IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-WC-02019-COA

MISSISSIPPI BAPTIST MEDICAL CENTER AND RECIPROCAL OF AMERICA (MISSISSIPPI INSURANCE GUARANTY FUND ASSOCIATION) — **APPELLANTS**

V.

BILLY MURPHY — **APPELLEE**

CONSOLIDATED WITH

RIVER OAKS AND LIBERTY MUTUAL — **APPELLANTS**

V.

BILLY MURPHY — **APPELLEE**

BRIEF OF APPELLANTS MISSISSIPPI BAPTIST MEDICAL CENTER AND RECIPROCAL OF AMERICA (MISSISSIPPI INSURANCE GUARANTY FUND ASSOCIATION)

ON APPEAL FROM
THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI
CASE NO. 2010-200 C

ORAL ARGUMENT REQUESTED

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MISSISSIPPI BAPTIST MEDICAL CENTER AND RECIPROCAL OF AMERICA (MISSISSIPPI INSURANCE GUARANTY FUND ASSOCIATION)

RIVER OAKS HOSPITAL/ HEALTH MANAGEMENT ASSOCIATES AND LIBERTY MUTUAL INSURANCE COMPANY **APPELLANTS**

V. **CASE NO. 2010-WC-02019-COA**

BILLY MURPHY **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Mississippi Baptist Medical Center, Appellant;
2. Reciprocal of America (Mississippi Insurance Guaranty Fund Association), Appellant;
3. River Oaks Hospital/Health Management Associates, Appellant;
4. Liberty Mutual Insurance Company, Appellant;
5. Billy Murphy, Appellee;
6. Honorable Liles Williams, Chairman
   Mississippi Workers' Compensation Commission
   1428 Lakeland Drive
   Post Office Box 5300
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7. Honorable Johnny Junkin, Commissioner
   Mississippi Workers' Compensation Commission
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8. Honorable James Homer Best, Administrative Judge
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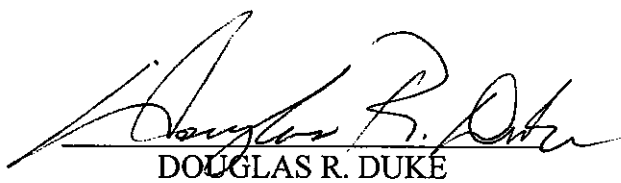
This, the 3rd day of March, 2011.



DOUGLAS R. DUKE

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1. WHETHER OR NOT MISSISSIPPI CODE ANN. § 71-3-37(13) APPLIES TO AUTHORIZE THE COMMISSION TO REQUIRE THIS EMPLOYER/CARRIER FOR THE FIRST INJURY TO PAY ONE HALF OF THE ISOLATED MEDICAL EXPENSES IN QUESTION.

2. WHETHER OR NOT UNDER THE "LAST INJURIOUS EXPOSURE" RULE AND/OR UNDER THE "INTERVENING CAUSE" RULE, THE CLAIMANT'S SECOND INJURY ON OR ABOUT JANUARY 21, 2001, AT RIVER OAKS HOSPITAL WOULD MAKE RIVER OAKS AND ITS CARRIER EXCLUSIVELY RESPONSIBLE FOR ANY OF CLAIMANT'S RESULTING MEDICAL TREATMENT, INCLUDING THOSE ISOLATED EXPENSES IN ISSUE ON THIS APPEAL.

3. WHETHER OR NOT THE COMMISSION'S DECISIONS FINDING CLAIMANT'S GASTROINTESTINAL TREATMENT CAUSALLY RELATED TO EITHER OF HIS WORK INJURIES AND FINDING EMPLOYERS/CARRIERS RESPONSIBLE FOR CLAIMANT'S DISCOGRAM IS SUPPORTED BY SUBSTANTIAL EVIDENCE?

