

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2011-WC-00090-COA

KATHY ALLEGREZZA

APPELLANT

VS.

GREENVILLE MANUFACTURING, INC. AND
THE TRAVELERS INSURANCE COMPANY

APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY, MISSISSIPPI
AND
THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- 1) Kathy Allegrezza, Appellant
- 2) Lawrence J. Hakim and Charlie Baglan & Associates, attorneys for Appellant
- 3) Greenville Manufacturing, Inc. (Fruit of the Loom), Appellee
- 4) The Travelers Insurance Company, Appellee
- 5) Marjorie T. O'Donnell and Clayton O'Donnell, PLLC, attorneys for Appellees

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STATEMENT OF THE ISSUES

1. Whether the Circuit Court of Washington County, Mississippi was correct in affirming the Mississippi Workers' Compensation Commission's decision regarding Allegrezza's date of maximum medical improvement with regard to her carpal tunnel condition.

2. Whether the Circuit Court of Washington County, Mississippi was correct in affirming the Mississippi Workers' Compensation Commission's determination of the nature and extent of temporary total disability and permanent disability and loss of wage earning capacity with regard to Allegrezza's carpal tunnel condition.

3. Whether the Circuit Court of Washington County, Mississippi was correct in affirming the Mississippi Workers' Compensation Commission's determination of Allegrezza's date of maximum medical improvement with regard to her back injury.

4. Whether the Circuit Court of Washington County, Mississippi was correct in affirming the Mississippi Workers' Compensation Commission's determination of the nature and extent and existence of temporary total disability and permanent disability and loss of wage earning capacity with regard to Allegrezza's back injury.

5. Whether the Circuit Court of Washington County, Mississippi was correct in affirming the Mississippi Workers' Compensation Commission's determination that the treatment of certain doctors including Dr. Michael Steuer, Dr. Adam Lewis, and Dr. Margaret Cassada was not reasonable and necessary under the terms of the Mississippi Workers' Compensation Act.

STATEMENT OF THE CASE

This is an appeal of the order and opinion of the Circuit Court of Washington County, Mississippi dated December 15, 2010, which affirmed the order and opinion of the Mississippi Workers' Compensation Commission.

The appellant herein, Kathy Allegrezza (hereinafter "Allegrezza"), filed separate claims before the Mississippi Workers' Compensation Commission alleging (1) an admittedly compensable injury incurred to her bilateral upper extremities (carpal tunnel syndrome) on August 19, 1997, and (2) an admittedly compensable injury to her back, incurred January 22, 1998. A hearing on the merits of all claims was held in Washington County, Mississippi, on May 14, 2002, before the administrative judge assigned to these claims. The administrative judge issued her opinion and order on October 22, 2002. With respect to the claims for carpal tunnel syndrome, the administrative judge found a permanent partial impairment in both upper extremities and ordered temporary total disability benefits for six weeks at the rate of \$224.00 per week and permanent partial disability benefits for 50 weeks at the same rate. As to the claim for back injury, the administrative judge found that Allegrezza "did not demonstrate a loss of wage earning capacity as a result of the... back injury, and is thus entitled to no compensation for this injury." (Record, p. 146). The administrative judge also heard Allegrezza's motion to amend the petition to controvert to allege psychological overlay. The administrative judge noted in her opinion that "[a] decision on this motion is entwined with consideration of whether, indeed, the medical treatment of Doctors [Margaret] Cassada,

[Adam] Lewis and [Michael] Steuer are outside of the appropriate chain of referral under [Mississippi Code Annotated] § 71-3-15(1).” (Record, p. 136). The administrative judge concluded that the treatments given by all three of those physicians were indeed outside the chain of referral and therefore “not the financial responsibility of the employer and carrier, and are not reasonable and necessary to the process of claimant’s recovery.” (Record, p. 137).

The Mississippi Workers’ Compensation Commission (hereinafter “Commission”) heard Allegrezza’s appeal of the administrative judge’s opinion and order on August 18, 2003, and issued its order on August 20, 2003, affirming the administrative judge’s findings, decision, and order on the carpal tunnel claims. The Commission also affirmed the administrative judge’s findings, decision, and order on the issue of Allegrezza’s psychological overlay, “concurring that the claimant’s motion to amend should be denied under the circumstances of this case.” (Record, p. 168). The Commission’s ratification of the administrative judge’s opinion and order included the judge’s decision that Doctors Steuer, Lewis, [Greg] Wood and Cassada fell outside the chain of referral.

With respect to Allegrezza’s back injury, however, the Commission found differently. The Commission adopted the administrative judge’s entire summary of relevant evidence, but it concluded that Allegrezza’s back injury resulted in some percentage of loss of wage earning capacity due to restrictions placed upon her by Dr. Collipp, her pain specialist. The Commission’s order added that, with respect to the

Allegrezza's back injury, she was entitled to \$67.20 per week for a period of 450 weeks, commencing November 19, 1998. (Record, p. 169).

The Commission's opinion and order was affirmed by the Circuit Court of Washington County, on December 15, 2010, resulting in this appeal by Appellant Allegrezza.

