IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2011-WC-01202-COA

SARAH BRAXTON	**APPELLANT**
V.	
RESORTS CASINO (RESORTS TUNICA)	**APPELLEE**
AND	
AMERICAN INTERNATIONAL INSURANCE COMPANY	**APPELLEE**

ON APPEAL FROM THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND TUNICA COUNTY CIRCUIT COURT

BRIEF OF THE APPELLEES

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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 this Court may evaluate possible disqualification or recusal.

1. Sarah Braxton, Appellant;
2. Resorts Casino (Resorts Tunica), Appellee;
3. American International Insurance Company, Appellee;
4. Lawrence J. Hakim, Esq., Attorney of Record for the Appellant;
5. Gary P. Snyder, Esq., Attorney of Record for the Appellees;
6. Courtney Leyes Tomlinson, Attorney of Record for the Appellees.

THIS the 30th day of January, 2012.

Courtney Leyes Tomlinson, MSB[redacted]

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I. STATEMENT OF THE ISSUES

The issues currently before the Court of Appeals are:

1. Whether substantial evidence supported the Mississippi Workers' Compensation Commission's conclusion that Ms. Braxton did not sustain an injury to her right knee on September 21, 2007; and

2. Whether substantial evidence supported the Mississippi Workers' Compensation Commission's conclusion that the Resorts Casino and American International Insurance Co.[1] are not estopped from denying any future medical care to Ms. Braxton's right knee.

II. STATEMENT OF THE CASE

The Appellant, Sarah Braxton ("Ms. Braxton"), allegedly suffered an on-the-job injury on September 21, 2007 while in the employment of Resorts Casino – Tunica ("Resorts Casino"). At the time of the injury, Ms. Braxton was returning to her work station from the break room on the second floor of the casino when she fell down a flight of stairs. Ms. Braxton filed a Petition to Controvert on April 4, 2008, alleging injuries to the "right lower extremity." *See* Volume I at pp. 1. At the hearing before the Administrative Judge held on August 6, 2009, the following stipulations were made, to wit:

a. That an on-the-job injury occurred on September 21, 2007;

b. Ms. Braxton injured her ***left*** knee, left hip, and right shoulder;

c. Ms. Braxton has returned to work for the pre-injury Employer;

d. Her average weekly wage was $380.34 per week;

e. She was paid temporary total disability in the amount of $325.80 for time missed in February 2008; and

f. Temporary partial disability has been paid in the amount of $1,683.50 from February 27, 2008 to June 4, 2008.

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[1] Even though this brief is filed on behalf of both Appellees, the Employer and Carrier will hereinafter be referred to as "Resorts Casino," or collectively as the "Appellees."

On January 14, 2010, following a full hearing, the Administrative Judge entered his Order of Administrative Judge, correctly finding Ms. Braxton failed to meet her burden that she suffered an injury to her right knee as a result of her September 21, 2007 accident. *See* Volume I at pp. 93-107. The Administrative Judge additionally noted that "[w]hile the [Appellees] clearly paid for the initial treatment to her right knee including the surgery to her right knee, the Administrative judge cannot find where this creates any kind of estoppel." *See* Volume I at pp. 107.

Ms. Braxton appealed the Administrative Judge's decision to the Full Commission on January 25, 2010. *See* Volume I at pp. 108. After briefing submissions by the parties, the Full Commission, on August 25, 2010, affirmed the "Order of Administrative Judge." *See id.* at pp. 116. On September 1, 2010, Ms. Braxton filed a Notice of Appeal with the Commission. *Id.* at pp. 117. The Tunica County Circuit Court affirmed the Commission's decision on August 5, 2011, finding that, "the decision of the Commission to find the injury was not related to the September 21, 2007, fall was not arbitrary and capricious and was not against the substantial weight of the evidence." Tunica County Record at pp. 66.

Aggrieved, on August 17, 2011, Ms. Braxton filed a Notice of Appeal appealing the August 5, 2011, order of the Tunica County Circuit Court. Tunica County Record at pp. 68-69.