II. STATEMENT OF THE CASE

This workers compensation appeal has been filed by the employer/carrier for the first back injury claimed by Mr. Murphy (Appellee) to have occurred in 2000. The employer/carrier for the second back injury appealed only through the Circuit Court level, and is not now before this Honorable Court. Said employer/carrier for the second injury has paid all indemnity benefits and medical benefits after the second injury except those medical benefits in question on this appeal. This case involves a review of the decision of the Circuit Court of Rankin County affirmance of the Order of the Mississippi Workers' Compensation Commission amending the Order of the Administrative Judge, and ordering this employer/carrier (for the first injury occurring in 2000) to pay one-half (1/2) expenses related to the Claimant's gastrointestinal treatment (allegedly related to depression medication) during his hospitalization at River Oaks Hospital in October of 2006 and travel expenses related to same despite no substantial medical evidence to support said Commission's Order. The Commission further ordered both employers/carriers to equally pay for the discogram procedure in October of 2006 and the related travel expenses despite lack of any proof the discogram was submitted to pre-certification under the Mississippi Fee Schedule and lack of evidence of reasonableness and necessity as a result of a compensable injury. This employer and carrier submit the Commission's ruling is not supported by substantial evidence and, indeed, the contrary is supported by the undisputed evidence in the record, and as such must be reversed by this Court and the order of the Administrative Law Judge be reinstated.

In the alternative, Mississippi Baptist Medical Center and its carrier for the alleged first injury of Claimant on January 10, 2000 maintain that the Commission erred requiring said employer and carrier for the first injury to pay one half of the subject medical expenses pending a determination as to which employer/carrier, if any, is liable for same under the Mississippi

Workers' Compensation Act. This part of the appeal involves interpretation of Section 71-3-37(13) Miss. Code Ann. 1972, as Recompiled and Amended, and the common law "last injurious exposure" rule.

A. Nature of the Case and Course of Proceedings Below

The Appellee claimant, Billy Murphy, (hereinafter "Mr. Murphy" or "Claimant"), alleges a back injury on January 10, 2000 while lifting a computer monitor at Mississippi Baptist Medical Center. (RE 7A – R. Vol. 2, p. 1) He alleges a second back injury on January 21, 2001, while working at River Oaks Hospital, when a co-employee pulled a chair in which Murphy was about to sit. (RE 7B – R. Vol. 5, p. 1) River Oaks Hospital/Health Management Associates and Liberty Mutual Insurance Company (hereinafter "River Oaks") originally admitted the injury, and later finally admitted the second injury was a compensable injury in their supplemental pre-hearing statement filed on August 3, 2009 (RE 1 - R. Vol. 7, p. 390-391). Moreover, following said second injury, claimant has been paid the maximum statutory indemnity benefits and has received all compensable medical benefits from River Oaks and its carrier (except for the medical expenses in question in this appeal).

On May 5, 2009, the claimant filed a motion to compel payment of medical and travel expenses related to his treatment at River Oaks Hospital in October 2006. (RE 2 - R. Vol. 2, p. 133-136) He filed a second motion on June 11, 2009, to compel payment of medical expenses for alleged treatment received in November 2008 at the University Medical Center for depression. (RE 3 - R. Vol. 3, p. 287-289) Following a hearing on both motions, the Administrative Judge's Order was entered on December 22, 2009 denying both motions. (RE 4 - R. Vol. 4, p. 397-398) Feeling aggrieved by this decision, the claimant appealed to the Full Commission. Following oral arguments and review of the record, the Commission entered an order reversing the ALJ's decision in part. (RE 5 - R. Vol. 4, p 403-410) The Commission ordered both

Employers/Carriers to pay the expenses related to the claimant's gastrointestinal treatment during his October 2006 hospitalization at River Oaks and to pay for the discogram procedure during that same time along with travel expenses for both. Mississippi Baptist Medical Center and its carrier now appeal to this Court, seeking reversal of the Commission decision, which is contrary to the law, undisputed evidence in the record and not supported by any substantial evidence.

MBMC further appeals stating that the Full Commission misapplied Miss. Code Ann. § 71-3-37(13) to require this employer/carrier for the first injury to pay one half of the subject isolated medical expenses in question. Said Commission ruling was also contrary to the Mississippi Workers' Compensation "last injurious exposure" rule.

