

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

SANDY BALL

APPELLANT

VERSUS

ASHLEY FURNITURE INDUSTRIES

APPELLEE

AND

EMPLOYEES INSURANCE OF WAUSAU

APPELLEE

**ON APPEAL FROM ORDER OF THE FULL COMMISSION
AND PONTOTOC COUNTY CIRCUIT COURT**

ORAL ARGUMENT REQUESTED

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Sandy Ball, Appellant;
2. Ashley Furnitures Industries, Appellee;
3. Employees Insurance of Wausau, Appellee;
4. Lawrence J. Hakim, Esq., Attorneys for Appellant;
5. Ginger Robey, Esq., Attorney for Appellees.

This the 20th day of January, 2011.


LAWRENCE J. HAKIM
MS BAR NO [REDACTED]

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I. STATEMENT OF ISSUES ON APPEAL

1.

The Mississippi Workers' Compensation Commission committed prejudicial and reversible error as a matter of law and fact in failing to find the Appellees responsible for Appellant's knee surgery, or for medical and indemnity benefits subsequent to December 23, 2003.

2.

The Mississippi Workers' Compensation Commission Order is not based upon substantial evidence, and is erroneous as matter of law insofar as it bases its holding upon the Rathborne v. Green, 115 So. 2d 674 (1959), whereas Hedge v. Leggett & Platt, Inc., 641 So. 2d 9 (Miss. 1994), is the applicable precedent based upon the facts of the instant case.

3.

The Mississippi Workers' Compensation Commission failed to resolve all issues of doubt, medical, or otherwise in favor of the Appellant.

4.

The Mississippi Workers' Compensation Commission improperly struck and/or excluded critical, relevant, and probative medical evidence from Dr. William Rice, an Orthopedic Surgeon the Appellant saw at the request of her treating physician.

II. STATEMENT OF THE CASE

On or about April 15, 2004, Appellant, Sandy Ball, filed her Petition to Controvert, alleging a work injury to her chest and right knee as a result of slipping on wet paint and falling on or about October 16, 2003.

On or about April 28, 2004, Appellees, Ashley Furniture Industries and Employers Insurance of Wausau, filed their Answer, admitting the subject work injury. On or about December 14, 2004, Appellees filed an Amended Answer, admitting the subject work injury, but disputing the extent of the injury. Accordingly, Appellant filed her Motion to Compel Medical Treatment in order to have knee surgery proposed by orthopaedic surgeon, Johnny Mitias, M.D.

By agreement of the parties, and consistent with Appellant's Motion to Compel, the issue to be addressed by the Administrative Judge was whether Appellant's proposed knee surgery was causally related to her admitted work injury. All other issues, including the existence and extent of temporary total disability, whether maximum medical improvement (MMI), had been reached, and existence and extent of permanent disability were reserved by stipulation of the parties for a later hearing.

At the request of the Administrative Judge, Cindy P. Wilson, the parties submitted Proposed Orders. Prior to the submission of her Proposed Order, Appellant attempted to put into evidence, key medical evidence, which was denied by Judge Wilson, on March 29, 2007. Thereafter, on July 18, 2008, over one year after her March 29, 2007 Order, Judge Wilson entered her Order of Administrative Judge on the medical issue, finding that Appellant suffered from a pre-existing condition, which she aggravated while working for Appellee, but that said

aggravation was temporary and that the Appellees were not responsible for benefits after December 23, 2003.¹

On or about December 19, 2008, Appellant timely appealed from the Order of Administrative Judge. On December 10, 2008, the Mississippi Workers' Compensation Commission affirmed without comment the Order of Administrative Judge. Thereupon on or about December 18, 2008, Appellant filed her Notice of Appeal.

On or about September 23, 2010 the Pontotoc County Circuit Court, Honorable James L. Roberts, Jr. affirmed, without hearing oral argument, the Order of the Commission.

Appellant accordingly has appealed to the Mississippi Court of Appeals.

III. SUMMARY OF THE FACTS

A. Key Uncontroverted and Unrebutted Facts in Evidence

- 1. Appellant, Sandy Ball sustained an admitted work injury to her left knee, October 16, 2003.**
- 2. This was the first and only injury to her knee.**
- 3. She had never had any prior problems or symptoms with her left knee before her admitted October 16, 2003 injury.**
- 4. Appellant never recovered from her admitted work injury to her knee.**
- 5. The symptoms in Appellant's knee never went away between the date of her injury and the date the Commission issued its ruling in her case.**
- 6. Appellant's orthopedic surgeon, Dr. Johnny Mitias, testified that her knee injury triggered the symptoms in her right knee and that he could not rule out her admitted work injury as a contributing cause to her ongoing symptoms.**

¹ While the Administrative Judge ruled that the Appellees are not responsible for benefits after December 23, 2003, it again should be noted that the sole issue she was to reach primarily dealt with medical benefits for the knee. All other issues, such as maximum medical improvement, as well as the existence and extent of temporary and/or permanent disability benefits were reserved by stipulation.

