IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANGELA WESTBROOK SMITH — APPELLANT

VS. — CAUSE NUMBER 2010-WC-01875-COA

TRONOX INCORPORATED(SUCCESSOR OF KERR-MCGEE CHEMICAL, LLC) AND ACE AMERICAN INSURANCE COMPANY — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Court of Appeals may evaluate the possibility of disqualification or recusal.

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2. Tronox Incorporated — Employer/Appellee
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8. Hon. Tammy G. Harthcock — Administrative Judge
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8. Hon. Liles Williams — Commissioners
Hon. John R. Junkin
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H. BYRON CARTER, III

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STATEMENT OF THE ISSUES

The employer and carrier/appellees do not agree with the Statement of the Issues as recited by the claimant/appellant. As such, it is believed that the instant appeal presents the following issues for review by this Court:

1. Whether the circuit court was correct in its recitation of the standard of review of a decision of the Mississippi Workers' Compensation Commission, as the circuit court judge's apparent definite and firm conviction was that the commission had made a mistake in its findings of fact and application of the Workers' Compensation Act as to the issue of temporary total disability.

2. Whether the order of the circuit court dated October 27, 2011, was correct in the determination that part of the commission's order, dated April 15, 2008, dealing with temporary total disability was not supported by substantial evidence, was arbitrary and capricious and contained errors of law. The circuit court judge considered that no medical evidence supported the award as no physician took the claimant off work and that the date of maximum medical improvement does not mean that the claimant is entitled to temporary total disability for all periods before that date. Although not specifically cited by the circuit court, claimant had admitted that she could not have been back at work due to her non-work-related back restrictions and that she never attempted to return to work for this employer.

3. Whether the order of the circuit court dated October 27, 2011, is correct in determining that part of the commission's order, dated April 15, 2008, dealing with permanent disability was supported by substantial evidence, was not arbitrary and capricious and did not contain any errors of law. The circuit judge considered that the five percent (5%) industrial loss of use was supported by the substantial evidence.

STATEMENT OF THE CASE

This appeal involves a review of the decision of the Circuit Court of Monroe County, Mississippi, on October 27, 2010, following its review of the decision of the Mississippi Workers' Compensation Commission. After reciting the appropriate standard of review for a decision of the commission, the circuit court concluded that the commission's decision concerning temporary total disability was not supported by substantial evidence, was arbitrary and capricious and contained errors of law and should be reversed, but that the commission's decision concerning causation and concerning permanent partial disability was supported by the substantial evidence. The employer and carrier submit that the circuit court's order regarding the commission's decision is in conformity with the standard of review and is supported by the evidence and the law and must be affirmed by this Honorable Court.

I. Nature of the Case and Course of Proceedings

This appeal arises out of injuries allegedly sustained while the claimant/appellant, Angela Westbrook Smith (hereinafter sometimes referred to as "employee", "claimant" or "Ms. Smith"), was employed with Kerr-McGee Chemical, LLC at its plant in Hamilton, Mississippi (hereinafter sometimes referred to as "the employer" or "Kerr-McGee" or "Tronox").[1] As a consequence of her alleged injuries, Ms. Smith claims to have sustained a period of temporary total disability, permanent total or permanent partial disability and medical treatment.

Historically, on November 19, 2001, the claimant/appellant filed her Petition to Controvert seeking compensation for injuries to her arms allegedly caused by "repetitive motion of opening

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1 Subsequent to this claim, through mergers and other corporate changes, the company has become Tronox Incorporated. Nevertheless, at the time of this claim, the claimant/appellant worked for Kerr-McGee Chemical, LLC.

large valves and pulling rusty hard to open levers." She alleged a date of injury of the ___ day of December, 2000. Claimant had left work in November of 2000 due to non-work-related health conditions. (R. 1)

On December 6, 2001, the employer and carrier/appellee answered the Petition denying an injury and denying that any benefits were due. The employer and carrier further alleged that because no date of injury was specified and no notice of injury received, the alleged injury was unrelated to claimant's employment. If the claimant suffered from any disability or loss of wage earning capacity, it was due to a pre-existing physical handicap, disease or lesion and that such pre-existing infirmity was a material and substantial contributing factor. (R. 3)

On December 22, 2003, claimant filed her Pretrial Memorandum alleging the contested issues were: the amount of claimant's average weekly wage, existence of temporary disability, existence of permanent disability and loss of wage earning capacity. The date of maximum medical improvement was to be determined by medical testimony. Claimant listed Dr. Laura Gray as a witness. Exhibits were listed as pertinent portions of the claimant's personnel file, all relevant "B" forms, wage statement and any attachment to responses to discovery. (R. 22)

The employer and carrier filed its Pretrial Statement on February 18, 2005, listing the issues as: whether a compensable injury occurred, the amount of the claimant's average weekly wage, the existence of temporary disability attributable to the alleged injury, the existence of permanent disability, reasonableness of medical treatment, the statute of limitations and that the claim was limited to carpal tunnel syndrome. (R. 26) Expert witnesses were listed as Drs. Charles Rhea and Johnny Mitias by deposition. Exhibits were noted to be the wage statement, excerpts from medical records and pertinent portions of the claimant's personnel file.