B. Statement of Undisputed Facts

Mississippi Baptist Medical Center and its carrier paid temporary lost wage or indemnity benefits and all medical expenses prior to claimant's release by his doctors and return to work (See Claimant's pre-trial statement – RE 6 - R. Vol. 2, p. 13-15) MBMC paid Claimant nothing after he returned to work at his next employer, River Oaks Hospital, and suffered a second injury on January 21, 2001. Since said second injury, only River Oaks and Liberty Mutual have paid not only all the incurred medical expenses related to and subsequent to said second injury, but also the complete maximum 450 weeks of permanent indemnity (lost wage) benefits. (See claimant's petition to controvert, RE 7B - R. Vol. 5, p. 1) The only items not paid by River Oaks after the second injury are those related to Claimant's post-second injury depression and related medications allegedly causing gastrointestinal problems and the discogram, which expenses are the subject of and only issue on this appeal. River Oaks and its carrier did not deny in its responses to either motion to compel their liability for the subject medical expenses because of any dispute between the two employers. (RE 8 - R. Vol. 7, pp. 308-311 and RE 9 – R. Vol. 7, pp.

317-321). The only issue raised by River Oaks before the Commission below relative to these said expenses is whether or not they were compensable as a result of any injury. Also see River Oaks/Liberty brief filed with the Circuit Court of Rankin County. (RE 10 - R. Vol. 1, p. 6-21)

Neither the gastrointestinal nor the depression/anxiety claim can be related to Claimant's first injury based on the undisputed medical evidence in the record and the "last injurious exposure" rule and neither of which conditions existed prior to the second injury at River Oaks in 2001. There is nothing in the medical records or the deposition testimony of Dr. Ron Williams (RE 11 - R. Vol. 3, p. 295 through Vol. 4, p. 305) to relate any such depression, related medications or alleged resulting gastrointestinal problems to the first injury. The University Medical Center records attached to Claimant's motion pertaining to the depression claim begin with the chief complaint of sore throat and shortness of breath on November 18, 2008, more than 8 years after Claimant's injury at Mississippi Baptist Medical Center and after starting his subsequent job at River Oaks Hospital. (See said medical records -- RE 12 - R. Vol. 4, p. 345 through 378). The Order of the Administrative Judge denying the subject medical benefits cites that said Judge read and studied these medical records and found no proof of any causal relationship or connection whatsoever between the Claimant's two back injuries and the medical treatment for which Claimant is now seeking payment by theses employers and carriers in connection with his gallbladder and/or psychiatric treatment. (RE 4 - Judge's Order, R. Vol. 4, p. 397 through 398).

In a far-reaching effort to have the psychiatric condition causally connected to Claimant's workers' compensation claims, the deposition of Dr. Ron Williams was taken by Claimant's attorney. Based upon said deposition testimony, there was no basis for possibly relating any depression or anxiety claim or conditions for medications therefor to the first injury claim against Mississippi Baptist Medical Center. From pages 34 to 39 of Dr. Williams' deposition testimony,

it is clearly established that only the second injury is even relevant to the issue of whether or not said expenses for claimant's discogram, depression and anxiety claims are compensable. On cross-examination, Dr. Williams testified as follows:

> MR. BURCH: I have no further questions.
> EXAMINATION BY MR. DUKE:
> Q. I have a few questions, Doctor. I represent Mississippi Baptist Hospital against whom Mr. Billy Murphy made a Workers' Compensation claim arising out of an alleged incident of January 10, 2000.
> A. Uh-huh.
> Q. Do you have in your records any history of that January 10, 2000 claim?
> A. Let me see here. I don't have a copy of that claim. I do have in my records a record of the injury and when it occurred.
> Q. Okay. Can you get to that record.
> A. Okay. Let's see. We have a reference to that in an initial eval on May 1st of '01.
> Q. Okay. What does that say?
> A. Chief complaint, low back pain radiating to the left lower extremity to the back of the knee. History of the present illness, patient is a 35 year old white male who is referred by Dr. Garner. States that the onset of his present pain symptoms began January 2001 when he was at work and someone moved a chair and he didn't realize it was moved. He sat down on the floor and had an injury to his back approximately one year ago. That's – I think that's not exactly the way it was reported in the notes initially. I think the initial injury, I saw somewhere else he stated he was attempting to lift a monitor up on top of the anesthesia machine and felt something give in his back then. I believe that was the initial one.
> Q. Is that history in your records?
> A. What I just read got in here somehow or other, but I've seen that somewhere else in the records that he was lifting a monitor, I believe, to put up on a shelf over the anesthesia machine.
> Q. Is that your record?
> A. I don't know. It was in my records somewhere. I don't know who reported that, but that was my initial one that I just read there, but I think it's got some typos in it.
> Q. The record you read me referred to the January 2001 chair incident where someone else pulled the chair out?
> A. That was River Oaks, I think.
> Q. Yes, sir. Yes, sir. And you, of course, did not treat him for that injury, not having seen him until May 1, 2001; is that correct?
> A. I believe that's correct. Yeah. I'm sorry. What I was reading from by mistake was one oft eh neurosurgeon's recall of the history.
> Q. Okay.
> A. That we consulted.
> Q. All right. That's the one you just read to me –

