

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**ANGELA WESTBROOKS SMITH**

**APPELLANT**

**VS.**

**CAUSE NO. 2010-WC-01875-COA**

**TRONOX CORPORATION, LLC, SELF-INSURED**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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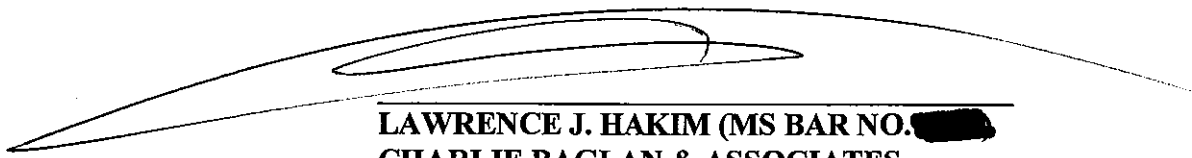
**APPELLEE**

**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. **Angela Westbrook Smith, Appellant;**
2. **Tronox Corporation, Successor of Kerr-McGhee Chemical, LLC, Appellee;**
3. **Lawrence J. Hakim, Attorney for the Appellant;**
4. **H. Bryon Carter, III, Attorney for the Appellee.**

This the 30<sup>th</sup> day of March, 2011.



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## **I. STATEMENT OF THE ISSUES**

1. The Order of the Commission regarding the extent of Appellant's permanent disability attributable to her work related bi-lateral carpal tunnel syndrome is too low in view of the overwhelming lay and medical facts and testimony.
2. That Appellant has sustained permanent disability/industrial loss of use of her bi-lateral extremities far in excess of five percent.
3. Alternatively Appellant is permanently and totally disabled as a result of her bi-lateral upper extremity work injuries.
4. The Mississippi Workers' Compensation Commission's finding that Appellant was temporarily and totally disabled from April 2, 2002 to October 27, 2003, was based on substantial evidence, and was not arbitrary or capricious, and was not erroneous as a matter of law.
5. The Circuit Court of Monroe County improperly upset the findings of the Mississippi Workers' Compensation Commission with regard to the issue of Appellant's period of temporary total disability, which findings of the Commission were based on substantial evidence and were not arbitrary or capricious.

## **II. STATEMENT OF THE CASE**

### **A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

Appellant, Angela Smith, ("Angela") filed her B5-11 alleging bi-lateral work-related carpal tunnel syndrome injuries, beginning in December, 2000. The claims were denied by the Employer, and no indemnity or medical benefits were paid. On June 7, 2007, a hearing was held on this claim before Honorable Tammy Harthcock at the Oktibbeha County Courthouse in Starkville, Mississippi.

At hearing the parties stipulated to the following:

1. Angela's average weekly wage was \$845.48.
2. That Angela reached maximum medical improvement, October 28, 2003.

The following issues were raised for Her Honor's determination and judgment:

1. Whether or not Angela had work-related bi-lateral carpal tunnel syndrome beginning on or about December, 2000.
2. Assuming compensability is found in Angela's favor, the existence and extent of  
a.) temporary disability; and b.) permanent disability.<sup>1</sup>

On August 21, 2007, Judge Harthcock rendered her Order of the Administrative Judge. In said Order, Judge Harthcock found that Angela had met her burden of proof that her bi-lateral carpal tunnel syndrome was work related; that there was insufficient evidence to determine the existence and extent of temporary disability; and that Appellant sustained a 5% industrial loss of use to each of her upper extremities based upon the evidence as a whole. Angela subsequently and timely appealed solely on the issue of the extent of permanent disability *vis-a-vis* industrial

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<sup>1</sup> At hearing the Employer did not raise as an issue, or otherwise contest separately, the reasonableness and necessity of medical treatment Angela received for her bi-lateral carpal tunnel syndrome, or the Employer's ultimate responsibility for same.

loss of use of the bi-lateral extremities. Significantly, the Employer neither appealed or cross-appealed from the Order of the Administrative Judge, nor raised as an issue any portion of the Order of Administrative Judge.