The employer and carrier filed an Amended Pretrial Statement on February 22, 2005. The amendment was to add Dr. Robert Buckley as an expert witness by deposition. (R. 30) An Amended Pretrial Statement of Employer was filed the same date that did not include Dr. Buckley as an expert witness. (R. 34)

On November 15, 2005, the administrative judge dismissed the claim for failure of the parties to schedule trial, as the claim had remained in an "Awaiting Hearing" status for an extended period. (R. 38)

On November 22, 2005, claimant filed a motion to reinstate the claim alleging that it was ready to be heard, but through oversite had not been scheduled for trial. (R. 39)

By order dated December 13, 2005, the claim was reinstated to the controverted docket. (R. 41)

The claim was scheduled for trial on October 31, 2006, in Aberdeen before Judge Tammy Harthcock. (R. 42) Subsequently, trial was continued to January 18, 2007, in Aberdeen. (R. 48) Trial was continued again to June 7, 2007, in Starkville. (R. 51)

Ultimately, trial was held on June 7, 2007, before Judge Harthcock. The issues were agreed to be: whether the claimant had a work-related injury in the form of bilateral carpal tunnel syndrome beginning on or about December 2000; assuming compensability, the existence and extent of temporary disability attributable to claimant's alleged work injuries; and assuming compensability, the existence and extent of permanent disability attributable to claimant's alleged work injuries. The parties stipulated to claimant's average weekly wage of $845.48 and that she reached maximum medical improvement on October 28, 2003.

Administrative Judge Harthcock entered her order on August 21, 2007. (R. 52) After reciting her review of the lay testimony and medical evidence, she held that claimant had met her

burden of proof that she had work-related bilateral carpal tunnel syndrome. She further held that as to temporary disability, claimant was not taken off work by Dr. Gray for carpal tunnel syndrome. Dr. Gray gave work restrictions, but claimant was already off work due to a back injury. Claimant continued to be off work due to her other unrelated medical conditions. Therefore, claimant would only be entitled to temporary benefits for the time she had surgery by Dr. Buckley, whose records were not admitted into evidence. As to permanent disability, claimant was placed on restrictions of no repetitive use of the hands or wrists and no lifting over 10 pounds by Dr. Gray. The judge noted that claimant was off work due to unrelated medical conditions. She had not attempted to return to work for Kerr-McGee, but had worked for a short time as a substitute bus driver. Based upon the evidence as a whole, including claimant's age, education, work history, job description and medical condition, Judge Harthcock awarded a 5% industrial loss of use to each upper extremity. This award resulted in 20 weeks of benefits at the maximum compensation rate of $303.35 being due.

On August 27, 2007, claimant petitioned for review by the commissioners. The issue was noted to be a disagreement that the claimant sustained only a 5% industrial loss of use to each upper extremity. (R. 60)

Pursuant to the employer's request, the commission prepared an official calculation of the amount due pursuant to its order, which including penalties and interest was determined to be $8,686.45. In September of 2007, the employer paid the award as calculated by the commission. A Form B-31 showing all payments made on the claim was submitted to the claimant's attorney, but not received back and hence not filed with the commission.

On April 15, 2008, the Full Commission entered its order. (R. 62) The commissioners affirmed the administrative judge's finding of a 5% industrial loss of use of each arm. The

commissioners amended the administrative judge's finding on the issue of temporary disability. They noted that the claimant underwent surgery for the carpal tunnel syndrome on April 5, 2002, and reached maximum medical improvement on October 28, 2003. Then, based upon those dates, the commissioners found that temporary total disability was due for the period from April 5, 2002 until October 27, 2003.

On May 15, 2008, the employer and carrier filed their notice of appeal to the Circuit Court of Monroe County, Mississippi, seeking reversal of the commission's order. (R. 64) The employer and carrier noted that compensability was contrary to the evidence in that the claimant's job duties, as testified by her and the employer witnesses, was not repetitive and that the finding of temporary total disability being due from the date of surgery to the date of maximum medical improvement ignored the fact that no physician took the claimant off work. The order also ignored that claimant's other medical conditions prevented her from returning to work during the disputed time period and that she had not attempted to return to work with Kerr-McGee. The employer and carrier also asked for the decision to be reversed on any other grounds that the court might determine from its review of the facts and evidence.

On May 20, 2008, the claimant filed her notice of cross-appeal alleging the award of permanent disability was too low and that the claimant was totally disabled. (R. 68)

On October 27, 2010, the circuit court prepared its order regarding the appeal. The same was entered by the clerk on November 1, 2010. (R. 75) In a lengthy opinion wherein the circuit judge acknowledge the limited standard of review, he ultimately held that the commission's decision regarding temporary total disability was not supported by the substantial evidence, was arbitrary and contained errors of law and should be reversed. He also held that the commission's

decision regarding permanent total [partial] disability was supported by the substantial evidence, was not arbitrary and contained no errors of law and should be affirmed.