B. Additional Facts

Appellant, Sandy Ball ("Sandy") was born August 29, 1974, and at the current time is 36 years old. She resides in New Albany with her husband, Michael, and their three children. Sandy is a 1992 graduate of W. P. Daniel High School in New Albany, and received R.N. training at Northeast Community College in Booneville, Mississippi. In November, 2005, she graduated from Concord Career College and is certified as a medical assistant. Sandy's past work experience includes factory work with Appellee, Ashley Furniture Industries, the Employer herein, and she previously, worked as a nurse's aide and a home health aide for Roselawn Retirement Home and Gilbert's Home Healthcare respectively.

On or about October 16, 2003, Sandy sustained an admittedly compensable work injury to her left knee at the Appellee's plant in Ecu, Mississippi. Sandy was clocking out when she slipped on wet paint and slid, face first, striking her knee on the floor in front of witnesses. Sandy received medical treatment from Gena Vail, FNP, New Albany Family Medical, and Dr. Johnny Mitias, as well as Hill Rehab.

Sandy first saw New Albany, Mississippi, Orthopedic Surgeon, Johnny Mitias, M.D., October 21, 2003. (General Exhibit 1) Dr. Mitias' took the following history:

"Ms. Ball is a 29 year old black female, who reports on 10/16/2003, that she was clocking out at work when she stepped on some wet paint causing her to lose her balance and she fell, landing in prone position. She went to the emergency room, where they examined her on 10/17/2003. They told her there were no obvious fractures or abnormalities. However, she began having pain over the right knee. She reports that she can not walk for any period of time for this causes pain around the patellofemoral space and she reports that it feels as if it tries to jump out of place."

On physical examination, Dr. Mitias noted Sandy walked with an antalgic gait and was guarded during the clinical exam. Sandy reported pain with the Apley's and McMurray's maneuvers over the patellofemoral space of her knee and was tender with palpation over the

medial joint line and around the patellofemoral space. X-rays showed Sandy had a patellofemoral chondromalacia. Dr. Mitias' diagnostic impression was patellofemoral contusion. His plan included placing Sandy in a BioSkin patella brace and giving her Lidocaine and Depo Medrol injections. Sandy was also started on physical therapy for her patellofemoral pain.

Sandy returned to Dr. Mitias, November 4, 2003, and reported that the therapy had decreased her pain approximately 70%, but she was still having pain when walking long distances. A physical examination on that date was normal and Dr. Mitias' plan included continuing Sandy with the brace and home exercises. Dr. Mitias released Sandy to regular duty.

Sandy returned to Dr. Mitias, December 4, 2003, with the following interval history:

"Sandy returns today. She is here for follow-up of her right knee pain. She states that it began hurting much worse and even sewing, which is what her job duty at Ashley is, is causing pain. She states that the pain is along the anterior aspect of her knee."

A physical examination on this date revealed an antalgic gait on the right and tenderness around the patellofemoral joint. Dr. Mitias' diagnostic impression was right patellofemoral pain and he ordered an MRI.²

Sandy returned to Dr. Mitias', December 23, 2003, and on that visit Dr. Mitias went over the right knee MRI with her. It was his opinion that the MRI showed early patellofemoral compartment degeneration and no signs of arthritis or other contusions, or meniscal damage. The physical examination was essentially the same as the previous visit and Dr. Mitias' diagnosis was patellofemoral chondromalacia of the right knee.

Dr. Mitias released Sandy to light duty with a 0% impairment rating.

Sandy returned to Dr. Mitias, October 7, 2004, with the following interval history:

"Ms. Ball is a 30 year old white female, who states that she has been having right knee pain for quite some time now. We have treated her for this in the past and

² This was the first time Sandy had an MRI of her right knee done for her admitted work-injury.

basically exhausted all treatment options up to this point. She still has complaints of patellofemoral type symptoms and states it bothers her mostly whenever she walks for long distances. She states that she has received injections and has been to physical therapy and these have helped only briefly.”

A physical examination on this visit revealed tenderness to palpation over the medial border of Sandy’s patella with some mild joint line tenderness. Sandy also demonstrated pain with a patella grind test. Dr. Mitias’ diagnostic impression was right patellofemoral syndrome and x-rays taken showed the patellofemoral space was narrower than previous. Dr. Mitias offered sandy a surgical procedure known as a lateral release due to the continue pain.