A. Yes.
Q. – about the January 29, '01 incident?
A. Yes. That's the interim.
Q. And on your direct examination testimony you answer questions from Governor Waller. You were questioned only with respect to the back injury, and the only date of injury he gave you was the January 29, 2001 back injury, is that correct, on direct examination?
A. I don't recall.
Q. We'll have the record to speak for itself. It's all typed up there.
A. Okay.
Q. Or will be. The – not having seen this patient until May 1, 2001, would you defer to the physicians for opinions regarding causation and restrictions, disability and the like, who did treat him for the injury alleged as occurring on January 10, 2000?
A. Yes.
Q. And those physicians being Dr. Vohra and Dr. Neill. You're familiar with those physicians?
A. I am.
Q. They're competent physicians?
A. I know of them. No comment.
Q. You're not going to rate their capabilities one way or the other?
A. No.
Q. The same for Dr. Vise?
A. No. I believe Dr. Vise is very competent. He's retired now pretty much. But during his active years I felt like he was a competent and capable person.
Q. It sounds like with your answers you're saying that in your opinion Dr. Vohra and Dr. Neill don't know what they're talking about?
A. I didn't say that. No comment.
Q. In your records provided by counsel opposite in this case there are some Norville records. Is that for some sort of psychiatric evaluation?
A. I believe so, yes.
Q. In that record, specifically the October 24th, 2001 history, the claimant said he was enjoying his work, at the time it was at River Oaks?
A. Uh-huh.
Q. And feels his employer views him as one of the better employee at River Oaks. You would have no quarrel with that history, would you?
A. Was that after the injury at River Oaks, now?
Q. Yes. Yes. That's October 24th, 2001. And you can look in your records for it, if you'd like. You do have the Norville records, don't you?
A. They're not labeled as such. I don't think that I do.
Q. Who made that referral to the Norville Clinic?
A. Is that the one by Dr. Kessler? I think it is. And I believe we did, if it's to Dr. Kessler. And in preparation for his suitability for having the discogram procedure.
Q. Uh-huh.
A. We made that referral, I believe.
Q. Did you get her report of October?
A. Yeah, here it is.

Q. You have the October report, and also that down there under pain history he was returned to medium to light duty after the 2000 claim injury?
A. Yes.
Q. And also on the bottom of the next page it says there he indicated that he enjoys his work but feels that his employer views him as one of the better employees?
A. Uh-huh.
Q. And he feels that his pain was caused by someone else's negligence or carelessness. Do you see that?
A. Yes.
Q. So that someone else would have to be the chair puller, right, because it wouldn't be the self-imposed injury of picking up a monitor, would it?
A. That would appear to be true.

MR. DUKE: Well, since I garnered a giggle from Mr. Waller with my last punch line, I think I'll retire.

MR. WALLER: Have you got anymore questions, Don?

MR. BURCH: No.

(RE 11 - R. Vol. 3, p. 295 through Vol. 4, p. 305)

Throughout the entire deposition, only the second injury was causally connected by Dr. Williams. Since this is the claimant's only medical testimony in the records on this appeal, there is no factual or legal basis to causally connect the subject medical expenses with the first injury factually or as a matter of law.