III. **BACKGROUND FACTS**

A. DOCUMENTATION AND MEDICAL DOCUMENTATION OF THE SUBJECT ACCIDENT.

Ms. Braxton fell down the stairs while returning to her work station at Resorts Casino on September 21, 2007. *See* Hearing Transcript, attached to the Record as Volume II, at pp. 15-16.[2] Upon regaining her senses, Ms. Braxton got up and went to the casino security office to report

[2] Resorts Casino will hereafter cite to the Hearing Transcript as "T. at pp. _____."

her accident as is required by Resorts Casino. *Id.* at pp. 16. Ms. Braxton then relayed how the accident occurred and described her injuries to the casino security supervisor on duty. *Id.* The security supervisor transcribed Ms. Braxton's statement and then presented it to Ms. Braxton for her signature, T. at pp. 16; *see also* Exhibit Volume, attached to the Record as Volume III, at Exhibit #6. The statement signed by Ms. Braxton is handwritten and is somewhat difficult to read; however, close examination reveals that the body of the statement states as follows:

> I was coming from my break. I fell from the top of the stairs to the bottom. Stairwell number 3. My left knee hurts. I landed on my right side and shoulder. My fingers on my right hand are burning. I do not want an ambulance. My left hip hurts also.

See Volume III at Exhibit #6 (emphasis added). At this time, Ms. Braxton also signed a document entitled Notice of Physician/Provider Choice indicating that she accepted the casino's tender of treatment by Tunica Resorts Medical Clinic or Baptist Memorial Hospital - DeSoto ("BMH-DeSoto") in Southaven. *See* Volume III at Exhibit #7.

Another security officer transported Ms. Braxton to BMH-DeSoto. T. at pp. 23. Despite her allegations at the hearing to the contrary, BMH-DeSoto medical records from September 22, 2007 state multiple times throughout that Ms. Braxton's complaints were to her right shoulder, left hip and left knee. *See* Volume III at Exhibit #4. There is no recorded complaint to the right knee anywhere in those records. *Id.* Additionally, Ms. Braxton's complaints are confirmed on diagrams which are part of the hospital records. *Id.* X-rays made on September 22, 2007 at BMH-DeSoto were of the right shoulder, left hip and left knee.[3] Completely absent from Exhibit

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[3] Dr. Jason K. Morris ("Dr. Morris"), a board-certified radiologist licensed in the States of Mississippi, Arkansas, Louisiana, Georgia, Tennessee and Missouri, reviewed certain diagnostic films for BMH-DeSoto. *See* Volume III at Exhibit #10. These films were radiographs labeled "left knee, left hip, and right shoulder examination" and a cervical spine series, all dated September 22, 2007. *Id.* The films to the left knee included two (2) views. *Id.* Additionally, he reviewed films from a radiograph labeled "right knee" dated January 5, 2008. After comparing the two sets of films depicting both knees, Dr. Morris stated in his deposition that it is his opinion to a reasonable degree of medical certainty that the x-rays dated September 22, 2007 are radiographs representing the left knee. *See* Volume III at Exhibit #10 at pp. 10. He verified that there were no x-rays of the right knee

#4 is any reference to right knee complaints, treatment to the right knee, or diagnostic studies and films of the right knee. *See* Volume III at Exhibit #4.

B. MS. BRAXTON'S KNEE SWITCH.

Ms. Braxton received no additional treatment at BMH-DeSoto for her left knee. Ms. Braxton took one (1) day off and returned to work at Resorts Casino the following Monday, with no work restrictions. T. at pp. 26. At the hearing, Ms. Braxton produced no documentation or record of any visit to any health care provider between September 22, 2007 and early 2008 other than certain records of Lydia Franklin, nurse practitioner ("Nurse Franklin").[4] On December 17, 2007, approximately three (3) months following the subject injury, Ms. Braxton saw Nurse Franklin with complaints of right knee pain. *See* Volume III at Exhibit #3. Particularly telling is the history given by Ms. Braxton stating, "**above symptoms for the past few days, not getting any better.**" *Id.* (emphasis added). In 2008 and 2009, Ms. Braxton saw Nurse Franklin with multiple complaints, including bilateral knee pain. *Id.*

On January 5, 2008, Ms. Braxton again presented herself to the emergency room at BMH-DeSoto, but at that time, she claimed to have injured her right knee in September, 2007. *See* Volume III at Exhibit #5. Unlike her visit in September 2007, Ms. Braxton's complaints in January, 2008 were limited to the *right* knee and the sole x-ray taken at the time was to the right knee. *Id.* After being provided with a panel of orthopedic physicians for further treatment, Ms. Braxton chose Dr. John Lochemes ("Dr. Lochemes") of Memphis Orthopaedic Group as he was available to see her without significant delay. *Id.* Records from Memphis Orthpaedic Group

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for that date. *Id.* at pp. 11. Additionally, Dr. Morris confirmed that the x-rays from January 5, 2008 were radiographs of the right knee. *Id.* at pp. 11. The CD bearing the films of the studies on September 22, 2007 and January 5, 2008, was identified and marked as an exhibit to Dr. Morris's deposition and are included in Volume III as Exhibit #9.