Sandy return to Dr. Mitias, October 28, 2004, with the following interval history:

“She returns for a long standing problem with patellofemoral pain. She has had an MRI in the past for this and it showed some mild degenerative changes in her patellofemoral compartment. They are really more significant than I would expect to see from the examination today. She has times when she feels like this is going to pop out. She actually had a painful pop and occasionally will, especially when she steps off a curb and gets up from a sitting position, if her knee is not in the right position.”

Physical examination on this date revealed a “very positive lateral apprehension patellar sign,..., with some pain over the lateral facets with palpation.” Dr. Mitias’ impression was patella maltracking with chronic patellofemoral pain. Dr. Mitias referred Sandy at this point to Tupelo Mississippi Orthopedic Surgeon, William Rice, M.D., for a second opinion.

Sandy saw Dr. Rice, November 19, 2004. Dr. Rice obtained the following history:

“The patient is seen today for a second opinion today from Dr. Mitias. Although currently she is unemployed, she was working at Ashley Industries, when she fell at work and landing with an anterior blow to her knee. She has been seen by Dr. Mitias and has been treated with medication, both orally and intra-articularly with an injection of steroid by her report. She has had x-rays taken at the time of her injury and more recently an MRI, which we do not have, but we have the report from the imaging center of that study. She states she feels, especially with walking, “that the bone is slipping”, she has pain in the anterior knee. She has been treated with physical therapy without relief and surgical treatment has been recommended, which to me sounds from her description, to be a lateral release.”

Dr. Rice's physical examination of Sandy revealed tenderness localized to the retropatellar area and some anterior pain with the McMurray's test. Dr. Rice's diagnostic impression was ongoing patellofemoral pain. Dr. Rice's conclusion was that a lateral release was a reasonable option for Sandy and it appears that due to a change in insurance companies, it was Dr. Rice's understanding that he now, and not Dr. Mitias, would proceed with the surgery.

As noted *infra*, Dr. Rice concluded that Sandy's work-injury caused her need for surgery, although she was not allowed to place Dr. Rice's opinion into evidence.

On or about March 10, 2005 Sandy filed the Medical Records Affidavit of William L. Rice, M.D. On May 3, 2006 Sandy's counsel faxed a letter to Dr. Rice, seeking his opinion on whether or not her patello femoral pain and surgical procedure were causally connected to work injury. It was not until May 23, 2006 that Dr. Rice faxed back his response, which stated:

"It is my opinion that the diagnosis of patello femoral pain, as noted above, was related to the work accident described above. This caused the recommendation of surgical treatment, (i.e. lateral release, recommended by Dr. Mitias). Signed William L. Rice, M.D.

Sandy forwarded a copy of Dr. Rice's supplemental note to defense counsel, May 23, 2006, with intent to enter same into evidence. Sandy thereafter attempted to have same entered into evidence with Judge Wilson. However, on the Appellees' Motion to Strike Judge Wilson ruled on March 23, 2007:

"The Administrative Judge finds that the supplemental report of Dr. Rice, submitted by Claimant's counsel on August 9, 2006, is not admissible pursuant to Procedural Rule 9 (7) of the Mississippi Workers' Compensation Commission. Dr. Rice's supplemental report was not associated with any specific treatment provided to Claimant and constitutes inadmissible hearsay. Further, the parties in this matter previously agreed that the record would be closed in this matter as of May 5, 2006, and that the Administrative Judge would consider the medical records of the treating physicians and the deposition of Dr. Mitias and issue a ruling on whether the Employer and Carrier are responsible for further medical treatment for Claimant's right knee injury. The Medical Records Affidavit of Dr.

Rice was obtained and submitted after this agreement and in violation of the agreement.”

IV. SUMMARY OF THE ARGUMENT

Under the applicable standard of review this Court must reverse the decision of the Commission if said decision is not based on substantial evidence, is arbitrary and capricious, or was erroneous as a matter of law. If the Commission applied an incorrect legal standard, or applied the correct legal standard erroneously, review is *de novo*. Furthermore, this Court is duty bound to more closely and critically review an Order of the Commission where that Order adopts the findings and conclusions of the Administrative Judge, who in turn has adopted the findings and conclusions submitted by a party.

The Commission erred as matter of law when it exceeded the scope of matters to be heard by the Administrative Law Judge and essentially ruled against Appellant on the existence and extent of temporary and permanent disability.