III. ARGUMENT

Standard of Review

It is well established that this Supreme Court should reverse the *Full Commission Order* if this Court determines said Order was not supported by substantial evidence or determines that said Order was arbitrary or capricious. In addition, this Supreme Court should reverse the decision of the Commission "if prejudicial error be found". §71-3-51, *Miss. Code Ann.*

The Mississippi Supreme Court has stated that the Circuit Court should reverse the Commission's decision when it finds the decision was "based upon findings of fact which are contrary to the great weight of the evidence". *Central Electric Power Ass'n v. Hicks*, 236 Miss. 378 110 So.2d 351 (1959). The arbitrary and capricious rule is considered a less-stringent test

than the substantial evidence test. Any finding of fact by the Commission that is not supported by substantial evidence may also be considered to be arbitrary or capricious. *McGowan v. Mississippi State Oil and Gas Board,* 604 So.2d 312 (Miss. 1992). The *McGowan* decision stated that an act is arbitrary when it is not done according to reason or judgment, implying either a lack of understanding of or disregard for the fundamental nature of things.

It is the position of MBMC that the decision of the Commission is not supported by substantial evidence, is contrary to the great weight of the undisputed evidence in this case and was not entered according to reason or judgment based upon the facts and law applicable to this case.

1. The Commission Erred in Misapplying Miss. Code Ann. § 71-3-37(13)

Miss. Code Ann. § 71-3-37(13) states as follows:

> **"Whenever a dispute arises between two (2) or more parties as to which party is liable for the payment of workers' compensation benefits to an injured employee and there is no genuine issue of material fact as to** the employee's employment, his average weekly wage, the occurrence of an injury, **the extent of the injury, and the fact that the injury arose out of and in the course of the employment**, the commission may require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party must reimburse all other parties for the benefits they have paid to the employee with interest at the legal rate." (Emphasis added)

In support of the Commission Order, the Commission relied upon its cited cases therein of *Twila Cook v. Marion County Schools and Liberty Mutual Fire Insurance Company and AmFed National Insurance Company,* MWCC Nos. 07-08554-K-0541 and 06-05531-K-0542, 2009 WL 5562075 (Miss. Work Comp. Comm. - October 10, 2008) and the Commission stated as follows:

"§ 71-3-37(13) strikes us as precisely the remedy to be employed in a situation such as this where a Claimant with a compensable injury has immediate needs that are not being met **due to the competing claims of employers...**" *Id.* Citing *Eisworth v. Dollar General Store,* 2004

WL 1303057 (Miss. Work. Comp. Comm. – May 25, 2004). River Oaks did not deny in their response to Claimant's motions to compel these medical expenses due to competing claims of the employers. (RE 8 - R. Vol. 7, p. 308-311 and RE 9 – R. Vol. 7, pp. 317-321) Moreover, the Commission's Order in the *Eisworth* case, upon which it now relies for its erroneous ruling herein, was subsequently reversed by the Circuit Court of Pike County, Mississippi, based upon the same "last injurious exposure" rule set forth herein by MBMC and its carrier(s). See a copy of pertinent page 21 of the Pike County Circuit Court's *Judgment on Appeal* attached hereto as Exhibit "A" and incorporated herein by reference.

The clear statutory distinction in the case *sub judice* is that the reason for denying the medical expenses in question is that said expenses were not related to any back injury. At no time before the lower tribunal nor in its brief before this Honorable Court has River Oaks or Liberty Mutual taken the position that it is not liable for the subject medical expenses because they are the responsibility of the employer and carrier at the time of the first injury, MBMC and Reciprocal of America. In other words, it is respectfully submitted that when the compensability of medical expenses are undisputed, then the statute, § 71-3-37(13), provides a remedy for both employers to share in that medical expense until it is determined which of the two is liable for it. However, in the case at bar, the statute does not apply since the criteria of the statute have not been met.

For said statute to apply, it also requires, as quoted below, that there is no dispute as to the extent of injury and that the injury in question arose out of and in the course of the employment:

Miss Code Ann. § 71-3-37(13), states in part as follows:

> "Whenever a dispute arises between two (2) or more parties as to which party is liable for the payment of workers' compensation benefits to an injured employee **and there is no genuine issue of material fact as to ..... the extent of the**

> **injury, and the fact that the injury arose out of and in the course of the employment**, the commission may require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party must reimburse all other parties for the benefits they have paid to the employee with interest at the legal rate."