[4] Nurse Franklin is Ms. Braxton's private family practitioner.

demonstrate that Dr. Lochemes saw Ms. Braxton on January 9, 2008 with complaints of pain in her right knee. *See* Volume III at Exhibit #2. On that date, Ms. Braxton gave Dr. Lochemes the history of having injured her right knee when she slipped and fell down about four (4) stairs on September 21, 2007. *Id.* Dr. Lochemes ordered an MRI of the knee which showed chondromalacia patella along the superior patella eminence, minimal pre-patella edema and small joint effusion, peripheral tear of the medial meniscus. *Id.* Based on the MRI findings and clinical evaluation, Dr. Lochemes scheduled Ms. Braxton for a partial medial meniscectomy and chondroplasty of patella which Dr. Lochemes carried out on February 22, 2008. *Id.* By June 4, 2008, Dr. Lochemes stated that Ms. Braxton's on-the-job injury had resolved but he would wait two (2) months before pronouncing her MMI. *Id.* Dr. Lochemes further stated Ms. Braxton had osteoarthritis, which was unrelated to the on-the-job injury. *Id.* Ms. Braxton has since returned to work full duty and has worked regularly at both the casino and as a bus driver for ICS Headstart. T. at pp. pp. 51.

C. MS. BRAXTON'S TREATMENT OF HER RIGHT KNEE AFTER JUNE 2008.

On August 6, 2008, Dr. Lochemes saw Ms. Braxton for continuing symptoms in her right knee. *See* Volume III at Exhibit #2. On August 8, 2008 Dr. Lochemes performed an MRI of Ms. Braxton's right knee, which indicated *advanced degenerative changes*, medial joint compartment, and postoperative changes of the medial meniscus. *See* Volume III at Exhibit #2. Dr. Lochemes reviewed the MRI findings with Ms. Braxton on August 13, 2008 at which time Dr. Lochemes expressed the opinion that the recurrent effusion of which she complained is consistent with osteoarthritis and discussed potential joint replacement to address the arthritis which would "not be workers' comp related treatment." *Id.* Dr. Lochemes advised the Ms. Braxton to continue what she was doing and to work on weight loss to "unload the knee" *Id.* Dr. Lochemes indicated no further treatment at that time. *Id.*

On September 24, 2008 Ms. Braxton last saw Dr. Lochemes who noted "she doesn't want to acknowledge that the [knee symptoms] are from osteoarthritis." *Id.* He further noted that she had effusion but stated it was nothing that would be unexpected with an underlying arthritic condition. *See* Volume III at Exhibit #2. Dr. Lochemes felt ongoing weight loss, activity modification, and use of anti-inflammatory medications would be prudent. *Id.* However, because of the frequency of Ms. Braxton's visits, he suggested total joint replacement. *Id.* The last sentence for the September 24, 2008 office notes read: "[s]o a recommendation was made for total joint replacement for the underlying osteoarthritic condition *that has not been advanced or aggravated by the work comp injury.*" *Id.* (emphasis added).

D. MS. BRAXTON'S TME IN NOVEMBER, 2008.

Dr. Gregory Dabov ("Dr. Dabov") performed an independent medical examination ("IME") on Ms. Braxton on November 26, 2008.[5] During his deposition, Dr. Dabov admitted he did not have the records from BMH-DeSoto from September 22, 2007 or the records from BMH-DeSoto's Emergency Room dated January 5, 2008, at the time of his examination. *See* Volume III at Exhibit #1 at pp. 7.

After review of the emergency room records, Dr. Dabov testified:

Q: Now, as we went through the emergency room record of September 22, 2007, Dr. Deboic [sic] did you see any reference to injury or complaint of injury or complaint of pain or discomfort to Ms. Braxton's right knee?