The Commission further erred as a matter of law in failing to give the benefit of the doubt on medical issues to the Appellant. The Commission erred as a matter of law in failing to liberally interpret the Mississippi Workers' Compensation Act in order to accomplish its beneficent purposes.

The Commission committed error as a law and fact in failing to find that Appellant's lower extremity injury and subsequent need for surgery were causally related to her work injury. The deposition testimony of Dr. Mitias fully supports this conclusion and the contrary conclusion reached by the Commission reflects it applied an incorrect legal standard, and/or erroneously applied what otherwise would be the appropriate rule. The only logical explanation

for the Commission's decision, in light of Dr. Mitias' deposition testimony is that the Commission acted arbitrarily and capriciously in this case.

Finally, the Commission committed prejudicial error as a matter of law and fact in excluding the opinions of Dr. William Rice. However, even without Dr. Rice's opinions, the Commission, on the basis of Dr. Mitias' testimony alone, should have found for Sandy.

V. ARGUMENT

A. Standard of Review

An appellate court must reverse a decision of the Commission if, a.) said decision is not based on substantial evidence, b.) is arbitrary or capricious, c.) is based on an erroneous application of the law, d.) was beyond the power of the Commission to make, or e.) if it violates a statutory or constitutional right of the Appellant. Smith v. Jackson Construction Co., 607 So. 2d 119, 1124 (Miss. 1992); Piney Woods Country Life School v. Young, 946 So. 2d 805 (Miss. Ct. App. 2006).

A decision is said to be based on substantial evidence if it is not clearly erroneous and contrary to the overwhelming weight of the evidence. Piney Woods Country Life School at 807. Even though the Commission is the ultimate fact finder, the appellate court will reverse when the findings of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of evidence. DiGrazia v. Parkplace Entertainment, 914 So. 2d 1232 (Miss. Ct. App. 2005).

The substantial evidence rule is sufficiently flexible to permit an appellate court to examine the record as a whole and if that record reveals that the Commission's Order is based on a mere scintilla of evidence and is against the overwhelming weight of the evidence, the court

will not hesitate to reverse. Smith v. Commercial Trucking Co., Inc. and USF&G, 742 So. 2d 1082, 1085 (Miss. 1999).

An appellate court has the power to broaden the Commission's authority to meet the munificent purpose of the Workers' Compensation Act and there is a broad public policy behind the act to provide the necessary treatment to restore the injured worker to health and productivity. 742 So. 2d at 1087.

If the Workers' Compensation Commission commits prejudicial error, the appellate court does not need to defer to the Commission decisions on issues of fact and credibility. Barber Seafood, Inc. v. Smith, 911 So. 2d 454 (Miss. 2005).

Where the Commission merely affirms the Administrative Law Judge's decision, the appellate court must examine the findings of fact made by the Administrative Judge as those of the Commission. McDowell v. Smith, 856 So. 2d 581 (Miss. Ct. App. 2003).

An appellate court is charged with determining whether there has been an error of law made by the Workers' Compensation Commission and judicial review of errors of law is *de novo*. Weatherspoon v. Croft Metals, Inc., 881 So. 2d 204 (Miss. Ct. App. 2002).

A finding of the Workers' Compensation Commission is clearly erroneous when although there is slight evidence to support it, the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Worker's Compensation Act and where only a scintilla of evidence supports the Commission decision the Appellate Court must reverse. Mississippi Dept. of Transp. v. Moye, 850 So 2d 114 (Miss. Ct. App. 2002).

An Appellate Court has a duty to review the facts contained in the record of a Worker's Compensation proceeding, and to determine whether those facts substantiate the Order of the

Commission; Appellate review of the facts will determine whether the Commission was manifestly in error in its interpretation of those facts. Flake v. Randall Reed Trucking Co., 458 So. 2d 223 (Miss. 1984).

Finally, if the Administrative Judge, and by extension, the Commission have adopted the proposed findings of a party, an Appellate Court must review the challenged findings of fact, and Appellate record as a whole with a more critical eye to ensure that the Commission has adequately performed its function. Greenwood Utilities v. Williams, 801 So. 2d 783, 788 (Miss. Ct. App. 2001).

B. The Mississippi Workers' Compensation Commission committed prejudicial and reversible error as a matter of law and fact when it exceeded the scope of the hearing in violation of Procedural Rule 9 when it affirmed the Administrative Judge's finding that Appellant was entitled to no benefits which in essence was a ruling that Appellant was not entitled to any periods of temporary or permanent disability.