On November 10, 2010, the claimant/appellant filed her notice of appeal to this Court. She contested the issues of temporary total disability and permanent disability. (R. 82)

II. Statement of Relevant Facts

Claimant testified that she was born on August 6, 1959, and lived in Amory, Mississippi. (T 5) She has a 9th grade formal education and a GED. (T. 6) Claimant was employed at Walmart from 1976 to 1987 as a cashier, department manager and customer service representative. (T. 6, 42) Then, she worked for True Temper for around 6 months with several jobs. (T. 42). She began work with Kerr-McGee in 1989 and described all of her various job duties from the date of hire to her leaving work in November of 2000. (T. 8-12) Claimant testified that her hands started hurting around the first of 2000 or 1999 and that she had not seen a doctor for her hands before that. (T. 14) Claimant ultimately admitted that the pain first began when she was making a birthday cake for her sister in March of 2000. (T. 38) She never requested medical treatment from Kerr-McGee and never discussed her wrists with them. (T. 15) She mentioned her wrists to an assistant of Dr. Eckman while she was being treated for her back. At the time, she was already off work at Kerr-McGee due to her back and other health conditions. A friend of the claimant referred her to Dr Gray. (T. 17) Dr. Gray referred the claimant to Dr. Buckley, who performed surgery on claimant's right wrist in April of 2002. (T. 18 and 20) She had a brain aneurysm and surgery in May of 2001. (T. 22) After her aneurysm, claimant applied for Social Security disability and was awarded the same for which she receives $1,371.00 per month. (T. 22 and 24) Claimant has worked after November of 2000 as a bus driver. (T. 28) Claimant has a valid driver's license and does drive. (T. 48) Claimant believes she could not work due to her hands, shoulders

and neck hurting. (T. 29) Claimant had no conversations with Dr. Buckley about returning to work. (T. 22) She believes that she could not return to work at Walmart due to her hands and the lifting. (T. 33) Claimant has diabetes, hypertension and back problems. (T. 40) Her restrictions from Dr. Eckman for her back were no bending, climbing or lifting over a certain weight. (T. 40) Claimant admitted that she could not be back at work at her job at Kerr-McGee due to her back restrictions. (T. 41 and 45) She could only be at light duty. (T. 42) Claimant has not attempted to return to work at Kerr-McGee since she left in November of 2000. (T. 44) Claimant's wrists are worse now than when she left Kerr-McGee in November of 2000. (T. 47) Claimant is a smoker, smoking around a pack per day for over 15 years. (T. 53) The medical problems that keep claimant from working at Kerr-McGee are her hands and her back. (T. 54)

Patsy Shannon, the employer's occupational health nurse, never received a complaint from the claimant about wrist pain. (T. 56) The first notice of any wrist complaint was in December of 2000 after the claimant had been off work for a couple of months. (T. 57) Due to her back, claimant was limited to no lifting more than 10 to 15 pounds and changing position frequently and to limit bending and twisting. (T 58) The employer accommodated the claimant's restrictions regarding her low back pain, so that she could continue working. (T. 57 and 58) Ms. Shannon is familiar with OSHA definitions and testified that OSHA defines "repetitive" in regard to the forearm and wrist as 10 times per minutes. One time every 2 hours is not repetitive, and no job the claimant performed at Kerr-McGee was within the definition of repetitive. (T. 59 and 65) Claimant has not attempted to return to work at Kerr-McGee since November of 2000. (T. 60) When looking at the restrictions of Dr. Gray and whether the claimant could have been back at work, Ms. Shannon testified that management would have looked at the restrictions and made a

determination that more than likely would have allowed the claimant to return to work at least on a short-term basis. (T.58)

Todd Goldman, the staff safety specialist at Kerr-McGee, testified the he was familiar with the claimant's jobs at Kerr-McGee. He not only looked at the job performed by the claimant within the months before she left work, but her entire employment history with the employer. She performed no job for an extended period of time that required rapidly repetitive or hand-intensive activities. (T. 73) Basically, she monitored chemical reactions through the use of gauges. (T. 70) At a maximum, claimant could operate up to 16 gauges with valve levers or valve handles in a 12-hour shift plus taking samples every 2 hours. (T. 72) Claimant would write the readings in a ledger. (T. 73) She would do no job with her hands 10 times per minute. (T. 73)

Dr. Laura Gray, a pain management specialist, testified by deposition taken on October 28, 2003. She first saw the claimant on December 7, 2000. (D1-6)[2]. Claimant was complaining of neck, back, left leg and hand pain. (D1-7) Claimant also suffered from high blood pressure. (D1-8) Dr. Gray referred the claimant to Dr. Buckley, who performed the carpal tunnel surgery. (D1-10) Dr. Gray admitted that the case was complicated by the claimant's stroke and that functionally she has other limitations. (D1-12) Over objection to the question, Dr. Gray testified that assuming the claimant performed a variety of tasks including some that were repetitive in nature, she was of the opinion that work could have increased the likelihood of the claimant developing CTS. (D1-14 and 17) Dr. Gray admitted that she did not know the claimant's job

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The deposition of Dr. Laura Gray taken on October 28, 2003, is referenced as "D1" with the appropriate page references. Depositions of Drs. Johnny Mitias and Charles Rhea and are referenced as "D2" and "D3", respectively, per their labeling as exhibits at trial before the administrative judge and found on Volume 1 of 1 of the Exhibits..