A: No, sir.

Q: Now, have you seen any medical record prior to January 5, 2008 suggesting an injury to Ms. Braxton's right knee as a result of the accident of September 21, 2007?

[5] At the time of the IME, Dr. Dabov had medical records from Ms. Braxton's unrelated visit to the Campbell Clinic regarding her knees back in 2006.

A: No, I don't think I saw any records prior to January 2008.

Volume III at Exhibit #1 at pp. 20-21. Dr. Dabov's November 26, 2008 record indicated that the right knee condition that he observed on that date was related to her September 21, 2007 accident. *Id.* at pp. 27. When asked the basis for that opinion, Dr. Dabov responded, "the history from the patient." *Id.* When asked if there was anything else that led to that conclusion, Dr. Dabov stated as follows:

> Some of the records on which, frankly, going over these are not extremely clear about documenting which knee, sometimes the right knee is discussed, sometimes the left knee is discussed. **I was working under the assumption that she injured her right knee.** Her right knee is operated on. In gathering the information, that was my work, what I was working with.

Id. at pp. 27-28 (emphasis added).

Dr. Dabov further admitted:

> Q: But you would agree that as far as the medical records are concerned, between November – excuse me, between September 21, 2007 and January 5, 2008, there's not anything that you've seen to indicate an injury to the right knee?
>
> A: That is correct.

Id. at pp. 29.

E. MS. BRAXTON'S RIGHT KNEE TREATMENT PRIOR TO HER ON-THE-JOB INJURY.

Ms. Braxton's complaints of right knee pain pre-date her on-the-job accident. In fact, despite Ms. Braxton's assertion the treatment of her right knee prior to her injury at her place of employment was "brief," Campbell Clinic medical records reflect a significant history of knee pain in both her knees, existing long before the date of the subject on-the-job accident. *See* Ms. Braxton's Brief at pp. 2 and Volume III at Exhibit #12. On July 16, 2001, more than six (6) years prior to the subject on-the-job injury, Ms. Braxton saw Dr. Robert Pickering ("Dr. Pickering") with complaints of "having problems with both of her knees off and on *for a long*

period of time." *See* Volume III at Exhibit #12 (emphasis added). On physical examination, Dr. Pickering noted patellofemoral crepitance, bilaterally. *Id.* Dr. Pickering's impression was patellofemoral arthritis and he placed Ms. Braxton on Celebrex. *Id.* On August 13, 2001, Ms. Braxton reported good relief with her left knee using the Celebrex, but was still having significant pain in her *right* knee. *Id.*

On April 21, 2006, nearly eighteen (18) months before the subject injury, Ms. Braxton saw Dr. Gregory Dabov with the chief complaint of *right* knee pain. *Id.* The record notes she had previously experienced *right* knee pain which had been relieved following intra-articular injection, but a month prior to her Dr. Dabov visit the pain began to develop again with an *insidious* onset. *Id.* During Dr. Dabov's deposition, he recalled Ms. Braxton told him that she had a long history with right knee pain, had been through knee injections for at least four (4) years, and had managed her pain up until then. *See* Volume III at Exhibit #1. Dr. Dabov further stated Ms. Braxton's most recent episode prior to her April 21, 2006 Dr. Dabov visit occurred by insidious onset, "which means there's no inciting or traumatic event." *Id.* at pp. 24. Dr. Dabov's impression was internal derangement to the right knee with some patellofemoral syndrome. *See* Volume III at Exhibit #12. He prescribed physical therapy, injection of the right knee, and continued use of anti-inflammatory medications. *Id.*

According to Nurse Franklin's records, Ms. Braxton saw Nurse Franklin on May 27, 2003 with complaints of bilateral knee pain. *See* Volume III at Exhibit #3. On March 30, 2006, Ms. Braxton saw Nurse Franklin with chief complaints of "arm swollen & hurts" and "knee hurts." *Id.* (It is not clear whether one knee or both knees were symptomatic; and, if one knee, which knee).