STATEMENT OF THE FACTS

For the purposes of this appeal, Kathy Allegrezza was hired at Greenville Manufacturing, Inc. on May 12, 1997, where she began work in Quality Control, which was an inspecting job. (Record, p. 19). At her request, she transferred to the job of cutter around the first of June, 1997. (Record, p. 19). On or about August 19, 1997, she began to complain of pain in her hands and wrists. She was diagnosed with bilateral carpal tunnel syndrome and was first treated by her personal family and chosen physician, Dr. Joe Pulliam. (The first actual treatment she received was with one of Pulliam's partners, Dr. William Mullendore.). She continued to treat at Family Medical Clinic with Dr. Pulliam and his partners, Dr. Mullendore and Dr. Calander, over the next several weeks. (Exhibit 7).

Greenville Manufacturing, Inc. (hereinafter "Employer") and The Travelers Insurance Company (hereinafter "Carrier") requested that Allegrezza be evaluated by Dr. Jim Adams, the Employer/Carrier's referring physician. Dr. Adams first treated Allegrezza on September 5, 1997. (Exhibit 16). Dr. Adams requested that Allegrezza see Dr. Don Carpenter, a neurologist, for EMG/NCS studies. (Exhibit 16). Allegrezza was also examined by Dr. Aubrey Lucas, a hand specialist located in Jackson, Mississippi. (Exhibit 3). The EMG/NCS studies performed by Dr. Carpenter on September 23, 1997, confirmed the diagnosis of bilateral carpal tunnel syndrome. Dr. Aubrey Lucas examined Allegrezza on that same day and recommended that she receive splints and injections for the

diagnosis of bilateral carpal tunnel syndrome. Dr. Lucas treated Allegrezza conservatively for a period of time, but ultimately recommended surgery. (Exhibit 3).

On November 18, 1997, Dr. Larry Field, an orthopedic surgeon, examined Allegrezza at her request. Dr. Field concurred with the diagnosis of bilateral carpal tunnel syndrome, discussed various treatment options with Allegrezza, including surgery, and at this point, Allegrezza determined that she would undergo bilateral carpal tunnel release. (Allegrezza was also evaluated by yet another doctor, Dr. Shelby Brantley, who also confirmed carpal tunnel syndrome (Exhibit 5; Exhibit 8)).

Allegrezza at this point determined to return to Dr. Aubrey Lucas and chose him as her operating physician. On January 8, 1998, Dr. Lucas performed the surgery on both upper extremities and returned Allegrezza to modified duty on January 12, 1998. (Record, p. 23; Exhibit 3). Dr. Lucas determined that Allegrezza reached maximum medical improvement on April 2, 1998, and assigned a five percent (5%) impairment rating to each upper extremity. (Exhibit 3). Although Dr. Lucas initially returned her to full duty work with no restrictions on April 3, 1998, he subsequently placed restrictions on her activities because she continued to return to him with continued complaints of pain. However, in his deposition, Dr. Lucas confirmed that, although he treated Allegrezza on several occasions following April 2, 1998, his opinion never changed with regard to her date of maximum medical improvement or her impairment rating (Exhibit 8; Exhibit 5; Exhibit 3). In fact, repeat EMG nerve conduction studies

which were performed after April 2, 1998, actually showed improvement in her condition and Dr. Lucas never testified that Allegrezza was unable to work. (Exhibit 3).

On January 22, 1998, while Allegrezza was still on light duty restrictions following her bilateral carpal tunnel release, she tripped over a pallet and fell on her left side. (Record, p. 7). She complained that she had re-injured both wrists, her left shoulder, neck and lower back. Dr. Lucas examined appellant's wrists on January 22, 1998, and indicated that the fall did not worsen the condition of either wrist. (Exhibit 3). Although Allegrezza was initially evaluated by Dr. Jim Adams, the Employer/Carrier's referring physician, Allegrezza chose to return to her own family physician, Dr. Pulliam at the Family Medical Center. (Exhibit 7). Dr. Pulliam's diagnosis was back strain and he then referred her to Dr. Rodney Frothingham, a neurosurgeon located in Greenville, Mississippi. On March 9, 1998, Dr. Frothingham evaluated Allegrezza for the first time and ordered a lumbar MRI, which was read as negative by both the radiologist and Dr. Frothingham. The MRI did demonstrate some degenerative disc disease, but no evidence of herniated disc or nerve root compression. Dr. Frothingham did not feel that Allegrezza was a surgical candidate and referred her to Dr. Jo Travis, a physician who specializes in pain management and is an anesthesiologist. (Exhibit 10; Exhibit 11). Dr. Travis treated Allegrezza for a brief period of time with no apparent results and later referred her to Dr. David Collipp, a physician board certified in physical medicine and rehabilitation. (Exhibit 2). On May 1, 1998, Dr. Collipp first evaluated Allegrezza and felt that she had facet and S1 joint involvement and recommended that Dr. Travis

proceed with facet and S1 joint injections. It was also Collipp's opinion that Allegrezza should not be taking any narcotic pain medication. At Collipp's direction, Allegrezza underwent the facet injection mentioned above, but did not have the S1 injection as Dr. Travis found no tenderness in that area on re-examination. (Exhibit 2; Exhibit 10).