duties and did not know if she discussed the job duties with the claimant, however. (D1-20) She did not have a job description. (D1-20) If the job was only turning a lever or a wheel 1 or 2 time per week that absolutely would impact her opinion. (D1-21). If the main role of the claimant was supervisory with no repetitive action or stressor, that also would impact her opinion. (D1-21) Dr. Gray admitted there absolutely are other causes of CTS besides repetitive work. (D1-21) When asked if the claimant improved, Dr. Gray testified that the last 3 times that she saw the claimant, claimant was complaining about things unrelated to carpal tunnel, such as pain between the shoulder blades, diabetes, depression, joint pain, light-headedness from her stroke and her aneurism. (D1-25) There was no complaint about CTS when Dr. Gray last saw the claimant. (D1-26) Dr. Gray admitted that she was not giving the opinion that the claimant could not work because of her CTS. (D1-26) In order to give the opinion that claimant's employment somehow contributed to the CTS, Dr. Gray would need a job description. (D1-27) Based upon what she knew, Dr. Gray gave the opinion that it's just possible that work was a contributing factor. (D1-27)

Dr. Charles Rhea testified by deposition taken on August 16, 2004. He is a board-certified orthopedic and hand surgeon. (D3-5) He initially treated the claimant in August of 1995. (D3-5) The history at that time was that claimant was a 36 year old female with a 5 to 6 month history of vague feelings in her right hand. (D3-6) She had numbness and tingling in he right hand and forearm. (D3-6) Her job as an operator did not require any forcible or repetitive hand intensive activities, although it did require some occasional lifting, writing and mostly operator and supervisory duties. (D3-7) She was referred by Dr. Ervin for assessment. (D3-7) Because she was experiencing symptoms in her neck and shoulder region, she could have some component of her complaints to be cervical arthralgia. (D3-9) The nerve conduction studies indicated moderate to severe right carpal tunnel syndrome. (D3-10) Carpal tunnel syndrome is strictly swelling around

the flexor tendons, which causes pressure on the nerve in a confined space at the wrist. (D3-11) Hand intensive activities is not the only cause. (D3-11) Anything that can cause swelling in the tendons in the wrist can cause CTS. (D3-11) Age seems to be a factor. (D3-11) The fact that the claimant did not have a work-related factor did not mean that she did not have carpal tunnel syndrome, but that she just may not have occupationally related CTS. (D3-12) Dr. Rhea's approach was to try something conservative before surgery. (D3-13) With the claimant, there really was not going to be anything with her job that they could identify and change. (D3-14) Based on the claimant's description of the job, she was not having any rapidly, repetitive or hand intensive activities, which were aggravating her condition. (D3-15) More often than not, the severe cases do not respond to conservative treatment and will need surgery. (D3-19) When Dr. Rhea initially examined the claimant, he thought at least some of the complaints were coming from the neck. (D3-20) The cervical problems could lead to complaints and symptome similar to CTS. (D3-21) Dr. Rhea did not think he asked the claimant not to work or placed any specific restriction on her. (D3-23) In most instances, if the disease is the median nerve compressive neuropathy at the wrist and there are no other factors then the probability the patient will get a good result is 95%. (D3-27)

Dr. Mitias, a board-certified orthopaedic surgeon, testified by deposition dated September 7, 2004. (D2-3) In the history and examination, claimant did not do any really fast speed assembly or highly repetitive activity. (D2-7) In the examination, the carpal tunnel had resolved. (D2-8) By not being at work, the claimant should have gotten some relief, but she stated that she was still in pain. (D2-8) It has been proven universally that if you take away the repetitive activity most people who have CTS get better. (D2-9) Based upon reasonable medical probability, Dr. Mitias was of the opinion that based on the history and examination, the claimant's carpal

tunnel syndrome was not work-related. (D2-10) You do make CTS better by removing the event. (D2-13) A lot of things coalesced into Dr. Mitias' decision about causation. (D2-15) One was the claimant's explanation of her job. The other was the fact that she didn't get better when the work stopped. The other is all the other medical issues that claimant has going on with her neck and back and brain aneurysm, which can lead to all sorts of sensations. (D2-15) The fact that the claimant failed a five-position grip test was not the sole test, but only part of the decision. (D2-16)

SUMMARY OF THE ARGUMENT

Although the employer and carrier did not appeal or cross-appeal to this Court on the issue of compensability of the claimant's bilateral carpal tunnel, the same does not mean that the employer and carrier agree with the finding by the commission. Following the administrative judge's order, the employer and carrier requested a calculation by the commission and made the business decision to pay the award. An appeal or cross-appeal on the issue to this Court would be fiscally fruitless, as even if this Court agreed that causation was lacking, the employer and carrier would not be allowed to recoup any money previously paid the claimant. See Miss. Code Ann. §71-3-37(11) (1972). Nevertheless, the record is rife with examples as to why the carpal tunnel syndrome was not work-related, primarily as claimant's job was not rapidly repetitive or hand-intensive in any sense of the words or phrases. In her last position, claimant monitored chemical reactions through the use of gauges and *could* operate up to 16 gauges with valve levers or valve handles in a 12-hour shift, in addition to taking samples every 2 hours. She had to write the readings in a ledger, but only about 50 times per shift. Claimant's work was not repetitive in nature and did not cause her carpal tunnel syndrome. Admittedly, the employer and carrier did not appeal the issue, however..