On or about April 15, 2008, the Mississippi Workers' Compensation Commission entered its Full Commission Order, and a.) unanimously affirmed the Angela's bi-lateral 5% industrial loss of use to her bi-lateral upper extremities, and b.) found that Angela was temporarily and totally disabled from the date of her surgery, April 2, 2002, until the date the parties stipulated she reached maximum medical improvement from the bi-lateral upper extremity injuries, which was October 27, 2003. Therefore, the Full Commission unanimously ordered the Appellant to pay temporary total disability benefits for that period, with interest and a 10% penalty as provided by law.

On or about May 15, 2008, the Employer filed its Notice of Appeal of Full Commission Order and on or about May 20, 2008, Angela filed her Notice of Cross-Appeal of Full Commission Order.

On or about October 27, 2010, the Circuit Court of Monroe County issued its Order affirming the Commission on the issues of causation and permanent disability, but reversed the Commission's award of temporary total disability on the purported grounds that same was not supported by substantial evidence and was an arbitrary and capricious finding. Said Order was filed November 1, 2010, and on November 10, 2010, Angela timely filed her Notice of Appeal.

## B. SUMMARY OF THE FACTS

Claimant, Angela Smith, ("Angela"), was born in Amory, Mississippi, August 6, 1959. (R. 6) Angela's education is limited to a GED she received in 1983. She has had no other additional schooling or education. (R. 7) Angela has two adult sons. (Id.) Angela's work experience is extremely limited: she worked at Wal-Mart from 1976 to 1987 as a cashier, department manager and in customer service. (Id.) Angela began work with the Employer herein, August, 1989. (R. 8) The Employer is a chemical plant that manufacturers paint pigment in Hamilton, Mississippi. (Id.) Angela testified as follows concerning her work duties:

"When I first started in 89, I started in the pigment plant, what they call unit 400, where they did the bagging. I think we was like -- it was 50 -- pound bags. We had to bag the machine. In that department it is a start -- we had the machines -- we have to put the bags on the spout so -- and mash -- the machine, it would fill the bags. We use it and we take it and we pull, and it would roll down the conveyor. -- on one day, I can't remember exactly how we switched up, I want to say you know, I bagged for a day, it was a few on the other end that lift them off to the conveyor or on to a pallet. But we switched up, and I can't remember did we switch up on a daily basis or so many hours from bagging to stacking the 55 bags off the conveyor. They came out the conveyor -- off the bag machine on the conveyor and we kind of like weigh them, when you get to the end and you take them and fill them on the pallet."

(R. 8-9) Angela would have to lift over five 50 pound bags per hour at over 10 per hour. (R. 9-10) Angela was transferred out of Unit 400 to Unit 300 in the early 1990's and became a sand operator. (R. 10) Angela described that position as follows:

"The sand operator was mostly responsible for -- really we had a sand -- at that time we had a sand man that we had to make sure we kept filled. And the sand man was -- it was 50 pounds -- I want to say 50 or 100 -- pound bags that we had to take, but we didn't get -- we had a conveyor -- we was standing on a platform and a conveyor to lift the bags up to us. So we have to reach the bags and just carry them, just a little bit from the pallet to the bend and cut them open to empty them."

(R. 10) Angela's duties in this position also included the following:



"Go up to the catcher -- a chlorine acid sample, chlorine tanks. And also catch chlorine samples just like a gas, but the acid sample you would have to take the bag and take the acid out of it. They had to get that to the lab."

"The valve was on it, just maybe a turn valve, just a handle and we have to, you know -- sometimes you would have to pull just the scrubbers, the acid scrubbers, they have the valve -- the reactor, ..."  
(R. 11-12)

Also, Angela testified that the valves and wheels that she had to turn in the sampling process were stiff and difficult to operate. (Id.)

"Some was, you know, maybe rusted or the acid, corrosion. And, you know, some, you know, I have really had to take maybe put my whole weight on some if it was up top to open or get -- I usually look on the ground. If I found a piece of iron or steel, or what, I would take it and maybe say like beat it open."  
(R. 12-13)

While on the job in unit 300 Angela first began experiencing numbness, weakness and lack of grip strength the latter part of 1999 and early 2000. (R. 14) Angela is right hand dominant. (Id.)