Dr. Collipp continued to treat Allegrezza and on August 6, 1998, he referred her back to her chosen treating neurosurgeon, Dr. Frothingham, who saw her on that date, due to the fact that an EMG/NCS study Collipp had conducted possibly reflected L5 radiculopathy. On August 6, 1998, at an appointment with Dr. Frothingham, a lumbar myelogram was ordered. (Exhibit 11).

On August 11, 1998, the Employer/Carrier had Allegrezza examined by Dr. John Brophy, a neurosurgeon in Memphis, Tennessee. It was Dr. Brophy's opinion that sacroilitis was the primary source of her pain with possible mild lumbar radiculopathy. He believed that Dr. Frothingham's recommendation for a lumbar myelogram/CT scan was certainly indicated and stated that if the study failed to demonstrate any evidence of nerve root compression, Allegrezza should continue with nonsteroidal anti-inflammatory medication and progress to work-hardening/work-conditioning physical therapy so that she could return to work at her previous work level. (Exhibit 12).

Pursuant to Frothingham's recommendation and the concurrence of Dr. John Brophy, Allegrezza had a lumbar myelogram/CT scan performed on August 17, 1998, which reflected no focal abnormalities, no focal disc herniation, and was simply read as normal. In his deposition, Dr. Brophy indicated that having reviewed that result, he

believed that Allegrezza was never a surgical candidate. (Exhibit 12, pp. 12-13). Dr. Brophy also testified that he would never base a decision to perform surgery on a discogram and that MRIs, myelograms and EMG studies are much more useful in the determination of whether to perform surgery. (Exhibit 12, pp. 12-16).

When Allegrezza returned to see Dr. Collipp following the aforementioned testing, Dr. Collipp indicated that he felt Allegrezza was not a surgical candidate and that she should continue physical therapy. Dr. Collipp started her on Neurontin and recommended an S1 joint injection. On October 27, 1998, Collipp examined her again and noted that her complaints were subjective and that there was little on physical examination to support her complaints of pain. Dr. Collipp ordered a functional capacity evaluation which was performed on November 3, 1998, by Chris Menhard. (It should be noted that Dr. Aubrey Lucas had previously referred Allegrezza to physical therapist Chris Menhard with regard to her bilateral carpal tunnel symptoms.). Following the functional capacity evaluation ("FCE"), Dr. Collipp examined Allegrezza on November 19, 1998, reviewed the FCE results with her and indicated that he thought she could return to work at a light-medium duty job. Dr. Collipp placed her at maximum medical improvement on November 19, 1998, and assigned a ten percent (10%) partial impairment rating to the body as a whole. (Exhibit 2).

The FCE performed by Chris Menhard was of great importance to the administrative judge and also to the Commission in this matter. Mr. Menhard not only performed the FCE but also performed a job analysis at the site of Employer. The job

he examined was that of a cutter, which had been Allegrezza's job at the time of injury. Although Menhard indicated that Allegrezza had job restrictions, she could perform a light to light-medium duty job. He also indicated that she could, according to the FCE, pull 45 pounds occasionally, 22 pounds frequently and 9 pounds continuously; that she could push 40 pounds occasionally, 20 pounds frequently and 9 pounds continuously; and that she could carry up to 30 pounds for 100 feet occasionally, 15 pounds frequently and 6 pounds continuously. Furthermore, although there was some repetition to the job in question, Menhard felt there was no forceful repetition and there were several minutes of rest between the actions that Allegrezza took while performing that job-that is, between each cut. Menhard felt that, based upon the job site analysis, Allegrezza could perform the job as a cutter from the standpoint of her bilateral carpal tunnel syndrome. With regard to her back complaints, again, Menhard indicated that Allegrezza could perform a light to light-medium duty job and that she could perform all aspects of the job he evaluated safely within the FCE limits. It is clear, based on the functional capacity evaluation and job analysis performed by Chris Menhard, that Allegrezza could perform the job of a cutter with Employer, despite her bilateral carpal tunnel syndrome and back injury. (Exhibit 9).

It was noted above that when Dr. Collipp first examined Allegrezza he felt that she was not a candidate for narcotic pain medication. This continued to be Collipp's opinion throughout the time he treated her, despite the fact that she always requested narcotic pain medication on each of her visits to Dr. Collipp. As soon as Dr. Collipp

released her to return to work and indicated that she had reached maximum medical improvement, Allegrezza returned to Dr. Pulliam, her family physician, who then referred her to Dr. Michael Steuer, an anesthesiologist and "pain specialist," who was located in Greenville, Mississippi.¹ (Exhibit 1). The Employer/Carrier did not recognize Dr. Steuer as Allegrezza's treating physician, nor did they recognize any physicians to whom Dr. Steuer referred her, as the treatment by Dr. Steuer and the treatment of any referrals by Dr. Steuer was not in the proper chain of referral nor were said treatments approved by Employer/Carrier and, therefore, those treatments were not deemed the responsibility of Employer/Carrier. The administrative judge and the Commission agreed.

The administrative judge and the Commission obviously placed a great deal of importance on the opinion of Dr. David Collipp who is a well respected, board certified physician in physical medicine and rehabilitation. He was the second physician in the Allegrezza's chain of referral (beginning with Dr. Pulliam) who specializes in pain management. (Dr. Jo Travis was the first.). Dr. Collipp testified that his first order of business was to wean Allegrezza from the "rather strong narcotic pain medication" she was taking. (Exhibit 2, p. 8). Dr. Collipp admitted that on nearly every visit, if not every visit, Allegrezza repeatedly requested narcotic pain medication, but he always refused.