The actual issues herein on appeal are whether or not the gastrointestinal problems allegedly related to taking depression medication are the type of injury which arose out of any employment, and whether the discogram is a compensable expense. Moreover, **MBMC denied any compensable injury and denied that the present injury (psychiatric/gastrointestinal) arose out of the employment with MBMC and denied the extent of the injury**. See these appellants' Answer to Amended Petition (RE 13 - R. Vol. 2, p. 11-12) and Amended Pre-Hearing Statement. (RE 14 - R. Vol. 2, p. 84-89) On the other hand, and contrary to the Commission's Order, River Oaks' supplemental pre-hearing statement filed August 3, 2009 admits the compensable injury of January 21, 2001. (RE 1 - R. Vol. 7, p. 390-391) Said supplemental pre-hearing statement supersedes any prior pleading to the contrary. Therefore, the statute cannot apply and the Commission cannot require under the undisputed facts and law in this case that Mississippi Baptist Medical Center pay one half of the subject medical expense for any period of time.

To amplify the inapplicability this "share equally" statute is the fact that employer/carrier for the second injury chose to drop out of this appeal process and thereby remove itself from any possible or alleged dispute between the carriers.

2. The Commission's Directing Payment by Mississippi Baptist Medical Center and Its Carrier(s) of Any Medical Payments Herein is Not Supported By Any Substantial Evidence Whatsoever and Is Contrary to Law.

None of the medical records nor testimony relate Claimant's depression to the first injury at Mississippi Baptist Medical Center in 2000.

Under the "intervening cause" rule and/or under the "last injurious exposure" rule, the claimant's second and last injury at River Oaks, on or about January 21, 2001, would make River Oaks and its carrier solely liable for all subsequent medical treatment in this case. River Oaks has obviously accepted this principle of law since River Oaks' carrier has paid all medical expenses (except the particular expenses at issue) and the full 450 weeks of indemnity or lost wage benefits. The "intervening cause" rule states that "in successive injury cases, if the second injury is an aggravation that contributes independently to the final disability, then courts have found the subsequent employer liable for the entire claim. ...A clear aggravation of an initial injury makes the second employer solely liable." (emphasis added) *United Methodist Senior Services v. Ice*, 749 So.2d 1227 (Miss. App. 1999).

Also the Mississippi Supreme Court in *Singer Company v. Smith*, 362 So.2d 590 (Miss. 1978), set forth the definition of the "last injurious exposure" rule as follows: "When a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation." In the present case, the inference is claimant's condition is due totally to the second injury because River Oaks admitted the compensability of the accident and paid all subsequent indemnity and medical expenses, except those medical expenses herein contested.

Therefore, it is clear that under either the "intervening cause" rule or under the "last injurious exposure" rule, River Oaks and its carrier would be exclusively liable not only for the payment of disability, which River Oaks paid, but also for medical treatment following the 2001 River Oaks injury. Based on the facts, law and authorities in this case, the *Full Commission Order* dated May 12, 2010, should be reversed and/or the *Order of Administrative Judge* issued by Judge Homer Best should be reinstated. In the alternative, the *Full Commission Order* should

at least be reversed as against MBMC and its carrier. Therefore, even if this Honorable Court does not reverse the Commission's Order in its entirety, the decision should be reversed to prevent MBMC from being required to pay any one-half the benefits because there is no legal/statutory authority for such an order. Here again, the point must be made that River Oaks and its carrier by not continuing to appeal cannot dispute its liability and the proposition that the employer for the second injury is solely responsible for the medical expenses in question, if said medical expenses are found to be compensable.

3. The Commission's Decision Directing the Payment of Certain Medical Expenses is not Supported by Substantial Evidence.

Claimant underwent a discography on October 9, 2006 and was admitted for a 23 hour observation for pain control as well as for complaints of weakness and nausea and vomiting. Claimant remained at River Oaks for treatment relating to the nausea and vomiting for several days until he was diagnosed with gallstones. On October 19, 2006, he had his gallbladder removed. It is from this hospitalization which the Commission has ordered the Employers/Carriers to pay for the discogram and gastrointestinal treatment (though not the gallbladder surgery).

The Order of the Mississippi Workers' Compensation Commission ordering the carriers to pay the hospital bill of River Oaks Hospital for treatment of claimant's admission in October 2006, is not supported by any substantial evidence.