Angela reported her upper extremity problems to the plant nurse, Patsy Fredrick. (R. 15) Despite her reporting these problems, the plant did not do anything about this, do an investigation, take proactive steps, or send Angela to a physician.<sup>2</sup> (R. 15)

Angela was already on medical leave due to an unrelated back and neck condition when she finally first sought medical treatment with Dr. Laura Gray, a medical doctor, located in Tupelo, Mississippi, and specializing in physical medicine and rehabilitation. (R. 18) Dr. Gray eventually referred Angela to Dr. Robert Buckley, who performed a carpal tunnel release on her right hand. (R. 18-19) Because Angela did not receive a good result from the right sided release, she did not undergo a release for her left upper extremity. (R. 19) Dr. Buckley referred Angela back to Dr. Laura Gray, who at the time of the hearing was continuing to treat Angela for her bi-

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<sup>2</sup> Angela did testify that she never requested medical treatment from Patsy Fredrick, or discuss medical treatment with anyone else at the Employer herein. (R. 16)

lateral upper extremity work injuries, as well as for other problems. (R. 20)<sup>3</sup> Neither Dr. Buckley, nor Dr. Laura Gray, returned Angela back to work with the Employer herein.<sup>4</sup> (R. 21)

Angela candidly testified that she did not attempt to return back to work because she had filed for social security disability, and a doctor the Social Security Administration had sent her to, after testing her hands and after performing an examination, told her she would not be able to return to work. (R. 23)

Angela continues to have numbness and tingling, particularly in her left upper extremity. She still continues to have symptoms of pain in her right upper extremity. (R. 26) She experiences difficulty gripping objects such as the telephone, skillet, etc. Her hands feel weak and her fingers cramp.<sup>5</sup> (Id.)

The only work Angela has performed since leaving the Employer herein as been as a substitute school bus driver and this work has been very sporadic. (R. 28-29) Angela testified credibly and without rebuttal that she did not believe she could return to work with the Employer or perform any of her prior work at Wal-Mart, due to the current condition of her hands. (R. 29-30, 34)<sup>6</sup>

On cross-examination the plant nurse, Patsy Fredrick admitted that she could not testify definitively that the Employer would have accommodated Dr. Laura Gray's restrictions on a long term basis and further agreed that repetitive use of the hands and wrist is an essential function of some jobs at Kerr-Magee. (R. 65)

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<sup>3</sup> Because Angela was already off work for other medical problems, neither Dr. Laura Gray, nor Dr. Robert Buckley had to take Angela off work for the bi-lateral upper extremity injuries. (R. 20-21)

<sup>4</sup> Angela had surgery for a brain aneurism, May, 2001.

<sup>5</sup> The evidence shows that Angela was placed under restrictions for an unrelated condition by Dr. Walter Eckman and the Employer could not or would not accommodate those restrictions. (R. 28)

<sup>6</sup> Notably the Employer did not put on any vocational evidence to show what, if any, work was available to Angela.

The Employer called Mr. Michael Goldman, who is a staff safety specialist. Mr. Goldman essentially testified that Angela's description of the work she performed and how she performed it were accurate. (R. 76)

### **C. SUMMARY OF THE MEDICAL EVIDENCE**

Angela first saw Tupelo, Mississippi, Physical Medicine and Rehabilitation Specialist, Laura Gray, M.D., December 7, 2000, upon referral from Dr. Walter Eckman. Dr. Gray diagnosed Angela with cervical brachial syndrome, lumbar radiculopathy, and questionable dysesthetic pain at C6, C7 and C8. Dr. Gray eventually diagnosed Angela with bi-lateral carpal tunnel syndrome.

Dr. Gray tried to treat the bi-lateral CTS conservatively, but this failed and she eventually referred Angela to Dr. Richard Buckley.

Dr. Robert Buckley performed a right CTS release on or about April 5, 2002. Because Angela did not obtain a satisfactory result, she chose not to proceed with the left CTS release Dr. Buckley had recommended and Dr. Buckley referred her back to Dr. Gray.