¹ According to Dr. Steuer's own admission in his deposition, during the time he treated Allegrezza, his medical license had been revoked in the State of California and, accordingly, his Mississippi medical license had been revoked. The revocation was "stayed" at the time of the deposition and he was on a two-year probationary period for apparent misconduct in the State of California. (Exhibit 1, pp.52-53).

(Exhibit 2, p.34). Dr. Collipp prescribed non-narcotic pain medication such as Ultram and Darvon, which Allegrezza said gave her headaches. (Exhibit 2, p.27). Furthermore, Dr. Collipp was strongly of the opinion that Allegrezza could return to work. Dr. Collipp referred her to Chris Menhard for the functional capacity evaluation and relied upon that evaluation with regard to Allegrezza's work restrictions. Collipp felt that she could work and was not a surgical candidate. In fact, Collipp stated that it was his opinion that it is "important that she works." (Exhibit 2, pp. 33-35, 39 and 41).

The administrative judge did not address the treatment of Dr. Steuer or Dr. Adam Lewis (a referral by Dr. Steuer) in her opinion because she correctly determined that the treatment of these doctors was administered after Allegrezza had reached maximum medical improvement and that these physicians were outside the proper chain of referral beginning with her chosen family physician, Dr. Pulliam. The Commission affirmed the administrative judge's conclusion on this issue and adopted it as part of its final findings of fact as did the Circuit Court of Washington County, Mississippi. However, for the benefit of this Court, the treatment of these physicians will be discussed as briefly as possible.

Allegrezza first saw Dr. Steuer on December 15, 1998, and Steuer immediately began to prescribe the narcotic pain medication which Dr. Collipp so strongly believed should not be provided. Please recall that Dr. Frothingham, a neurosurgeon, Dr. Brophy, a neurosurgeon, and Dr. Collipp all agreed that Allegrezza was not a surgical candidate based on the myelograms, MRIs, CT scans and other tests that had been performed.

However, when Allegrezza first saw Dr. Steuer, a discogram was performed and, based on the results of same, Steuer referred her to Dr. Adam Lewis, a neurosurgeon, located in Jackson, Mississippi. Dr. Steuer later stated in his deposition that Allegrezza did not have a herniated disc, that she did not have a ruptured disc, and that there was no evidence of spine instability. (Exhibit 1, pp. 41-42, 45). Furthermore, Dr. Steuer ultimately indicated that Allegrezza could work and that it would be good for her to do so. (Exhibit 2, pp. 46-47).

Allegrezza's attorney filed a motion with the Commission requesting that the administrative judge recognize Dr. Steuer and his subsequent referrals as Allegrezza's treating physicians. The motion was heard before Judge Thompson who **denied** the motion based on the fact that Allegrezza had already seen two experts who specialize in pain management. Judge Thompson indicated that the attorneys for all parties should confer and agree upon a doctor to examine the appellant Allegrezza in order to determine the current state of her medical care. No order was rendered, however, from this hearing and before the attorneys could agree on another physician, Dr. Adam Lewis had seen Allegrezza and performed surgery. Dr. Lewis did not request prior approval for this surgery and Allegrezza's attorney indicated that even he did not know that the surgery had taken place until after it had been performed.

Dr. Adam Lewis apparently first saw Allegrezza on June 30, 1999, by referral from Dr. Steuer. (Exhibit 17). Despite the fact that Dr. Frothingham, Dr. Brophy and Dr. Collipp had by that time indicated that Allegrezza was not a surgical candidate, Dr.

Adam Lewis referred her to Dr. Greg Wood for consideration of a lumbar fusion. Dr. Lewis stated in July 10, 1999, correspondence that "if Dr. Wood agrees that [Allegrezza] is a good fusion candidate, we will proceed with surgery." (Exhibit 17). Interestingly, Dr. Greg Wood did not agree that surgery was indicated. (Exhibit 13). Dr. Wood examined Allegrezza on July 1, 1999, July 14, 1999, and July 21, 1999. After the initial visit on July 1, 1999, Dr. Wood ordered a repeat discogram by Dr. McPherson at St. Dominic Hospital. The Court should recall that Dr. Steuer had also performed a discogram. On July 14, 1999, Dr. Wood reviewed the discography report and indicated that it was normal. He then ordered a myelogram and post-myelogram CT, both of which had been performed on numerous occasions, and reviewed those results on July 21, 1999. He stated that the lumbar myelogram and post-myelogram CT scan were negative and because the discography was also negative, he felt that Allegrezza was not a surgical candidate. Despite the opinion of four reputable physicians, Dr. Lewis performed surgery on Allegrezza in September of 1999, without seeking prior approval from the Employer/Carrier and without even notifying Allegrezza's own attorney. (Exhibit 13; Exhibit 17). A review of Lewis' records indicates that he never placed a disability impairment rating on Allegrezza nor gave her any restrictions and actually released her to Steuer for removal of the staples following the surgery. (Exhibit 17).