The commission awarded temporary total disability to the claimant based only upon the date of surgery and the date of Dr. Gray's deposition (which was her date of maximum medical improvement as claimant would have fully recovered at least by that date). The circuit court, review the file for substantial evidence to support the award, did not find where any doctor took the claimant off work for this period of time. The commissioners were assuming that the claimant could not work from the date of surgery to the date of maximum medical improvement without supporting medical proof. The circuit judge cited an appropriate case holding that everything prior

to the date of maximum medical improvement is total temporary. Dr. Buckley performed the carpal tunnel surgery, but his medical records were not filed with the commission. Without his records, we don't know whether he would have taken the claimant off work for one day or one week, much less almost 19 months. Typical recovery time for carpal tunnel surgery is 6 to 12 weeks, but even then some patients can return to work well-before the date of maximum medical improvement. The commission did not have medical proof of any physician to support that the claimant could not have returned to work during the disputed period. The claimant's own testimony was that she did not attempt to return to work for Kerr-McGee. Moreover, this employer had accommodated the claimant for other health conditions and is believed would have accommodated her for any restrictions related to carpal tunnel syndrome. The circuit court correctly determined that the commission's award was contrary to the law and due to be reversed.

The circuit court further determined that the commission's finding as to the industrial loss of use was supported by the substantial evidence. He believed that the commission reviewed the testimony, medical records and arguments of counsel and after considering the evidence as a whole made their decision that such a loss existed. While the employer and carrier might argue a lower loss and the claimant might argue a greater loss, neither this Court nor the circuit court is allowed to re-weigh the evidence to determine its own belief of the level of the loss, if any. As such, the commission had the evidence from the record to support the five percent industrial loss of use. They were not duty bound to find a greater loss for a claimant, who was off work and receiving Social Security disability for other medical conditions. Certainly, the claimant presented no medical or lay evidence to support permanent total disability.

ARGUMENT AND LAW

I. Standard of review.

The Mississippi Supreme Court has held the standard of review in workers' compensation appeals:

> The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the Administrative Law Judge to the contrary notwithstanding.
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> * * *
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> [An appellate court may] reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence.

Smith v. Container General Corp., 559 So.2d 1019, 1021 (Miss. 1990) (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1988)). As noted by the circuit court judge, the commission sits as the ultimate finder of facts. "The Commission is the finder of facts. And if those facts are based on substantial evidence [an appellate court lacks] the power to disturb them, even though that evidence would not convince [the court] were [it] the fact finder." *Olen Burrage Trucking Co. v. Chandler*, 475 So.2d 437, 439 (Miss. 1985). See also *Total Transp., Inc. of Miss. v. Shores*, 968 So.2d 400 (Miss. 2007) and *Pilate v. Int'l Plastics Corp.*, 727 So.2d 771 (Miss.App. 1999). The findings of the Commission are binding so long as they are supported by substantial evidence. *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss.1988). While the scope of appellate review is limited, the commission is due to be reversed, if prejudicial error is found or if the commission's decision is against the overwhelming weight of the credible evidence. *Strickland v. M. H. McMath Gin, Inc.*, 457 So.2d 925, 928 (Miss. 1984). See also *KLLM, Inc. v. Fowler*, 589 So.2d 670 (Miss. 1991). As found by the circuit court, the commission's findings regarding temporary total disability are unsupportable and contrary to the law. Given the finding, the commission acted arbitrarily and capriciously, in regard to that issue.

II. The circuit court was correct that the commission's decision regarding temporary total disability was not supported by the substantial weight of the evidence and is contrary to the law.

The claimant requests this Court to use "common knowledge, common experience and common sense" and to ignore the lack of medical proof required to make an award of temporary total disability benefits. The commission noted that the parties stipulated to the date of surgery by Dr. Buckley on April 5, 2002, and to the date of maximum medical improvement of October 28, 2003, which was the date of Dr. Gray's deposition. Based upon these stipulated dates, the commission held that the employer and carrier were to pay "temporary total disability benefits from April 5, 2002 until October 27, 2003, with interest and a 10% penalty as provided by Law." (R. 62).

"Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." Miss. Code Ann. § 71-3-3(i) (1972). "The causal connection between the claimant's injury and disability must be proven with competent medical proof and based upon a reasonable degree of medical probability. *Harrell v. Time Warner/Capitol Cablevision,* 856 So.2d 503, 511 (Miss.App. 2003); *Howard Indus. v. Robinson,* 846 So.2d 245, 252 (Miss.App. 2002). *"[T]he Commission may not award compensation in the absence of medical proof to show causal connection." Kersh v. Greenville Sheet Metal Works*, 192 So.2d 266, 268 (Miss.1966) (emphasis in original). Further, the claimant bears the burden of proof to show disability. *Wagner v. Hancock Med. Ctr.*, 825 So.2d 703 (Miss.App. 2002).

There is no medical proof claimant was taken off work by any physician to give a beginning date for temporary disability. As such, the commission failed to use common knowledge and common experience to note that there are many reasons that the treating physician

might not have taken the claimant off work following the surgery. Dr. Buckley was the surgeon, who performed the carpal tunnel release on April 5, 2002, and his opinion should be supreme. Without his records, we don't know whether he would have taken the claimant off work for one day or one week, much less almost 19 months. Perhaps, the claimant may have been able to return to her job duties monitoring gages with the use of one hand, so he did not need to take her off work at all. Even though she was not the treating physician, but merely the physician who referred the claimant to the treating surgeon, Dr. Buckley, Dr. Gray never gave an opinion that the claimant could not work due to the carpal tunnel syndrome.