IV. SUMMARY OF THE ARGUMENT

Substantial evidence supports the Commission's conclusion that Ms. Braxton's right knee injury was unrelated to her September 21, 2007 fall at Resorts Casino. The evidence indisputably demonstrates that she did not report a right knee injury to casino personnel nor to the hospital on the date of the accident. In fact, Ms. Braxton did not report a right knee injury until December 2007, three (3) months after her on-the-job accident. Additionally, Dr. Lochemes, who had access to Ms. Braxton's complete medical history including the records from the date of the accident, unequivocally opined that any right knee injury was unrelated to Ms. Braxton's fall at Resorts Casino and was rather the result of an underlying osteoarthritic condition.

Moreover, the fact that Resorts Casino initially compensated Ms. Braxton for her right knee injury does not foreclose them from later challenging future compensability and the relatedness of the injury to the on-the-job accident, and Ms. Braxton is unable to cite to any legal authority to the contrary. Rather, the question is whether substantial evidence supports the Commission's order finding that Ms. Braxton's right knee injury is unrelated to her on-the-job accident. Resorts Casino's initial compensation for the injury does not make the injury any more related to the accident in September 2007 than Ms. Braxton's reporting the injury three (3) months after the accident. Accordingly, Resorts Casino respectfully requests that this Court affirms the Commission's findings.

A. STANDARD OF REVIEW.

"Subsequent appeals to the Supreme Court are technically from the decision of the Circuit Court; however, for all practical purposes, the decision of the Commission is that which actually is under review." *Langford v. Southland Trucking, LLC*, 30 So. 3d 1266, 1275 (¶ 29) (Miss. Ct. App. 2010) (citing to *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991)). "The decision of the Commission will be reversed only if it is not supported by substantial evidence, is

arbitrary or capricious, or is based on an erroneous application of the law." *Tew v. Siemens Power Transmission*, 2010 WL 4609212 (¶ 18) (Miss. Ct. App. Nov. 16, 2010) (internal citations omitted). To say it another way, "[w]here the decision of the Commission is supported by substantial evidence, there can be no finding of arbitrariness and caprice." *Richardson v. Johnson Elec. Auto., Inc.*, 962 So. 2d 146, 150 (¶ 10) (Miss. Ct. App. 2007) (internal citations omitted). In other words, where the Commission's decision is undergirded by substantial evidence, then it must be upheld, even if the Court of Appeals might have reached a different conclusion were the Court of Appeals the trier of fact. *Smith v. Johnston Tombigbee Furniture Mfg. Co.*, 43 So. 3d 1159, 1164 (¶ 15) (Miss. Ct. App. 2010) (citing to *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). Albeit not easily defined, substantial evidence can be said to mean "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Langford*, 30 So. 3d at 1274-75 (¶ 28) (Quoting *Delta CMI*, 586 So. 2d at 773) (internal quotation marks omitted). Additionally, substantial evidence is "more than a mere scintilla of evidence; it affords a rise to the level of a preponderance of the evidence; it affords a substantial basis of fact from which the fact in issue can be reasonably inferred." *Id.* (internal quotation marks omitted).

"A reviewing court commits error if it simply re-weighs the evidence and substitutes its judgment for that of the Commission." *Lifestyle Furnishings v. Tollison*, 985 So. 2d 352, 358 (¶ 17) (Miss. Ct. App. 2008) (internal citations omitted). When conducting the limited review of the evidence in the record, it is not this Court's role "to determine where the preponderance of the evidence lies when the evidence is conflicting, [since] it is presumed that the Commission, as trier of fact, has previously determined which evidence is credible and which is not." *Johnston Tombigbee Furniture,* 43 So. 3d at 1164 (¶ 16)(quoting *Hale v. Ruleville Health Care Ctr.*, 687

So. 2d 1221, 1224-25 (Miss. 1997) (internal quotation marks omitted). The Court of Appeals exercises *de novo* review on matters of law. *Tew*, 2010 WL 4609212 (¶ 18) (citing *KLLM, Inc. v. Fowler*, 589 So. 2d 670, 675 (Miss. 1991)).

B. MS. BRAXTON IS UNABLE TO DEMONSTRATE THAT HER RIGHT KNEE INJURY IS RELATED TO HER ACCIDENT AT RESORTS CASINO.

Even though medical evidence is to be given liberal construction and that doubtful cases should be resolved in favor of compensation, the Commission is called upon to apply "common knowledge, common experience and common sense" when weighing the evidence. *Janssen Pharmaceutica, Inc. v. Stuart*, 856 So. 2d 431, 436 (Miss. Ct. App. 2003) (internal quotations and citations omitted). However, "[t]he adherence to a liberal standard does not avoid the requirement that the [Ms. Braxton] must offer proof in order to recover." *Id.* at 436. This proof of causal connection "must rise above mere possibility." *Id.* (internal citations omitted). Under this standard, the Commission correctly determined that Ms. Braxton did not injure her right knee on September 21, 2007.