By the time the hearing on the merits was held before the administrative judge on May 14, 2002, the Employer had long been closed and the only witness who testified at the hearing was Allegrezza. She admitted at the hearing that no doctor ever told her

that she could not work, including those doctors whose care had not been recognized by the Commission. Significantly, the Commission noted this fact in its opinion and order and same was adopted by the Circuit Court of Washington County, Mississippi. (Record, p. 52).

SUMMARY OF THE ARGUMENT

Despite the length of time this case has been proceeding and the apparent complexity of the issues involved, there are basically four rather simple matters to be determined by this Court. The first issue concerns Allegrezza's bilateral carpal tunnel syndrome and whether there was substantial evidence to support the Circuit Court's ratification of the Commission's order and assessment of benefits with respect to that injury. The second concerns Allegrezza's back injury and whether there was substantial evidence to support the Circuit Court's ratification of the Commission's decision with respect to the extent her disability. The third issue involves the unauthorized treatment received by Allegrezza and whether or not the Employer/Carrier are responsible for payment of this treatment and, further, whether the Commission was bound by the opinions of these unauthorized physicians. Finally, this Court should uphold the Circuit Court's ratification of the Commission's order and opinion as to the fourth issue, i.e., that there was sufficient evidence to rebut whatever presumption of permanent and total disability might have been due to Allegrezza.

With regard to the first issue of bilateral carpal tunnel syndrome, it was stipulated that Allegrezza's bilateral carpal tunnel syndrome was work related. After being examined by several doctors, she chose Dr. Aubry Lucas to perform surgery, which was done on January 8, 1998. (Exhibit 3). Allegrezza was released to return to work, ultimately with restrictions, and an FCE was performed by Chris Menhard. Menhard also reviewed the job that Allegrezza performed with the Employer and the restrictions of

Dr. Lucas to determine that Allegrezza could still perform her job of cutter with Employer. Allegrezza was assigned a five percent (5%) permanent partial impairment rating to each upper extremity and said rating was paid by the Employer/Carrier in the total amount of \$4,480.00. (Exhibit 9).

With regard to Allegrezza's back injury, it was stipulated at the hearing and admitted that she fell on January 22, 1998, while in the course and scope of her employment with Employer. Allegrezza chose treatment by her family physician, Dr. Joe Pulliam, who referred her to Dr. Frothingham, a neurosurgeon. Dr. Frothingham determined that she was not a surgical candidate and referred her to a pain management doctor, Dr. Jo Travis. Dr. Travis then referred her to Dr. David Collipp who also specializes in pain management and is board certified in physical medicine and rehabilitation. During this period of time, Allegrezza was referred to Dr. John Brophy for an employer's evaluation and Brophy concurred with Dr. Frothingham that Allegrezza was not a surgical candidate and should be able to return to work. Dr. Collipp opined that Allegrezza reached maximum medical improvement on November 19, 1998, and that she could return to work with certain restrictions. As previously stated, Chris Menhard performed a functional capacity evaluation taking into consideration the restrictions placed on Allegrezza by Dr. Collipp and reviewed the job of cutter with Employer. Menhard determined that Allegrezza could return to work as a cutter based on the restrictions of Dr. Collipp. (Exhibit 9).

The next matter to be considered is the issue of unauthorized medical treatment which Allegrezza received from Dr. Steuer, Dr. Lewis and Dr. Margaret Cassada, a psychiatrist located in Greenville, Mississippi and another referral by Dr. Steuer. The facts in this matter clearly establish that Allegrezza chose Dr. Pulliam as her chosen physician who referred her to numerous treating physicians, two of which were pain specialists, Dr. Collipp and Dr. Jo Travis. The treatment of both Collipp and Travis was provided by the Employer/Carrier. The administrative judge found that it was unreasonable and unnecessary for Allegrezza to be referred to Dr. Steuer, a third pain management specialist, and, in fact, a previous administrative judge assigned to the case refused to recognize Dr. Steuer as Allegrezza's treating physician for that reason. Consequently, Dr. Steuer's referrals to Dr. Lewis and Dr. Cassada were outside the chain of referral and were not reasonable or necessary within the terms of the Act. Allegrezza's doctor shopping was not condoned by the administrative judge, the Commission, or the Circuit Court, and, respectfully, should not be by this Court.

Finally, the Court should not accept Allegrezza's position that she has an "automatic trigger" for a finding of permanent and total disability. The fact that the Employer did not reinstate her after she was released to return to work is legally relevant, but it is not outcome determinative. The administrative judge, the Commission, and the Circuit Court found that the Employer/Carrier rebutted any such presumption of permanent and/or total disability created by the failure to reinstate and this Court should find likewise.

ARGUMENT

A. Standard of Review

It has long been the rule of law in Mississippi that the Workers' Compensation Commission is the trier and finder of facts in a compensation claim. *Morris v. Lansdell's Frame Co.*, 547 So.2d 782 (Miss. 1989); *R. C. Petroleum, Inc. v. Hernandez*, 555 So.2d 1017, 1021 (Miss. 1990). The Commission has the authority to accept or reject any or all of the administrative judge's findings and is not bound by same. The Commission reviews not only the evidence, but the law as well. *Daybright Lighting, Etc. v. Cummings*, 419 So.2d 211 (Miss. 1982) (citing *Dunn*, Mississippi Workers' Compensation § 284 (1967)); *Railway Express Agency v. Hollingsworth*, 74 So.2d 754 (Miss. 1954). The Commission's review of the order of the administrative judge is, therefore, *de novo*, and the Commission's order constitutes the findings of record by the original trier of fact.