The circuit court agreed with the employer and carrier that the commission made an erroneous award of temporary total disability benefits to the claimant. The commission had altered the administrative judge's decision not to award temporary disability. The administrative judge found that:

> [t]he claimant was not taken off work by Dr. Gray for the carpal tunnel syndrome. Dr. Gray gave Claimant work restrictions. However, Claimant was already off work due to a back injury. Claimant continued to be off work due to her other unrelated medical conditions. Therefore, Claimant would only be entitled to temporary benefits for the time she had surgery by Dr. Buckley. Those records were not entered into evidence, so a determination of temporary disability may not be made at this time.

(R. 58) The claimant cited cases in her brief to support her argument that lay testimony can *supplement* the medical testimony to show (permanent) disability. In some instances, lay testimony may be helpful to show the effect of permanent restrictions on permanent disability. Here, however, the question is temporary disability with *no* restrictions from any physician related to the carpal tunnel syndrome.

As for the ending date for alleged temporary disability, the circuit court cited *Walker Mfg. Co. v. Butler*, 740 So.2d 315, 331 (Miss.App. 1998), for the proposition that the date of maximum

medical improvement does not mean that everything before it was total temporary. Although the quote was found in Justice Southwick's dissenting opinion, it nevertheless is a correct statement of the law. The Act allows the temporary indemnity benefits to cease for many reasons. As examples, the benefits could stop if the treating physician allows the claimant to return to work prior to the date of maximum medical improvement - with or without restrictions. The benefits could stop if the commission orders termination due to the claimant's failure to comply with medical treatment. The claimant could return to work at reduced hours and only be entitled to temporary partial disability. These are just some examples, but again, without medical testimony, all that is known is the date of surgery and the date of Dr. Gray's deposition, which was used as the date of maximum medical improvement. No determination was made as to the restrictions, or lack thereof, during this time period or whether the claimant could have returned to work to reduce the benefits "due" from total to partial or entirely eliminated the same. Further, claimant quite likely could have been released to return to work prior to any date of maximum medical improvement; release to work and maximum medical improvement are not always identical dates. Without medical proof, it is quite likely that the employer could have accommodated the (unknown) restrictions, if there had been any, to bring the claimant back to work. The employer's occupation health nurse testified in regard to whether the claimant could have been returned to work, "Management would have looked that at those [non-existent, but presumed] restrictions and...then made that determination" and "more than likely they would have been able to [return the claimant to work] on a short-term basis."" (T.58) This testimony was unrebutted by the claimant or the medical records. The undisputed, and actually admitted, fact that the employer had returned the claimant to work and accommodated the back restrictions would further support the

belief that she would have been accommodated. Without medical records or expert opinion, the determination of temporary disability is pure speculation.

What is known is that claimant testified that she had no conversations with Dr. Buckley about returning her to work. (T. 22) Further, she made no attempt to return to work for the employer. (T. 44) In the case of *Boyd v. Miss. Workers' Compensation Comm. Self-Insurer Guaranty Assoc.*, 919 So.2d 163, 168 (Miss.App. 2005), this Court held that the claimant has a duty to learn her restrictions, if any, and to make the attempt to return to work. The "requirement falls squarely upon the shoulders of the claimant." Id. Without her effort to return to work for Kerr-McGee, we can only assume that the claimant choose not to work based upon her other health conditions or simply personal preference, but not due to any wrist-related medical restrictions that prohibited her from working. Benefits are not due to a claimant who simply chooses not to work.

Therefore, there is no medical evidence regarding temporary restrictions to support any period of temporary disability, total or partial. Even if it is assumed that there was some period of disability following surgery, claimant never asked her physicians what that period might be and never attempted to return to work at Kerr-McGee. While "common knowledge and experience" might allow the commission to believe that there usually is some period of temporary disability following surgery, the record is void of support for the same. Moreover, that "usual" period following a carpal tunnel release is not 19 months. Additionally, claimant's last job duties of monitoring gages required minimal use of both hands. The assumption that the period of temporary total disability ran from the date of surgery to the date of maximum medical improvement is without **any** support in the medical records **or** lay testimony showing that the commission acted arbitrarily and capriciously.

III. The circuit court was correct that the commission's decision regarding permanent disability is supported by the substantial weight of the evidence.

The amount of industrial loss of use was found by the administrative judge and affirmed by the commissioners. The circuit judge found substantial evidence to support the award. Nevertheless, the claimant requests this Court to ignore all lower bodies, particularly the commission, to find the claimant totally disabled or, if not totally disabled, to determine its own industrial loss of use. Such is contrary to the standard of review of workers' compensation appeals. Unfortunately, the decision of the commission on the permanent disability issue is supported by the testimony and medical evidence.[3]

As to permanent total disability, the claimant could have actively asserted at trial that the injury to her arms caused her to be totally disabled. She has admitted that going outside the scheduled member injury to total disability is a more rigorous test. Appellant's brief at pgs. 10-11. Certainly, it is. "To demonstrate total disability, the claimant must show that [she] has made a diligent effort, but without success, to obtain other gainful employment." *Adolphe Lafont USA, Inc., v. Ayers*, 958 So.2d 833, 839 (Miss.App. 2007) Claimant provided no proof of any job search, except that after November of 2000 she did work as a bus driver. Actually, the admitted work as a bus driver shows that claimant can work and cannot be totally disabled.