Dr. Gray continued to treat Angela up to the time of hearing. Her deposition was taken and she testified based on hypotheticals posed, that Angela's bi-lateral carpal tunnel syndrome was caused and/or significantly contributed to by the work she performed for the Employer herein. Dr. Gray placed 3% bi-lateral upper extremity ratings and placed permanent work restrictions of no repetitive motion with the hands and no lifting over 10 lbs. due to the bi-lateral CTS. It was Dr. Gray's opinion that Angela continued to suffer from carpal tunnel syndrome.<sup>7</sup>

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<sup>7</sup> The medical depositions of Orthopedic Surgeons Johnny Mitias and Charles Rhea were also taken. Dr. Mitias saw Angela at the request of the employer for a one-time Employer Medical Examination, and he did not attempt to render any medical treatment to Angela. Dr. Mitias did not place any rating or restrictions on Angela and could not rule out Claimant's work as a contributing factor in her bi-lateral CTS. Dr. Rhea treated Claimant briefly in 1995

### **III. SUMMARY OF THE ARGUMENT**

The Mississippi Workers' Compensation Act should be interpreted liberally and any doubt regarding the sufficiency of the evidence should be resolved in favor of the Claimant with the benefit of the doubt going to the Claimant.

While the Commission correctly found that Angela sustained permanent disability to her bi-lateral upper extremities as a result of her work injury, the Commission erred in its finding of the extent of same. Based on the overwhelming facts and medical evidence, as well as case law, the Commission should have found Angela sustained greater than five percent (5%) loss of use with regard to her bi-lateral upper extremities. Based upon the lay and medical testimony and evidence of record, the proof would support a finding that Angela is in fact permanently and totally disabled as a result of her work injuries.

Assuming arguendo that Angela is not permanently and totally disabled as a result of her work injury, the Commission correctly found that Claimant sustained a period of temporary total disability as a result of her work injuries. The Commission has the discretionary power and authority to make such a finding and need not rely exclusively on the medical records and the reports to make same.

#### **A. STANDARD OF REVIEW**

The Mississippi Workers' Compensation Act must be applied liberally so that the beneficent aspects of the act are met and to that end, doubtful cases should be resolved in favor of the Claimant. South Central Bell Telephone Cop. v. Aden, 474 So. 2d 584 (Miss. 1985); Barham v. Klumb Forrest Products Center, Inc., 453 So. 2d 1300 (Miss. 1984)

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and could not state whether the CTS she was diagnosed with in 1995 was the same CTS she developed in 2000. He further testified that her complaints and symptoms could have been coming from her neck.

Moreover, if any doubt exists regarding sufficiency medical evidence, the benefit of the doubt goes to the Claimant. Siemens Energy & Automation, Inc. v. Pickens, 76 So. 2d 276 (Miss.); Mueller Copper Tube Cop. v. Upton, 930 So. 2d 428 (Miss. Ct. App. 2005).

**B. ANGELA SMITH HAS SUSTAINED PERMANENT DISABILITY TO HER BI-LATERAL UPPER EXTREMITIES BEYOND THE 5% FOUND BY THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION**

To establish entitlement to benefits under workers' compensation, Angela bears the burden of proving by a preponderance of the evidence each of the following elements of the claim:

1. An accidental injury occurred;
2. Arising out of and in the course of employment, and;
3. A causal connection between the injury and claimed disability.

Hedge v. Leggett & Platt, Inc., 641 So. 2d. 9, 13 (Miss. 1994).

The Commission's Order properly resolved the elements in favor of Angela. The law in this state on worker's compensation claims is that even though the 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).<sup>8</sup>

Medical evidence is to be given 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. Janssen Pharmaceutical, Inc. v. Stuart, 856 So. 2d. 431 (Miss. Ct. App. 2003).

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<sup>8</sup> As noted above, the Employer accepted Judge Harthcock's resolution of all issues and did not appeal or cross-appeal from her Order of Administrative Judge.