As detailed more fully, under the procedural history and background of the instant case, Sandy agreed to forego a formal evidentiary hearing with live testimony in lieu of a decision from the Administrative Judge on the basis of the record with the expectation that the decision would be strictly limited to the surgical issue and that all other issues pertaining to this claim would be reserved until further time. Instead, the Administrative Judge issued her decision finding that Sandy would not be entitled to any benefits after December 23, 2003. In short, what the Administrative Judge as affirmed by the Commission did was improperly reach a ruling on the issues of temporary and permanent disability in Sandy's case, the genesis of which began with Sandy's Motion to Compel Medical Treatment.

By so ruling, the Administrative Judge and the Commission *exceeded* the scope of what to all intents and purposes was supposed to merely be a Procedural Rule 9 hearing on Sandy's

Motion to Compel Medical Treatment. The Mississippi Supreme Court has previously addressed the issue of a Commission Order that exceeds the scope of the hearing. Monroe v. Broadwater Beach Hotel, 593 So. 2d 26 (Miss. 1992)

In Monroe, the claimant sustained a compensable injury to her knee, but had to file a General Rule 9 Motion for treatment on her back, which she alleged was aggravated by her knee injury. 593 So. 2d at 27.

At the hearing the claimant only presented evidence concerning the causal connection between her original knee injury and back problem. Id. at 31.

The Administrative Judge found that claimant's back injury was not work related, but the Administrative Judge went on to make additional findings that claimant had reached maximum medical improvement (MMI) for her knee injury and further made a finding of permanent disability regarding same.

The Commission affirmed and the claimant appealed, arguing that the Commission committed error when it determined issues outside the scope of the hearing, which scope was limited to the Employer/Carrier's responsibility *vel non* for the claimant's back injury. Id. at 29.

Upon appeal the Mississippi Supreme Court reversed the Commission agreeing that the Commission had exceeded the scope of the hearing, even though the claimant had entered evidence into the record outside of the primary medial issue. Id.

In so holding, the Mississippi Supreme Court declared:

An Administrative Law Judge may not announce a limited purpose of a hearing, require the litigants to argue under limitation, and then decide the whole of the case, including time of maximum recovery, apportionment and compensation. And claimant is entitled to know: "this hearing is it; now is my time to put on my total case and expect a final decision."

The ruling as rendered below assumes totality of evidence and finality of result and indeed leaves us unsure as to additional proof and additional dispositions. The

Commission or Administrative Law Judge might not perceive additional evidence or legal precedent, but we have a diligent and imaginative bar. Left unfettered, Monroe's case may be more completely developed than intended. Certainly a claimant can not be [led] into a partial hearing and have the whole claim determined.

Id. at 31.

This very issue has been recently revisited by the Mississippi Court of Appeals. Washington v. Woodland Village Nursing Home, 25 So. 3d 341 (Miss. App. 2009). In Washington, the claimant suffered an admittedly compensable injury to her neck. Claimant later developed lumbar problems, allegedly arising from her work injury and also needed additional surgery on her neck. 25 So. 3d at 345.

A hearing was held which specifically identified as the three issues to be heard, 1.) causal connection; 2.) whether or not the employer/carrier should be responsible for additional surgery, and 3.) whether the claimant would have to forfeit her worker's compensation benefits due to alleged fraud. Id. at 351.

The Administrative Judge's order made additional findings in addition to those involving the above three issues to-wit: that the claimant had reached maximum medical improvement and had suffered no loss of wage earning capacity. Id. at 349.

On direct appeal and cross-appeal, both the Commission and Hancock County Circuit Court affirmed the Order of Administrative Judge. Id. at 345.

Even though the Administrative Judge's statement concerning the hearing scope contained two references to disability, the Court of Appeals reasoned one reference was to medical or functional disability, which was the type of disability permitted to be determined at the claimant's hearing; whereas the industrial disability was specifically reserved for a later hearing. Id. at 353-354.

The employer/carrier argued that a second hearing would only occur if the additional surgery were authorized and obtained and since authorization for same was denied, the Administrative Judge properly reached the issue of permanent disability. Id. at 354.

The Court of Appeals disagreed for two reasons:

“First, the Administrative Law Judge stated that a second hearing was to occur on the “result” of disability if “such [disability]” was found to be compensable, not if further surgery was authorized. Indeed, Washington’s medical disability was found to be compensable, leading to the conclusion that a second hearing would occur on its “result”. Second, we construe any ambiguity inherit in the Administrative Law Judge’s statement in favor of Washington on the basis that “a claimant is entitled to know”; “this hearing is it”; now is the time to put on my total case and expect a final decision.” ..., the Administrative Judge’s statement communicated that a second hearing would occur on the “result” of disability if the injury were found to be compensable; this reasonably communicated to Washington that there was no need to put on evidence of loss of wage-earning capacity until the second hearing.”