As to permanent partial disability, the administrative judge and the commission considered the same. "Based upon the evidence as a whole, including but not limited to Claimant's age,

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The word "unfortunately" is used as there were factors upon which the commission could have rested a decision that the carpal tunnel syndrome was not compensable or that the permanent award was less than 5%. As noted, the employer and carrier simply made a business decision not to argue those points and paid the award.

education, work history, job description, and medical condition", the administrative judge found a 5% industrial loss of use to each arm (which as previously noted has been paid to the claimant). The commission noted that it "reviewed the record of evidence, and considered the arguments of the parties as well as the applicable law" and agreed and affirmed the administrative judge.

Clearly, the issue of the extent of permanent disability, if any, is a decision for the finder of fact, and the commission is the finder of facts. Since its decision is based upon the substantial evidence contained in the record, as it noted to have reviewed, this Court lacks the power to overturn the award, even though this Court might find a higher (or lower) industrial loss of use were it the fact finder. *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss.1988); and *Olen Burrage Trucking Co. v. Chandler*, 475 So.2d 437, 439 (Miss. 1985). The circuit court already performed this analysis and concluded that the record contained substantial evidence for its support.

Without regard to the standard of review requiring the commission be affirmed, the Mississippi Supreme Court has held that "'industrial' disability is the functional or medical disability as it affects the claimant's ability to perform the duties of employment." *Robinson v. Packard Elec. Div., General Motors Corp.*, 523 So. 2d 329, 331 (Miss. 1988). In determining the existence and extent of a claimant's industrial loss of use, this Court has stated that "the question in these cases is the degree of loss of use of the member for wage earning purposes, and this issue is for determination from the evidence as a whole." *Walker Mfg. Co. v. Butler*, 740 So.2d 315, 324 (Miss.App. 1998) (quoting Dunn, Mississippi Workmen's Compensation § 86 (3d ed. 1990)). See also *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163 (Miss. 1991). The loss must be supported by medical evidence. Miss. Code Ann. §71-3-3(i) (1972).

In her deposition, Dr. Gray placed 3% medical impairment ratings on each upper extremity. At some point during her treatment, Dr. Gray did assign restrictions of limited repetitive motion of the hands and lifting to 10 pounds. Dr. Gray refused to testify that the restrictions were permanent, however. (R. 11-12) She also testified that the last 3 times she examined the claimant prior to her deposition on October 28, 2003, (and no additional medical evidence subsequent to that date was filed) claimant was complaining about things other than carpal tunnel and that there was no complaint about carpal tunnel. (D1-26) Dr. Gray even testified that she was not stating that the claimant could not work because of her carpal tunnel syndrome. (D1-26) When Dr. Mitias examined the claimant on January 29, 2004, he noted that claimant's hand complaints were not relegated to the carpal tunnel nerve. (D2-7) She had a negative Tinel and Phalen's sign at the elbow and hand meaning the carpal tunnel syndrome had resolved. (D2-8) Hence, no physician has provided any permanent restrictions related to carpal tunnel syndrome.

Again, the query is to look at how the medically imposed restrictions affect the claimant's ability to perform the usual duties of her employment. According to Todd Goldman, the staff safety specialist for Tronox, claimant performed no job for an extended period of time that required rapidly repetitive or hand-intensive activities. (T. 73) Dr. Mitias confirmed that claimant agreed that she really didn't do a lot of really fast speed assembly or highly repetitive activity. (D2-7) Her last job was to monitor chemical reactions through the use of gages and periodically taking samples. (T. 70) Usual employment is broader than the job held at the time of the injury (*Weatherspoon v. Croft Metals, Inc.*, 853 So.2d 776, 779 (Miss. 2003)), but if the claimant has no permanent restrictions, there can by no effect on her ability to perform her usual tasks. Claimant could perform the last job with Kerr-McGee. Looking backward as well, claimant was able to perform the usual duties of her employment until she left work due to her back, not her carpal

tunnel syndrome. Even with some restrictions regarding only the wrists, claimant could have performed the majority of her job duties.

In *Walker Manufacturing Co. v. Cantrell*, 577 So. 2d 1243, 1249 (Miss. 1991), the supreme court, in a scheduled member injury claim, held that in assessing a workers's occupational disability, one factor to be considered is the claimant's ability to perform "other, comparably gainful" work and held that a claimant must make a reasonable effort to secure other comparably gainful employment. Claimant has admitted that she neither attempted to return to work at Kerr-McGee or to look for other employment (except for the bus driver job which she held).

While the Act is to be somewhat liberally construed due to the beneficent purposes of the Act, that often used catch phrase does not require the administrative judge, the Commission, the circuit court or this Court to ignore common sense and reasoning to make an award. To the contrary, the claimant's brief is replete with requests for the Court to use common sense. This Court held in *Boyd v. Mississippi Workers' Compensation Comm. Self-Insurer Guaranty Assoc.*, 919 So.2d 163,169 (Miss.App.2005),

> While the Act should, indeed, be liberally construed, the Act should not be construed so liberally as to provide benefits for injuries that are not compensable under the Act, such as those injuries that are not causally related to the employee's work. Indeed, such a result would appear to contravene the beneficial [sic] purposes of the act by diverting resources away from recipients who meet the legal criteria for receiving benefits.

Similar to Boyd, this claimant wishes for this Court to ignore her other medical conditions, her failure to attempt to return to work for this employer or any other employer and the dearth of medical proof to support any permanent disability for these carpal tunnel complaints and to make an award for permanent partial benefits based only upon her wishes and desires. Claimant was

able to work at Kerr-McGee until restrictions unrelated to her carpal tunnel syndrome caused her to quit.