Unless common knowledge suffices, medical evidence must prove not only the existence of a disability, but also its causal connection to employment. Bradley and Thompson, Workers' Compensation Law, §76:53 in 9 Ency. Miss. Law, at 182-184. While medical evidence must support Angela's incapacity and its extent, the fact of disability need not be proven entirely by medical evidence. Hall of Miss., Inc. v. Green, 467 So. 2d. 935 (Miss. 1985). The Medical evidence is sufficient if it supports, but does not fully prove, a finding of disability. Id.

Angela respectfully submits however that the Commission erred in finding that she had *only* sustained a 5% disability to her upper extremities. Under Mississippi Law, an injured employee suffering a partial loss of use, (partial impairment), of a scheduled member is entitled to the same partial benefits as provided for total loss of use of the member under certain circumstances. Bradley and Thompson Mississippi Workers' Compensation §5:44 explains:

This occurs if the evidence shows that partial loss of use causes the worker to be unable to perform substantial acts of the worker's usual occupation. The inability to perform this substantial work activity demonstrates that the actual occupational effect of this partial impairment has substantially the same effect as total loss of use of the member.

Id. citing McGowan v. Orlan's Furniture, Inc., 586 So. 2d 163 (Miss.1991)

The law may be summarized as follows:

If a partial impairment of a scheduled-member causes the worker to be unable to perform substantial acts required in the worker's usual occupation, benefits for the permanent injury are not limited to the proportion of medical or functional impairment of the scheduled-member. Instead, the extent of loss of use of the member of the worker's usual occupation is the greatest factor in deciding whether the worker has lost all, or only part of the use of the member. From all of the evidence-impairment and occupational impact-the decision is made whether the partial impairment has substantially the same effect on the worker's ability to perform the usual occupation as total loss of use of the member.

Id. (citations omitted) Thus, the key test to determine loss of use is whether the injured worker can perform the substantial acts required of her in the performance of her job. Id.

Apparently the Commission limited Angela to 5% industrial loss of use bi-laterally due to the fact that Angela had been off work for unrelated medical conditions, had worked for a short time as a substitute bus driver, and had not looked for other work. Under Mississippi Law, none of these factors, individually, or in concert serve as a sufficient basis to limit Angela to 5% industrial loss of use. To the contrary, Angela's un rebutted testimony, as corroborated by the Employer's witness, Patsy Frederick, is that the essential functions, (i.e. substantial acts), of Angela's work with this Employer are the very types of activities Angela was permanently restricted from performing per Dr. Laura Gray. Moreover, Angela provided credible and un rebutted testimony that the permanent work restrictions placed on her bi-lateral upper extremities, by Dr. Laura Gray, due to her work related injuries, similarly precluded her from returning to any of her other work, including work she had performed in the distant past with Wal-Mart. In short, Angela put on overwhelming evidence that due to her work related injury and disability resulting from same she was totally precluded from performing the substantial acts of any of her pre-injury employment. Therefore, under the holdings of either Meridian Professional Baseball Club v. Jensen, 828 So. 2d 740 (Miss. 2002), or Weatherspoon v. Croft Metals, Inc., 853 So. 2d 776 (Miss. 2003), Angela has clearly met the loss of use test with regard to the substantial acts of her employment regardless of how the term "usual employment" is interpreted.

To the extent the Commission considered Angela's job search or alleged lack thereof as a *negative* factor in determining loss of use, such a consideration is plain error. The irrelevance and non-necessity of a job search in determining industrial loss of use is clearly established:

The ruling, [in *McGowan v. Orleans Furniture, Inc.*] was that as a matter of law, the worker had met the legal test for entitlement to benefits without seeking other employment. On the question of whether the Claimant had the further burden of showing loss of wage-earning capacity by proof of showing unsuccessful attempts to obtain other employment, is the case when the *more rigorous tests* of the 450-week

categories is used, the prior cases were nearly silent. The issue was raised in *Richey v. City of Tupelo*, and the Court said that although it would not consider it for lack of a cross-appeal, there was no such requirement when the manifestations of the injury had not subsided. The loss-of-use tests for scheduled-member injuries fits the notion that *the rules for measuring these benefits are, by design, streamlined, not tailored*, or, as the Court said in *Walker MFG. Co. v. Cantrell*: the legislature has institutionalized this imprecision in the case of scheduled-members, preferring certainty to extended litigation.