No medical proof supports any connection between claimant's back injury and gastrointestinal issues. More specifically, the Order of the Commission is contrary to the medical opinion of Dr. David Collipp, which clearly shows claimant's complaints of esophagitis and gallstones were the causes of his pain and complaints which resulted in his cholecystectomy in 2006. The Commission further failed to take note that Dr. Collipp's opinion was to a reasonable degree of medical certainty, that the claimant's pre-existing GERD was not

significantly effected by his use of opiates or his other medications and further that there was no relationship whatsoever between the claimant's 2006 admissions to River Oaks Hospital and his use of opiates for his work injury. (RE 15 - R. Vol. 4, pp. 327-340)

The Commission relied upon the deposition testimony of Dr. Ron Williams. Dr. Williams testified he did not believe the gallbladder issues were related to the claimant's work injury. (RE 5 - R. Vol. 4, p. 403-410). However, he went on to testify that he suspected claimant's emotional condition and medications had an effect on his gastrointestinal problems. *Id.* Although a work injury may lead to complications or other consequences which would also be compensable, this is not the case here. See, John R. Bradley and Linda A. Thompson, *Mississippi Workers' Compensation* § 4:24 (2009 Ed.).

Further, Dr. Williams failed to point out what specific treatment the claimant received during the October 2006 hospitalization was related to the gallstones and which issues related to the alleged work injuries. Simply stated, the substantial evidence does not support the Commission's finding as to the gastrointestinal treatment.

The Full Commission further erred in ordering payment of a discogram that was never properly shown to have been submitted to pre-certification under the Mississippi Fee Schedule and without any evidence of reasonableness and necessity, and which is contrary to the medical record of Dr. Collipp which clearly states that discograms are not considered to be reliable on patients such as the claimant with his presentation of self-limitation and over-reporting of symptoms.

Thus, the employers and carriers are not responsible for the payment of any treatment at River Oaks in October 2006 including but not limited to the discogram, gastrointestinal issues and treatment related to the diagnosis and ultimate surgery to remove the gallbladder.

CONCLUSION

The Commission's Order should be reversed on the following grounds:

1. FOR THE REASONS STATED IN CO-DEFENDANT'S BRIEF, THE MEDICAL EXPENSES FOR THE CLAIMANT'S DISCOGRAM AND GASTROINTESTINAL/DEPRESSION INJURIES ARE NOT COMPENSABLE AS A MATTER OF LAW.

2. IN THE ALTERNATIVE, THERE IS NO LEGAL OR FACTUAL BASIS TO REQUIRE THIS EMPLOYER/CARRIER FOR THE FIRST INJURY TO PAY ONE-HALF OF SAID MEDICAL EXPENSES.

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL CENTER and RECIPROCAL OF AMERICA (MISSISSIPPI INSURANCE GUARANTY FUND ASSOCIATION)

By: _____
Douglas R. Duke

ORAL ARGUMENT REQUESTED

Given the clear inapplicability of Miss. Code Ann. § 71-3-37(13) to require MBMC to pay one-half of the subject medical expenses, oral argument is requested to allow the Defendants to highlight this Court's need to advise the Mississippi Workers' Compensation Commission that Miss. Code Ann. § 71-3-37(13) is not applicable to the undisputed facts of this case on appeal.

CERTIFICATE OF SERVICE

I, the undersigned attorney of record, do hereby certify that I have this day mailed via United States Mail, postage pre-paid, a true and correct copy of the above and foregoing document to the following:

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CERTIFIED this 3rd day of March, 2011.

Of Counsel for said Appellants (Employer and Carrier)

IN THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI

DOLGENCORP, INC.
(a/k/a DOLLAR GENERAL), a self-insured — APPELLANT

V. — Cause No. 06-341-PCS

BARBARA EISWORTH and
FRITO-LAY, INC. and
FIDELITY & GUARANTY INSURANCE COMPANY — APPELLEES

-AND-

BARBARA EISWORTH — CROSS-APPELLANT

V.