"If the Commission's findings of fact and order are supported by substantial evidence, all appellate courts are bound thereby." *Morris*, 547 So.2d at 785. The Court of Appeals has repeatedly held that "this Court defers to the findings of the Commission when they are supported by substantial evidence." *Tyson Foods, Inc. v. Thompson*, 765 So.2d 589, 591 (Miss. Ct. App. 2000). The Court of Appeals "will not overturn a Commission decision unless it is premised on an error of law or unsupported findings of fact." *Richards v. Harrah's Entertainment, Inc.* 881 So.2d 329, 332 (Miss. Ct. App. 2004) (citing *J. R. Logging v. Halford*, 765 So.2d 580, 584 (Miss. Ct. App. 2000)). An appeals court can "reverse the Commission's order only if it finds that order clearly erroneous

and contrary to the overwhelming weight of the evidence.” *Morris*, 547 So.2d at 785.

In fact, this Court held in *Bryan Foods, Inc. v. James David White*:

An appellant court must defer to an administrative agency’s findings of fact if there is even a quantum of credible evidence which supports the agency’s decision. This highly deferential standard of review essentially means that this Court and the circuit courts will not overturn a Commission decision unless said decision was arbitrary and capricious.

Bryan Foods, Inc. v. James David White, 913 So.2d 1003, 1007 (Miss. Ct. App. 2005) (*internal citations omitted*). As the Circuit Court did not find any errors of law or unsupported findings of fact contained in the Commission’s order, its order confirming same was entirely appropriate and correct.

B. The Carpal Tunnel Claim

It is well established that a claimant in a workers’ compensation matter has the general burden of proof to establish not only that she sustained a work related injury, but the nature and extent of any disability resulting from that injury. *Flintkote Co. v. Jackson*, 192 So.2d 395 (Miss. 1966). The liberal construction of the Act does not eliminate the necessity of making proof a prerequisite to recovery. *Ingall’s Shipbuilding Corp. v. Howell*, 74 So.2d 863, 865 (Miss. 1954). In the case at hand, the overwhelming weight of proof regarding Allegrezza’s carpal tunnel syndrome and her condition following her surgeries clearly established that she could return to work at the job she previously held. In fact, there was no evidence presented by Allegrezza that she could not perform employment which was comparable to the occupation she was performing at the time of her injury.

Allegrezza's bilateral carpal tunnel syndrome complaints obviously deal with the scheduled member section of the Act, which arbitrarily schedules compensation payable for the loss of use of a scheduled member. In order to establish that a claimant is entitled to more than the impairment rating assigned by her treating physician, she must convince the Commission that she is no longer able to perform employment which is comparable to her occupation prior to the time of the injury. She must present relevant evidence that she could not perform the jobs within her normal occupation or occupations. *Meridian Prof. Baseball Club v. Jensen*, 828 So.2d 740, 747 (Miss. 2002). In the case at hand, Dr. Aubrey Lucas, Allegrezza's operating surgeon, indicated that she could return to work, although she did have some restrictions. Chris Menhard, the physical therapist, conducted an on-site analysis of the job performed at the time of the injury and, using Dr. Lucas' restrictions, indicated that Allegrezza could perform that job. There was no medical testimony which challenged this opinion and, consequently, the Commission was entirely correct in its determinations regarding the carpal tunnel syndrome and the Circuit Court was correct in affirming same. (Exhibit 9; Exhibit 3).

The testimony of Dr. Aubrey Lucas and physical therapist Chris Menhard, taken together, indicate that Allegrezza had the capacity to return to work. The decision of the administrative judge with regard to the bilateral carpal tunnel syndrome and the benefits due Allegrezza, both of which were ratified as the final finding of fact in the Commission's order, was entirely correct. Consequently, it was correct for the Circuit Court to affirm the order of the Commission.

C. Back Injury Claim

There is no doubt that the Commission's finding that Allegrezza could still work despite "some percentage of loss of wage earning capacity" was supported by substantial evidence in the record and, consequently, was properly affirmed by the Circuit Court. Allegrezza saw four treating physicians of her own choosing (Pulliam, Frothingham, Travis and Collipp), none of whom indicated that she could not return to work. The Commission noted in its opinion and order the total lack of testimony from any doctor, including those excluded from the chain of referral, that Allegrezza had no ability to work. (Record, p. 169). In fact, Allegrezza herself testified that no doctor ever told her that she could not work. She stated when asked, "I can do what I want to do." (Record, pp. 52-53).