Bradley and Thompson, Mississippi Workers' Compensation §5:46 (citing McGowan v. Orleans Furniture Inc., 586 So. 2d 163(Miss. 1991) and Walker Mfg. Co. v. Cantrell, 577So. 2d 1243, 1247(Miss. 1991).

Similarly, it was error for the Commission to utilize as a negative factor in the industrial loss of use analysis Angela's other medical problems. The credible and un rebutted testimony is that while Angela still had *minor* cognitive deficiencies due to her brain aneurysm, any such minor cognitive deficiencies certainly didn't prevent her from comporting herself admirably in the highly stressful setting of her worker's compensation hearing, wherein she was subjected to cross-examination, nor did Angela's brain aneurism and surgery prevent her, as a substitute school bus driver from being entrusted with the lives of school children, and the responsibility for their safety. There was no lay or expert evidence or testimony, vocational, medical or otherwise, to even suggest that any other medical problem Angela has would individually, or in concert with other medical/health problems, prevent her from returning to any of her pre-injury employment.

The fact that Angela had managed to secure part-time employment as a substitute school bus driver: a.) speaks highly of her motivation to try to return to gainful employment, and demonstrates that her other health problems were not disabling to her, but, b.) demonstrates the difficulty she has experienced in securing employment commensurate with her pre-injury employment; such a factor to the extent that it should have been utilized at all in a industrial loss



of use analysis would be a factor that could only enhance and increase the extent of industrial loss of use Angela has sustained as a result of her work related bi-lateral tunnel syndrome.

**C. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT ANGELA SMITH SUSTAINED A PERIOD OF TEMPORARY TOTAL DISABILITY AND SAID FINDING IS BASED UPON SUBSTANTIAL EVIDENCE, IS NOT ARBITRARY AND CAPRICIOUS, AND IS NOT ERRONEOUS AS A MATTER OF LAW**

Based upon the totality of the medical and lay evidence the Commission found that Angela had sustained a period of temporary total disability and awarded benefits therewith. As the ultimate finder of fact, the Commission was well within its discretionary power to make this finding and its finding was both correct and proper.<sup>9</sup> Moreover, such finding is not to be confined to the medical evidence alone, but the Commission is also empowered to also make this decision based upon "common knowledge, common experience, and common sense." Janssen Pharmaceutical, Inc. v. Stuart, 856 So. 2d 431(Miss. Ct. App. 2003); Hall of Mississippi, Inc. v. Green, 467 So. 2d 935 (Miss. 1985).

It can be reasonably inferred that since the inception of the Mississippi Workers' Compensation Act and the creation of the Mississippi Workers' Compensation Commission, the Commission has seen hundreds, if not thousands of bi-lateral carpal tunnel claims. One feature that will be common to all of those claims is the fact that the Claimant usually sustains a period of temporary total disability after he or she has had surgery for this condition. Therefore, the Commission could easily base its finding on common knowledge, common experience, and common sense. The fact that Dr. Gray assigned a disability rating and permanent work

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<sup>9</sup> Angela has argued in section B *infra* that she has sustained more than 5% permanent disability/occupational loss of use to her bilateral extremities. Should the proof in fact show that Angela is permanently and totally disabled as a result of her work injury, the existence and extent of her temporary disability becomes moot. Miss. Code Ann. §71-3-17(a)(as amended).

restrictions to Angela's bi-lateral upper extremities reinforces the fact that Angela also bore a temporary period of disability.