Id. In the instant case, Sandy *only* agreed to a decision made on the record in lieu of a formal evidentiary hearing because it was the parties understanding that the sole issue reached by the Judge would be the Appellees responsibility for Sandy’s proposed knee surgery.

Therefore, based upon the case law precedents, the Mississippi Workers’ Compensation Commission committed reversible error as a matter of law and fact when it exceeded the scope of the hearing, which arose from Sandy’s Motion seeking medical treatment in the form of surgery for her knee only.

- C. The Mississippi Workers’ Compensation Commission committed prejudicial and reversible error as a matter of law and fact and acted arbitrarily and capriciously in failing to find, contrary to the overwhelming weight of the evidence, that Appellant sustained a compensable injury to her knee arising out of and in the scope and course of her employment with the Appellee and that all residual problems, including the need for surgery, were and are the direct and causal result of said work injury.**

The primary objective of the Mississippi Workers' Compensation Act is to restore the injured worker to good health and thus gainful employment. Miss. Code Ann. §71-3-1 (as amended).

More specifically, the statute mandates:

The Employer shall furnish such medical, *surgical*, and other attendants or treatment, nurse and hospital service, medicine, crutches, artificial members, and other apparatus for such period as the *nature* of the injury or the process of recovery may require.

Id. at §71-3-15(1) (emphasis added). Rule 9 of the General Rules of the Mississippi Workers' Compensation Commission states in pertinent part: "...the medical services shall be reasonably suited to the nature of the injury."

The starting point in analyzing a decision of the Commission is the mandate that the Act be interpreted liberally in order to achieve its beneficent purposes. This means that close cases must be decided in favor of the injured worker, and that any issues of doubt or any ambiguity in the medical evidence must be resolved in favor of the Claimant. More specifically, medical evidence is to be given a liberal construction, with doubtful cases resolved in favor of compensation and the Commission is called upon to apply "common knowledge, common experience, and common sense", when weighing the evidence. Jansen Pharmaceutical, Inc. v. Stewart, 856 So. 2d 431 (Miss. Ct. App. 2003).

All that a claimant must show is that her symptoms *more likely than not* relate to the work injury. A. F. Leis Co. v. Harrell, 743 So. 2d 1059, 1061 (Miss. Ct. App. 1999).

Even though medical testimony may be somewhat ambiguous as to causal connection, all that is necessary is that the medical findings support a causal connection. Moore v. Ind. Life and Accid. Inc. Co., 788 So. 2d 106, 112 (Miss. 2001).

When weighing a doctor's testimony, the Commission must look at the *substance* of that doctors medical opinions:

"[T]he compensation process is not a game of say the magic word, in which the rights of injured workers should stand or fall on whether a witness happens to choose a form of words prescribed by court or legislature, ... what counts is the real substance of what the witness intended to convey."

Air Tran., Inc. v. Byrd, 953 So. 2d 296, 299 (Miss. Ct. App. 2007) (quoting, Dixie Contractors, Inc. v. Ashmore, 349 So. 2d 532, 534 (Miss. 1997)).

Thus, the question is "From the *whole* of the doctor's testimony, what is the real substance he stated concerning causal connection?" Id. (emphasis added)

Professor John R. Bradley and Administrative Judge, Linda A. Thompson put the matter succinctly:

"An injury arises out of the employment "if contributed to or aggravated or accelerated by the employment." In other words, a claimant's pre-existing weakness or infirmity does not defeat her claim for benefits when the work incident is a contributing cause of the disability. This is so even if the employer has no knowledge of the worker's pre-existing condition. As the Court has said, "the employer takes his employees as they are."

The aggravation issue can be carried further. When an injury is work connected, all medical problems or disabilities that derive from that primary injury or the process of the worker's recovery there from are also compensable, so long as the progression of complications has some causal relation to the original injury and is not the result of an intervening independent injury.

The General Rule is:

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct."