The Commission stated in its order that "the record is replete with medical evidence that suggests that [Allegrezza] is capable of being employed despite her injury." (Record, p. 169). The Circuit Court of Washington County correctly affirmed that determination. Indeed, the evidence in the record supporting the Commission's finding with regard to Allegrezza's back injury is more than substantial. Dr. Collipp treated Allegrezza from May 1, 1998, until January of 1999. He treated and evaluated her extensively during this time and, at one point, referred her back to Frothingham for further studies and recommendations. Frothingham and Collipp determined that Allegrezza did not need surgery and Collipp indicated that she reached maximum medical improvement on November 19, 1998. Dr. Collipp then ordered a functional

capacity evaluation to be performed by Chris Menhard who, as previously indicated, was of the opinion that Allegrezza could perform her job with Employer. Allegrezza presented no rebuttal testimony, other than her own, to dispute this medical fact. The overwhelming weight of the evidence indicates that Allegrezza sustained a back injury when she fell in January of 1998, received more than adequate reasonable and necessary treatment, reached maximum medical improvement on November 19, 1998, and could have returned to work. The Circuit Court's affirmation of the Commission's conclusion that Allegrezza had experienced some loss of wage earning capacity was entirely consistent with the uncontradicted fact that no doctor, whether within or outside the chain of referral, opined that Allegrezza could not return to work.

D. Unauthorized Treatment by Drs. Michael Steuer, Adam Lewis and Margaret Cassada

Section 71-3-15, Mississippi Code Annotated, states in relevant part as follows:

(1) The employer shall furnish such medical, surgical, . . . or treatment. . . . for such period as the nature of the injury or the process of recovery may require. The injured employee shall have the right to accept the services furnished by the employer or, in his discretion, to select one (1) competent physician of his choosing and such other specialists to whom he is referred by his chosen physician to administer medical treatment. Referrals by the chosen physician shall be limited to one (1) physician within a specialty or subspecialty area. Except in an emergency requiring immediate medical attention, any additional selection of physicians by the insured employee or further referrals must be approved by the employer, if self-insured, or the carrier prior to obtaining the services of the physician at the expense of the employer or carrier.

It is clear in this case that Allegrezza chose Dr. Joe Pulliam as her chosen treating physician. The statute provides that a claimant is certainly entitled to choose such

physician and the employer is responsible for the care of that competent physician and other such specialists to whom he refers a claimant. However, the employer/carrier are responsible for referrals to only one physician within a specialty or subspecialty. The purpose of the statutory procedure for seeking medical treatment in a workers' compensation claim and for permitting referrals as outlined in the statute is in part to systemize the means by which medical costs are to be imposed on the employer and to assist the employer/carrier in controlling, to some extent, these costs. *Wesson v. Fred's, Inc.*, 811 So.2d 464 (Miss. 2002). The Supreme Court has held that where referral to physicians is unreasonable and where the claimant did not seek approval of the employer's insurance carrier before seeking such services, then in that event, the employer/carrier are not required to furnish those services. *Wesson* at 467.

In a Mississippi Supreme Court case similar to the one at hand, *Congleton v. Shellfish, Inc.*, 807 So.2d 492 (Miss. 2002), the claimant, Congleton, was injured while in the course and scope of his employment with Shellfish, Inc. and was referred to two treating physicians, Dr. Hopper and Dr. Bazzone. The Commission determined that although these were the doctors recommended by Shellfish, Inc., they were also the doctors of choice for Congleton and indicated that the employer/carrier were liable for their treatment. Congleton had also sought on his own treatment by Drs. Rayner, Buckley, and Ross and the Commission ruled that these physicians were not the responsibility of the employer/carrier and held that the employer/carrier were not responsible for payment of the bills for Rayner, Buckley, and Ross. Congleton argued

that he had not had his choice of physician in accordance with the statute. Although the Mississippi Supreme Court indicated that the claimant could have had his choice of physician, he still was required to obtain prior approval by the employer or the employer's insurance carrier before seeking such treatment. Because Congleton did not make any such effort to seek approval from his employer for the subsequent medical treatment and because the Act states that medical expenses are only due for that period of time "as the nature of the injury or process of recovery may require," Congleton's request for reimbursement of the three doctors was denied by the Supreme Court.

In the matter at hand, the treatment of Allegrezza by Dr. Steuer, one of the unauthorized physicians, three points are important. The first is that although Allegrezza was referred to Dr. Steuer by her chosen treating physician, Dr. Pulliam, Pulliam had already referred her, through Dr. Frothingham, to two pain specialists who provided treatment to Allegrezza. According to the statute, the Employer is only responsible for one physician within a given specialty or subspecialty. By the time Allegrezza saw Dr. Steuer, the Employer/Carrier had already provided the services of two such doctors, Dr. Travis and Dr. Collipp. Secondly, Allegrezza did not request prior approval before seeing Dr. Steuer, and, according to the statute and *Congleton*, the Employer/Carrier are not responsible for the treatment by Dr. Steuer. Furthermore, the treatment of Dr. Steuer occurred after Allegrezza reached maximum medical improvement. It is also important to note that Allegrezza attempted to have Dr. Steuer appointed as her chosen treating physician, but the administrative judge hearing the

case at the time denied her claim. It is clear that Dr. Steuer is outside the chain of referral as determined by the Commission and affirmed by the Circuit Court.