The caselaw precedents firmly establish the fact that disability is not to be based exclusively on medical evidence; in fact, a Claimant's disability does not need to be proved by medical testimony as long as there is medical testimony which will support a finding of disability. Hall of Mississippi, Inc., 467 So. 2d 935 (Miss. 1985) Indeed, lay testimony may be considered to supplement medical testimony in determining a percentage of loss to be assigned to the injury. McGowan v. Orleans Furniture Co., Inc., 586 So. 163. The Commission has broad leeway to go outside of the medical evidence to make a finding of disability. Thus for instance, the disability of a Claimant only needs to be supported by medical findings, but compensation may be allowed for disabling pain in the absence of positive medical testimony and objective medical findings as to any physical cause, especially when evidence of an accident is followed by disabling pain, and the absence of circumstances tending to show malingering or to indicate that Claimant's testimony as to pain is not inherently improbable, incredible or unreasonable, or that the testimony is untrustworthy. Penrod Drilling Co. v. Ethridge, 487 So. 2d 1330 (Miss. 1986). Significantly, neither the Administrative Judge, the Commission, or even the Circuit Court Judge ever called into question the Angela's testimony or suggest she was malingering. To the contrary, her testimony was found to be credible and trustworthy.

Compensation benefits may be allowed for disabling pain in the absence of positive medical testimony as any physical cause whatever. Howard Industries, Inc. v. Robinson, 846 So. 2d 245 (Miss. Ct. App. 2002); Alumax Extrusions, Inc. v. Hankins, 902 So. 586 (Miss. Ct. App. 2004)

While the incapacity to earn wages and the extent thereof must be supported by medical findings, the requirement is met when the fact and the extent of the Claimant's incapacity are corroborated *in part* by medical testimony; however, medical findings are not the exclusive basis for determination, and the Commission is required to consider all of the testimony and the pertinent factors, including physical or functional disability from the medical viewpoint and any demonstrated impairment of the Claimant's capacity to secure and retain employment and perform work for which she is qualified. Greenwood Utilities v. Williams, 801 So. 2d 783 (Miss. Ct. App. 2001).

Both the Administrative Judge and the Commission found Angela's testimony to be credible and said testimony included a description of her symptoms and limitations with her hands. There was absolutely no rebuttal evidence proffered by the Employer/Carrier to in anyway challenge, counter, or contradict Angela's credible testimony concerning the severe problems and restrictions she has with her bi-lateral upper extremities. Accordingly, the Commission's decision concerning Angela's period of temporary disability was based on substantial evidence, and was not arbitrary or capricious, or erroneous as a matter of law.

### **CONCLUSION**

While the Mississippi Workers' Compensation Commission properly found that Angela had sustained compensable work injuries to her bi-lateral upper extremities that had resulted in permanent disability and industrial loss of use, (which the Employer concedes), Angela respectfully submits that the Mississippi Workers' Compensation Commission committed reversible error as a matter of law and fact in determining that she had only sustained a 5% industrial loss of use bi-laterally. Under the facts of this case, legal authorities and treatise cited above, Angela's bi-lateral

industrial loss of use far exceeds 5% bi-laterally. Indeed, the medical proof and evidence of record support a conclusion that Angela may be permanently and totally disabled as a result of compensable work-relates injuries.

Alternatively, the Commission was well within its province as finder of fact when it properly found that Claimant had sustained a period of temporary total disability and award benefits therewith. Finally, the Circuit Court of Monroe County committed reversible and prejudicial error by affirming the Commission's permanent partial disability award, but reversing the Commission's temporary total disability award.




Accordingly, Appellant, Angela Smith respectfully prays that the Court of Appeals reverse the Circuit Court's 's decision with regard to the existence of temporary disability, and the extent of permanent disability and industrial loss of use and remand the instant case back to the Mississippi Workers' Compensation Commission for a finding of permanent disability in excess of five percent (5%) to each upper extremity, and reinstatement of the Commission's finding regarding temporary total disability if the Appellant is not permanently and totally disabled as a result of her work-related injury.

**RESPECTFULLY** submitted, this the 30<sup>th</sup> day of March, 2011.

ANGELA SMITH, 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 mailed, proper postage prepaid, a true and correct copy of the above and foregoing **Brief of the Appellant** to:

Honorable James L. Roberts, Jr.  
**Circuit Court Judge**  
P. O. Drawer 1100  
Tupelo, MS 38802-1100

Honorable H. Byron Carter, III  
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Respectfully submitted, this the 30<sup>th</sup> day of March, 2011.

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**LAWRENCE J. HAKIM**