DOLGENCORP, INC. and
FRITO-LAY, INC. and
FIDELITY & GUARANTY INSURANCE COMPANY — CROSS-APPELLEES

JUDGMENT ON APPEAL

THIS APPEAL coming to be presented to the undersigned upon Notice of Appeal and the oral arguments and briefs of all parties and the undersigned, having reviewed and considered the full record on appeal, does hereby set forth the following:

Case History:

This is a workers' compensation appeal involving two alleged separate injuries occurring during employment at two successive employers. In this case the Cross-Appellant/Appellee, Barbara Eisworth (hereinafter referred to as the "Claimant"), has alleged that she suffered a work-related injury to her back and shoulder on or about November 9, 2001, while working for Dolgencorp, Inc. (hereinafter refered to as "Dollar General") and that she suffered a second work-related injury (and/or aggravation of a pre-existing injury) to her neck, back and shoulder on or about July 2, 2002, while working for Frito-Lay, Inc. Testimony, evidence and exhibits were presented at the trial of this case before the Honorable Melba Dixon, Administrative Judge

as amended, and the Medical Fee Schedule. Dolgencorp, Inc. shall not be responsible for any medical benefits or medical treatment rendered after January 15, 2002.

12. The Claimant, having suffered a compensable injury, is entitled to reasonable and necessary medical treatment and Frito-Lay, Inc., and its carrier, Fidelity and Guaranty Insurance Company, are obligated to furnish and provide the Claimant with reasonable and necessary medical service and supplies such as the nature of her injury and in the process of her recovery that the injury at Frito-Lay, Inc., may require on or after July 2, 2002, consistent with *Miss. Code Ann.*, §71-3-15 (1972), as amended, and the Medical Fee Schedule.

13. Considering the record on appeal as a whole, the undersigned finds that the Claimant had an injury at Frito-Lay, Inc., on or about July 2, 2002, and/or had a pre-existing condition from the injury at Dollar General which was aggravated, exacerbated and/or lighted up by her employment at Frito-Lay, Inc., on or about July 2, 2002, which caused and/or contributed to her resulting surgery and/or disability.

14. Considering the evidence as a whole, the undersigned finds that under the "last injurious exposure" rule and/or the "intervening cause" rule, the Claimant's injury at Frito-Lay, Inc., on or about July 2, 2002, would make Frito-Lay, Inc., and its carrier solely liable for all subsequent medical treatment and any resulting permanent disability in this case after said date of injury.

15. Considering the evidence as a whole and consistent with the previous Order of the Administrative Judge pursuant to §71-3-37(13), *Miss. Code Ann.* (1972), the undersigned finds that Frito-Lay, Inc., and its carrier are solely liable for any and all medical treatment and disability following the July 2, 2002, injury at Frito-Lay, Inc.; therefore, it is the determination of the undersigned that Frito-Lay, Inc., and its carrier, Fidelity and Guaranty Insurance Company,

6. That the employer, Frito-Lay, Inc., and carrier Fidelity and Guaranty Insurance Company, shall pay for, furnish and provide to the Claimant all reasonable and necessary medical services and supplies as the nature of her injury or the process of her recovery may require on or after July 2, 2002, pursuant to §71-3-15, *Miss. Code Ann.* (1972), as amended, and the Medical Fee Schedule.

7. That pursuant to §71-3-37(13), *Miss. Code Ann.* (1972), and the previous Order of the Administrative Judge at the Mississippi Workers' Compensation Commission, Frito-Lay, Inc., and its carrier, Fidelity and Guaranty Insurance Company, shall forthwith pay to and reimbursement Dolgencorp, Inc., a self-insurer, for any and all medical expenses, disability payments and/or other benefits that have been paid by Dolgencorp, Inc., to or on behalf of the Claimant for any disability and/or medical expenses incurred on or after July 2, 2002, together with interest at the legal rate allowed by law.

SO ORDERED this the 25 day of Feb., 2009.

Judge David H. Strong, Jr.
Pike County Circuit Judge

CORRECTED CERTIFICATE OF SERVICE

I, the undersigned attorney of record, do hereby certify that I have mailed via United States Mail, postage pre-paid, a true and correct copy of the *Brief of Appellants Mississippi Baptist Medical Center and Reciprocal of America* to the following:

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CERTIFIED this 8th day of March, 2011.

Of Counsel for said Appellants (Employer and Carrier)