supplemental written opinion of Dr. Rice was not admissible evidence and did not act arbitrary or capricious in striking the same.

Procedural Rule 9 of the Mississippi Workers' Compensation Commission sets forth the guidelines by which medical records may be received into evidence at a hearing in lieu of live testimony from a physician. Rule 9 specifically lists several requirements for medical records to be admissible evidence. Subsection 1 explains that the party wishing to offer the medical records must give opposing parties 30 days written notice prior to the scheduled hearing. Subsection 2 states that a copy of the medical records shall be attached to the written notice. Subsection 3 states that the records must include a sworn statement from either the physician or the physician's medical records custodian stating that the records are a true and correct copy of the medical records as kept in the regular course of the physician's practice. Subsection 4 states that the contents of the medical reports shall be subject to the same objections as to relevancy and competency as the testimony of the reporting physician had he/she been present to testify live at the hearing. Subsection 7 specifically states that "[a]ffidavits shall not contain opinions or other matters composed by attorneys for the

signature of physicians. The Commission intends for this Rule to pertain to narrative notes and reports composed and generated by the physician in the ordinary course of medical practice.”

Claimant contends that the Commission erred and acted arbitrary and capricious by excluding the unsworn, handwritten notation authored by Dr. William Rice on May 22, 2006. Claimant obviously takes issue with the exclusion of this evidence as it was the only evidence offered by the Claimant to support her position that her current condition is related to her work injury of October 16, 2003, as opposed to her underlying, pre-existing condition, as discussed supra. However, Claimant clearly failed to present medical evidence supporting her position in an admissible form as outlined by Procedural Rule 9.

Claimant failed to give Employer and Carrier 30 days written notice, prior to the scheduled hearing set for May 9, 2006, that she was offering additional opinions from Dr. William Rice. Further, Claimant did not disclose the handwritten note from Dr. Rice until after the hearing on the merits had been cancelled and the parties had agreed that the administrative judge would make a ruling based on the medical records and the deposition of Dr. Mitias already filed with the Commission. In fact, the Claimant did not disclose the additional statement from Dr. Rice until after the record had been closed. Further, Employer and Carrier would show that the statement from Dr. Rice did not include a sworn statement from either the physician or his medical records custodian that the record was a true and correct copy of a medical record kept in the regular course of the physician’s practice. It is evident that this was not a statement authored by Dr. Rice in the ordinary course of his

practice. As his medical records indicate, Dr. Rice only evaluated the Claimant on November 19, 2004. His handwritten notation was dated May 22, 2006. Further, there is no sworn statement or affidavit from Dr. Rice authenticating the handwritten note. Likewise, the Commission has specifically stated that it intends for only those medical records and narrative notes and reports composed and generated by the physician in the ordinary course of medical practice to be admissible.

In *Georgia Pacific Corp. v. McLaurin*, 377 2d 1359, (Miss. 1979), the Mississippi Supreme Court addressed a case in which an administrative judge allowed a claimant to introduce an unsworn doctor's report into evidence, over the objection of counsel for the employer. *McLaurin*, 377 2d at 1360. The doctor's report in question consisted of a series of letters written by the doctor to the claimant's attorney. *Id.* In holding that the Commission erred in allowing the unsworn report into evidence, the Court stated that the Commission's rule making power "does not extend to admitting incompetent evidence where such admission would amount to a denial of due process. Nor does the 'liberal construction' of the Workman's Compensation Act permit the disregard of traditional notions of fair play and substantial justice in the adversary proceedings contemplated by the Act." *Id.* at p. 1361. The Court went on to address the special importance of medical evidence in workers' compensation proceedings:

In Workman's Compensation cases the testimony of the doctor as to his "medical findings" is the sine qua non to recovery under the statute. It is an understatement to say that this testimony is important.

It is quite likely that the bench and bar would be scandalized if this Court should approve the receiving of evidence of *ex parte*, unsworn statements of persons other than doctors even in workman's compensation cases.

While doctors occupy an important role in our scheme of things, they are, after all, merely human, and may not be considered wholly free from the frailties that beset the rest of us. There is nothing, therefore, in the fact that a witness may be a member of the medical profession that reasonably may be said to justify his exemption from the requirements and restrictions which would apply to others giving testimony as witnesses in an adversary proceeding. The admission of the reports constitutes reversible error.

Id. at p. 1362.

Again, it should be noted that Dr. Rice's supplemental medical report was never submitted in the form of a medical records affidavit. The handwritten note was not generated in the ordinary course of his practice as Dr. Rice did not see Claimant on the day he authored the note. Clearly, Dr. Rice did not arbitrarily decide to review Claimant's records and issue a supplemental report on the causation issue. Instead, either Claimant or her counsel took some action to elicit the report from Dr. Rice. Herein lies the crux of the reliability problem. Neither the administrative judge nor defense counsel were in a position to know what information was conveyed to Dr. Rice prior to his preparation of the supplemental report. This brings into question the reliability of his report. Further, a supplemental report not associated with a particular visit and issued more than one and one half years after a patient's last visit cannot constitute a "narrative note and report composed and generated by the physician in the ordinary course of medical practice" as is mandated by Procedural Rule 9(7). Thus, in following its own procedural rules, the Commission correctly upheld the

administrative judge's ruling that the supplemental, handwritten note from Dr. Rice was not admissible medical evidence.


IV. Conclusion

The administrative judge, as confirmed by the Commission, found that the Claimant herein sustained a temporary aggravation of her pre-existing right knee condition as a result of a work injury that occurred on October 16, 2003. Further, the administrative judge found that the Claimant's condition improved to a baseline point on December 23, 2003, relying on the medical testimony for treating physician, Dr. Johnny Mitias, and that Employer and Carrier were no longer liable for worker's compensation benefits after that point. Employer and Carrier would show that these findings are supported by the substantial evidence and applicable law and should be affirmed. Claimant not only takes issue with those findings of the administrative judge, but further contends that the administrative judge erred in striking proposed additional medical evidence presented by the Claimant as well as contending that the administrative judge's Order exceeded the announced scope of the hearing. However, in reviewing the record, this Court will see that the administrative judge ruled only on the issues before her for consideration and acted appropriately in striking the Claimant's medical evidence that did not comply with the Commission's Procedural Rules. The administrative judge acted neither arbitrarily nor capricious, and thus, the Order of the Commission, affirming the administrative judge, should be upheld.

Respectfully submitted,

ASHLEY FURNITURE INDUSTRIES AND
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CERTIFICATE OF SERVICE

I, GINGER M. ROBEY, of counsel for the employer and carrier herein, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

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The Honorable James L. Roberts, Jr.
Circuit Court Judge
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THIS, the 16th day of February, 2011.


GINGER M. ROBEY