Bradley and Thompson, Mississippi Workers' Compensation §54:24

Following are salient portions of Dr. Mitias' testimony:

1. Patellofemoral chondromalacia can exist but be asymptomatic, (Page 11 at Line 16)
2. The knee injury Sandy sustained can trigger symptoms in a previously asymptomatic patellofemoral chondromalacia. (Id. at Line 20)
3. The trauma Sandy sustained to her knee can actually accelerate changes to the actual chondromalacia process itself. (Id. at Line 24-25)
4. Significantly, Dr. Mitias could *not* rule out Sandy's work injury as a contributing cause of her ongoing symptoms. (Page 18 at Line 6-8)
5. The primary purpose of the surgery would be to relieve Sandy's symptoms and render her knee more stable. (Id. at Line 15-17)
6. Once again Dr. Mitias could not rule out Sandy's work injury as being a substantial contributing factor in the ongoing condition of her knee. (Page 22 at Line 16-17)
7. Finally, Dr. Mitias admitted and opined that Sandy's injury was the trigger for her symptoms in the knee. (Page 23 at Line 2)

It should be noted prior to her admitted work-injury Sandy's knee was asymptomatic and she did not suffer from any reported or documented knee problems. The records and facts make it abundantly clear that since the injury Sandy has complained of chronic pain in her knee and has been offered surgery that according to her orthopedic surgeon, is primarily designed to address the *symptoms*. It is clear, based upon the deposition testimony of Dr. Mitias, that her ongoing knee problems are the result of the injury.

Utilizing the applicable legal standard and following the correct rule of law, the Administrative Judge and Full Commission should have found that the surgical procedure recommended by orthopedic surgeons, Drs. Mitias and Rice, was reasonable and necessary, and

the result of Sandy's admitted work injury to her knee. Instead, the Commission resorted to a fifty-one year old case in ruling against Sandy.

The Administrative Law Judge based her decision on Rathborne Haire & Ridgeway Box Co. v. Green, 237 Miss. 588, 115 So. 2d 674 (1959). The Rathborne decision states:

The Rule in this state is that when a pre-existing disease or infirmity of an employee is aggravated, lighted up, or accelerated by a 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 when the effects of the 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.³

However, as Professor Bradley and Judge Thompson note,

"The *Rathborne* corollary when stated in succinct terms outside of the context of the *Rathborne* facts seems to mean one thing. However, when seeking its meaning by stating it in terms of the facts of the case from which it comes, it actually means something quite different.

Mississippi Workers' Compensation Law §5:24

Significantly, within five years the Mississippi Supreme Court limited the *Rathborne* corollary, (which the Commission has erroneously applied in the instant case). The distinction was based upon whether or not the injured worker is able to return to work following recovery from the work injury. M. T. Reed Const. Co. v. Garrett, 249 Miss. 892, 164 So. 2d 476 (1964).

As Professor Bradley's treatise notes, subsequent case law has reinforced the limited applicability of the *Rathborne* corollary. The better rule of law and the applicable precedent is Bolton v. Catalytic Const. Co., 309 So. 2d. 167 (Miss. 1975):

"Where one enjoys functional ability to perform his work in spite of an 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

³ It should be noted that the Rathborne corollary was applied in the instant case to a request for medical treatment arising from an admittedly compensable injury.

bar to compensation. Simply stated, when an injury causes loss of functional ability it is compensable.”

The Act itself codifies this at Miss. Code Ann. §71-3-3(b);

“Injury” means accidental injury or accidental death arising out of and in the course of employment without regard to fall, which results from an untoward event or events, if contributed to, or *aggravated*, or accelerated by the employment in a significant manner.

A familiar concept in Workers’ Compensation Law is that the employer takes the worker as the worker is found – with all the strengths and weaknesses the worker brings to the job. This includes physical strengths and weaknesses. If a lame worker suffers an employment fall and is injured, the injury is said to arise out of and in the course of employment under the same test applied for workers not lame. By the same token, if an awkward worker stumbles and falls, the Rule is the same as if the worker were agile.

Hedge v. Leggett & Platt, Inc., 641 So. 2d 9, 14 (Miss. 1994); (quoting, Dependents of Chapman v. Hanson Skills Co., 495 So. 2d 1357, 1360 (Miss. 1986)) (emphasis added).

Although a pre-existing condition may have played a role in the disability, it is Horn Book Law, “That where a claimant’s employment *contributes* to his condition, the injury is compensable.” Id. (quoting, Jenkins v. Ogletree Farm Supply, 291 So. 2d 560, 563 (Miss. 1974)). (emphasis ours)

Sandy further respectfully submits that the Commission applied the *wrong legal standard* when applying the Rathborne corollary to her request for *medical* benefits in the form of the knee surgery. The Mississippi Supreme Court has ruled that no apportionment between a pre-existing condition and a work related injury is to be made with respect to medical and hospital services. Sanders v. B. E. Walker Const. Co., 169 So. 2d 803, 251 Miss. 352 (Miss. 1964).

Sandy’s alleged “pre-existing condition” was neither symptomatic, nor disabling to her in anyway, shape, or form, before her work injury. Dr. Mitias provided ample proof of causation when he testified under oath that, a.) when he testified that Sandy’s work injury was the trigger

for the symptoms in said knee, and, b.) he could not rule out Sandy's work injury as a substantial contributing factor of the symptoms in her knee, and that knee's ongoing condition.