Ms. Braxton quotes *Moore v. Independent Life & Accident Insurance Co.* in her brief: "Even though medical testimony may be somewhat ambiguous as to causal connection, all that is necessary is that the medical findings support a causal connection." 788 So. 2d 106, 112 (Miss. Ct. App. 2001); *see also* Ms. Braxton's Brief at pp. 13. Although this appears to be a *de minimus* standard, such a causal connection cannot be based upon a false record that is unsupported by documentation. Ms. Braxton attempts to argue that the Commission's findings were erroneous by failing to consider the following evidence when it determined whether her right knee injury was unrelated to her on-the-job accident: 1) a self-serving statement that she reported her right-knee injury to her employer one week after the accident; 2) a post-operative note by Dr. Lochemes in which he opined that Ms. Braxton injured her right knee in September 2007; and 3)

Dr. Dabov's report that her right knee injuries were related to her on-the-job accident on September 21, 2007. As discussed below, the evidence articulated by Ms. Braxton is not enough to warrant reversal of the Commission's order, as these bases do not establish a causal connection between Ms. Braxton's right knee injury and the accident on September 21, 2007. Moreover, the evidence articulated by Ms. Braxton is inaccurate without any factual basis and is flawed.

1. Ms. Braxton's self-serving statement.

In a footnote in her brief, Ms. Braxton attacks Resorts Casino, stating: "[Resorts Casino] did not produce any witnesses with direct knowledge of what [Ms. Braxton] verbally reported regarding her injury; nor did they produce any rebuttal testimony to refute [Ms. Braxton's] claim she injured her right knee when she fell down the flight of stairs." *See* Ms. Braxton's Brief at pp. 3, nn.3. However, this Court should not afford any credence to Ms. Braxton's self serving statement as it is contradicted by the pertinent medical records, her medical history, and her December 2007 visit to Nurse Franklin. Based on her medical history, Ms. Braxton has had bilateral knee pain on and off for the six (6) years prior to the subject accident. *See* Volume III at Exhibits #3, #12. In April 2006, she saw Dr. Pickering at Campbell Clinic with complaints of right knee pain. *Id.* at Exhibit 12. As the Administrative Judge aptly concluded: "Her pain in 2006 and before was . . . insidious, meaning there was no inciting or traumatic event that caused the pain." *See* Administrative Judge's Order at pp. 100, attached to the Record as Pleading Volume I.

The next records mentioning right knee trouble were from Nurse Franklin on December 17, 2007, almost three (3) months after the accident. *See* Volume III at Exhibit #3. In her notes, Nurse Franklin states that Ms. Braxton complained of right knee pain and that she had been having symptoms *for the past few days*. *Id.* Nowhere in Nurse Franklin's note did she mention a

fall in September 2007 or Ms. Braxton injuring her right knee in September 2007. *Id.* The fact that Ms. Braxton had been diagnosed with insidious pain in her right knee just over one year prior to the subject accident and the first notation of right knee pain after the accident occurred in December 2007 (with pain in the right knee over the past few days prior to her visit) sheds some light on the disingenuousness of Ms. Braxton's testimony. Stated another way, even if Ms. Braxton statement were true, why did she not mention to Nurse Franklin that she had been suffering pain in her right knee for the past few months not the past few days? As the Administrative Judge so aptly noted, "It is difficult to believe [the Emergency Room] x-rayed the left knee and that [Appellant] would not have called it to their attention if her right knee was actually the knee hurting from the fall." *See* Volume I at pp. 96.