In the past, the claimant has argued that her receipt of Social Security disability benefits supports her claim of (total disability or) disability greater than 5% to each arm, but her receipt is due to other medical conditions. In fact, according to her testimony, claimant applied for, and received, the benefits shortly after her brain aneurysm and surgery. (T. 22 and 24)

In reviewing the evidence as a whole, claimant was only 44 years old at the time of maximum medical improvement, which is considered young for vocational purposes. She has a 9th grade formal education and a GED. She has worked in customer service and as a supervisor. Her last job duties at Kerr-McGee was to monitor gages and take samples. Claimant has a valid driver's license and does drive her own vehicle. Subsequent to leaving this employer, she was employed as a bus driver. In her last examinations by Dr. Gray, claimant was not complaining about her hands or wrists. Dr. Mitias found in his examination that the carpal tunnel had resolved. Considering the lack of complaints about the wrists, the lack of permanent restrictions regarding the carpal tunnel syndrome and the factors for determining the possibility of a loss greater than the medical impairment rating listed and reviewed by the administrative judge and the commissioners, the award of 5% industrial loss to each upper extremity was overly generous and (at worst) should be affirmed. Certainly, there is no lack of substantial evidence to support the fact finder's decision.

CONCLUSION

Although the employer and carrier did not appeal or cross-appeal to this Court on the issue of compensability of the claimant's bilateral carpal tunnel, the employer and carrier do not agree with the finding by the commission. The record is rife with examples as to why the carpal tunnel syndrome was not work-related, primarily as claimant's job (in the description of the claimant or the two employer witnesses) was not repetitive or hand-intensive. The employer and carrier made the business decision to pay the award as determined by the administrative judge. As an appeal or cross-appeal on the compensability issue would not have resulted in any financial benefit (See Miss. Code Ann. §71-3-37(11) (1972)), the decision should not be held against the employer and carrier when the Court reviews the totality of the facts to render a decision on the issues of temporary and permanent disability benefits..

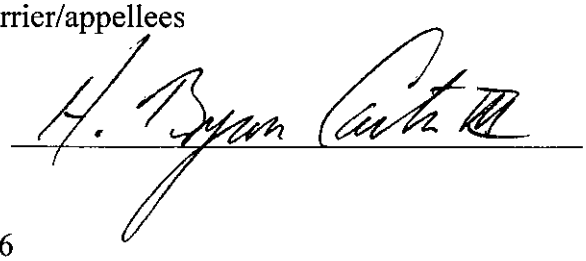
Without regard to the compensability "issue", the circuit court judge was correct in his understanding of the standard of review. Using that correct standard, he affirmed the commission on the issues of causation and industrial loss of use. (His affirmation did not necessarily indicate that he agreed with the findings, but that the commission's opinions were supported by the evidence, which again is within the standard of review.) The circuit judge also was correct in his opinion that the evidence did not show that the claimant was temporary totally disabled from the date of surgery to the date of Dr. Gray's deposition (given as the date of maximum medical improvement as the claimant was healed *at least* by that date). The circuit judge was correct that the record does not contain any medical proof of the any physician, treating or non-treating, to support that the claimant could not have returned to work during the disputed period. The claimant's own testimony was that she did not attempt to return to work for this employer. Moreover, this employer had accommodated the claimant for other health conditions and,

presumably, would have accommodated her at least temporarily for any restrictions related to carpal tunnel syndrome, had the same been provided by any doctor. The circuit judge also was correct in his opinion that the commission had substantial evidence before it to hold that the claimant was not totally disabled, as she now alleges. She presented no evidence that any physician believed her to be totally disabled from the carpal tunnel complaints or that she attempted unsuccessfully to return to work for this or any other employer. She did work as a bus driver showing her ability to work in some capacity. If compensability of the claim is assumed, the Commission's finding as to the industrial loss of use is supported by the substantial evidence. They noted that they reviewed the testimony, medical records and arguments of counsel to make their decision based upon the established factors to determine if such an industrial loss of use existed. Neither the circuit court nor this Court is allowed to re-weigh the evidence to determine its own belief of the loss, if any, as the finding of the commission is supported by the substantial evidence.

Therefore, for all of the foregoing reasons, Tronox Incorporated and Ace American Insurance Company respectfully request this Honorable Court to enter its opinion that the circuit court was correct in its understanding of the limited standard of review and its opinion regarding the review for substantial evidence to support or rebut the commission's decisions. As such, the order of the circuit court is due to be affirmed.

Respectfully submitted,

TRONOX INCORPORATED AND ACE AMERICAN INSURANCE COMPANY, employer and carrier/appellees

BY: 

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, I, the undersigned on behalf of Tronox Incorporated and Ace American Insurance Company, do hereby certify that we have this day hand-delivered the original and three copies of this Brief of Appellees, Troxon Incorporated and Ace American Insurance Company, to the Clerk of Supreme Court of the State of Mississippi and mailed by first class mail one true and correct copy of the same to:

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Hon. James L. Roberts, Jr.
Circuit Court Judge of Monroe County, Mississippi
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THIS, the 2nd day of May, 2011.

H. Byron Carter III
OF COUNSEL