Dr. Steuer referred Allegrezza to Dr. Adam Lewis, and if the Employer/Carrier are not responsible for the treatment by Dr. Steuer, they are certainly not responsible for the treatment by Dr. Lewis. Furthermore, not only did Allegrezza fail to seek prior approval before receiving care from Dr. Lewis, Lewis operated on her without seeking said prior approval and without even notifying Allegrezza's attorney. It is clear that the treatment provided by Dr. Lewis should not be the responsibility of the Employer/Carrier.² The same holds true for the psychiatric treatment by Dr. Margaret Cassada. As the administrative judge appropriately pointed out, the testimony of Cassada is suspect due to the fact that her referral was made by Dr. Steuer. The Commission approved the administrative judge's findings in this regard and adopted them as its own, as did the Circuit Court. Furthermore, as mentioned by the administrative judge, there does not seem to be any period of time that Allegrezza went without reasonable and necessary medical treatment and, in fact, was treated by numerous physicians of her own choosing for her back injury. Again, the Commission adopted this conclusion as the final finding of fact and the Circuit Court did the same. In light of the substantial evidence in support of the Circuit Court's affirmation of the Commission's finding on this issue, the decision regarding the treatment and testimony of Doctors Steuer, Lewis, and Cassada should be affirmed by this Court as well.

² The Court is reminded that Dr. Lewis was also the second neurosurgeon to treat the appellant, as Dr. Frothingham was the first.

E. The Employer/Carrier rebutted any presumption of permanent and total disability

Allegrezza's suggestion that her testimony that "[s]he was fired from Greenville Manufacturing because she could not perform the job" mandates a finding of permanent and total disability is based on an incomplete reading of Mississippi law on the subject. The case on which Allegrezza relies, *Jordan v. Hercules, Inc.*, 600 So.2d 179 (Miss. 1992), makes it clear that, even if an initial presumption of total disability results from such testimony, the presumption is not, as Allegrezza would have it, "automatic." Rather, the *Jordan* Court stated the rule as follows:

When the claimant, having reached maximum medical recovery, reports back to his employer for work, and the employer refuses to reinstate or rehire him, then it is prima facie that the claimant has met his burden of showing total disability. The burden then shifts to the employer to prove a partial disability or that the employee has suffered no loss of wage earning capacity.

Id. at 183.

It is clear that the presumption is rebuttable and the Commission's analysis clearly followed the full version of the *Jordan* rule. Certainly, medical testimony is crucial in determining whether or not a claimant is able to be employed. The Commission found that "the record is replete with medical evidence that suggests that [Allegrezza] is capable of being employed despite her injury." (Record, p. 169). The record is replete, that is, with evidence to rebut Allegrezza's prima facie case of total disability. The most compelling fact that supports this conclusion, and one on which the Commission specifically pointed out in its opinion, is that no one testified that she could no longer

work. Furthermore, even Allegrezza testified that no doctor ever told her that she could not work. (Record, p. 52). This lack of medical evidence to support her claim, together with the positive testimony of Dr. Lucas and the evaluation of Chris Menhard easily rebut whatever initial presumption of permanent and total disability was due Allegrezza.

The Circuit Court's adoption of the Commission's order that Allegrezza should receive benefits for a *percentage* of loss of wage earning capacity (that is, not a total loss) is thus consistent with a finding that the "presumption" of *total* disability does not hold for Allegrezza. Likewise, the administrative judge's order of temporary total disability benefits and permanent partial disability benefits in compensation for her carpal tunnel syndrome, which the Commission approved and incorporated into its final order, is consistent with the uncontradicted evidence that she could go back to work. Allegrezza in fact testified at the hearing, "I can do what I want to do." (Record, pp. 52-53). Although the Employer's purported refusal to reinstate Allegrezza was relevant to the Commission, the law is clear that simply being rejected from returning to work does not entitle a claimant to the status of total disability, particularly when there is copious evidence to show a capacity for work, while partially diminished, still exists. The Commission has far more latitude in assessing the facts before it than simply pulling the "automatic trigger" that Allegrezza would give it. Furthermore, it should be noted that although the Commission found Allegrezza's job search was "adequate," Allegrezza admitted that on each job application she completed, she listed as her reason for leaving her prior employment was "put on leave due to medical condition." Allegrezza also

communicated this to all potential employers. (Exhibit 20, p. 224; Appellant's Record Excerpts I.2. Order of the Washington County Circuit Court, pp. 7-8).

The Commission stayed well within the bounds of the law for awarding workers' compensation benefits set by the Mississippi Supreme Court, and its findings of fact are due considerable deference by this Court.

CONCLUSION

As stated at the outset of the Employer/Carrier's argument, this Court's role is not to reassess the evidence or make its own determinations of credibility. There is more than sufficient evidence to support each and every one of the Commission's, and, therefore, the Circuit Court's, findings and conclusions with regard to benefits due Allegrezza in this case. By law, the Commission's opinion and order should be affirmed, as should the order and opinion of the Circuit Court of Washington County.

Respectfully submitted, this the 11th day of January, 2012.

GREENVILLE MANUFACTURING, INC. AND
THE TRAVELERS INSURANCE COMPANY,
Appellees

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CERTIFICATE OF SERVICE

I, MARJORIE T. O'DONNELL, of Clayton O'Donnell, PLLC, attorney of record for the Appellees in this matter, do hereby certify that I have this date mailed, by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing BRIEF OF APPELLEES to:

Honorable Margaret Carey-McCray
Washington County Circuit Judge
P O Box 1775
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Mr. Charles E. Baglan, Jr.
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This the 11th day of January, 2012.

Marjorie T. O'Donnell
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