Accordingly, the only conclusion that can be reached is that the Commission's decision is arbitrary and capricious and/or erroneous as a matter of law.

D. The Commission should have admitted into evidence the MRA and supplemental report of Dr. William Rice.

As has been noted *infra* Dr. Mitias referred Sandy to Tupelo, Mississippi orthopedic surgeon, William Rice, M.D., for a second opinion on the need for surgery. Sandy saw Dr. Rice November 19, 2004 and Dr. Rice's note of that date has been discussed above. Dr. Rice opined that Sandy was indeed a surgical candidate and he later opined in a handwritten note appended to his original office note that Sandy's work injury contributed to her need for surgery.

It is important to note that based on the fact Dr. Mitias, himself, referred Sandy to Dr. Rice, a qualified orthopedic surgeon, Dr. Rice was well within the proper chain of selection.

The Administrative Judge rendered an Order on March 29, 2007, granting the Appellee's Motion to Strike Dr. Rice's report. The Judge gave as rationale for her decision the following:

"Dr. Rice's supplemental report was not associated with any specific treatment provided to Claimant and constitutes inadmissible hearsay. Further, the parties in this matter previously agreed that the record would be closed in this matter as of May 5, 2006 and that the Administrative Judge would consider the medical records of the treating physicians and the deposition of Dr. Mitias and issue a ruling on whether the Employer and Carrier are responsible for further medical treatment for Claimant's right knee injury. The Medical Records Affidavit of Dr. Rice was obtained and submitted after this agreement and in violation of the agreement."

While Dr. Rice was not a "treating physician" *per se* at the time he saw the Claimant, he nonetheless saw her at the request of Dr. Mitias for a second opinion. Indeed, Dr. Rice believed that he would be the doctor performing the knee surgery.

Secondly, there was no "violation of any agreement". There is no Procedural Rule utilized by the Mississippi Workers' Compensation Commission that absolutely bars a party's attempt to introduce additional probative evidence before or after an Administrative Judge has rendered her Order, or ask that the record be re-opened, when the Commission retains jurisdiction over a claim.

In the instant case, the Administrative Judge rendered her Order, striking Dr. Rice's Affidavit, March 29, 2007. However, she did not render her Order of Administrative Judge denying medical treatment for Sandy until over one year later on July 18, 2008. Furthermore, the Appellant submitted Dr. Rice's original Affidavit, March 10, 2005.

Sandy respectfully submits that the Administrative Judge's refusal to admit the new evidence may indicate that she "had already made up her mind" with regard to Sandy's claim and request for knee surgery, and simply did not want to be "inconvenienced" by any additional facts and probative evidence.

Accordingly, the Administrative Judge and the Commission acted arbitrarily and capriciously striking Dr. Rice's report from the record. Indeed, the striking of said report which was originally presented in proper format and timely manner via a Medical Records Affidavit amounts to an impermissible violation of Sandy's due process rights in this matter.

However, notwithstanding all of the above, Sandy still respectfully submits that even without Dr. Rice's opinion, Dr. Mitias' deposition testimony, in and of itself, warranted a finding for Sandy that the proposed surgery was causally connected to her original work injury as Dr. Mitias in essence affirmatively testified to that fact.

VI. CONCLUSION

As the Mississippi Supreme Court has noted, the legal effect of evidence and its ultimate conclusions are questions of law. Central Electric Power Ass'n v. Hicks, 110 So. 2d 351 (Miss. 1959). The Mississippi Workers' Compensation Commission committed error as a matter of law by, a.) deciding matters outside of the very limited scope of the hearing in this matter; b.) failing to construe and apply the Mississippi Worker's Compensation Act correctly as required by the statutes and case law of this State, c.) by erroneously utilizing a case that simply is inapplicable to the instant case, and d.) by failing to resolve any doubt and/or ambiguity in the medical testimony in favor of the Claimant.

Accordingly, review is *de novo* and the substantial medical evidence in this case indicates the Appellant's ongoing symptoms and need for surgery are causally related to her admitted work injury and therefore the Appellees are responsible, under law, to provide additional ongoing medical treatment for same, including the proposed surgery by Dr. Mitias.

RESPECTFULLY submitted, this the 20th day of January, 2011.

SANDY BALL, APPELLANT

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CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, Attorney for the Appellant herein, do hereby certify that I have this day forwarded regular mail, a true and correct copy of the above and foregoing **Brief of the Appellant** to:

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2. Honorable Ginger M. Robey
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