2. Dr. Lochemes's post-operative note.

In her brief, Ms. Braxton asserts that Dr. Lochemes, in a post-operative note dated February 29, 2008, "clearly opined that [Ms. Braxton] injured her right knee in September 2007, when she fell down a flight of stairs at work, which required the February 2008 surgery." *See* Ms. Braxton's Brief at pp. 9. The Commission rightfully afforded no weight to Dr. Lochemes' post-operative note as Ms. Braxton gave him the history that she injured her *right* knee in September 2007, when she first saw him in January 2008. Such analysis based on an inaccurate statement of the facts was exposed when Dr. Dabov was asked to defend his opinion which was based on this post-operative note in his deposition.[6]

3. Dr. Dabov's opinion.

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[6] Ms. Braxton defends Dr. Lochemes's opinion in her brief, arguing that it was "not her duty to present her previous records and history to Dr. Lochemes; it was the duty of the [the Appellees]." This argument completely misses the point as it does not matter whose fault it was for failing to give Dr. Lochemes her complete medical record. What matters is that Dr. Lochemes rendered an opinion in February 2008 regarding Ms. Braxton's injury based on a self-serving statement given to him many months after her fall. Such an opinion is not reliable.

In *Airtran, Inc. v. Byrd*, the Mississippi Court of Appeals stated that when examining a doctor's testimony in regards to the causation issue, one must ask: "From the *whole* of the doctor's testimony, what is the real substance he stated concerning causal connection?" 953 So. 2d 296, 299 (Miss. Ct. App. 2007) (emphasis added). While Dr. Dabov's innocuous opinion may appear to establish causation, when examined in its entirety, it does not establish that Ms. Braxton's right knee injury is related to her September 21, 2007 accident. Although he gave the opinion that Ms. Braxton's current condition and need for treatment was related to Ms. Braxton's September 2007 fall, he acknowledged that he based his opinion on the history given to him by Ms. Braxton. Moreover, since Dr. Dabov had only seen the records from Dr. Lochemes, he was working under the faulty assumption that her right knee had been injured in her fall. The Administrative Judge correctly concluded:

> By the end of his deposition [Dr. Dabov's] opinion on the causation was not as clear or as strong. He agreed that there was some question in tying the right knee pain to the original injury. He noted it would not be uncommon for someone to have a fall and initially complain of pain in some areas and then notice some problem in other areas and a few days later. He also said that it is possible not to notice the injury right away due to other injuries. *In the end he could not say with probability when the injury to the right knee occurred.*

See Volume I at pp. 101 (emphasis added). The "whole" of Dr. Dabov's opinion was not the unequivocal opinion Ms. Braxton describes in her brief.

C. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE RIGHT KNEE INJURY IS UNRELATED.

In her brief, Ms. Braxton assumes that Resorts Casino is arguing the right knee is not covered because: 1) Ms. Braxton had prior problems with her right knee; or 2) Resorts Casino is prejudiced by her lag in reporting the injury. Resorts Casino is arguing neither. Rather, Resorts Casino is arguing Ms. Braxton's right knee injury is not covered because it is completely unrelated to her on-the-job accident in September 2007, and the Commission and Administrative

Judge agreed. Ms. Braxton's inability to demonstrate causation between her right knee injury and her on-the-job accident support this conclusion. First, in Dr. Dabov's deposition, he claimed that it was possible that a patient, after suffering a fall, may have new injuries manifest within a few days of the fall. *See* Volume III at Exhibit #1. In Ms. Braxton's case, it was a few months after the fall. This is supported by medical records from December 2007 from Nurse Franklin in which Nurse Franklin noted that Ms. Braxton had been having pain in her right knee over the past few days. *See* Volume III at Exhibit #3.

Ms. Braxton also misapplies the law regarding future injuries that are related to the on-the-job injury to the facts of her own case. It is true an employer remains liable to a worker's compensation claimant for subsequent injuries related to a prior work-related injury. However, Ms. Braxton assumes this axiom encompasses future injuries to different body parts than what injuries were alleged initially. The case law, however, does not support Ms. Braxton's assumption. *See Wal-Mart Stores, Inc. v. Fowler*, 755 So. 2d 1182 (Miss. Ct. App. 1999) (holding credible evidence supported Commission's decision that claimant's back injury, sustained while brushing her hair, was part of a continuous chain of back problems that arose from pre-existing back condition that manifested itself due to a work related back injury); *A.F. Leis Co. v. Harrell*, 743 So. 2d 1059 (Miss. Ct. App. 1999) (connecting a subsequent left knee injury from jumping on a trampoline to an earlier employment-related left knee injury). While the claimants in *Fowler* and *Harrell* suffered subsequent issues to the *same body part* that was injured on the job, Ms. Braxton is now claiming a totally different body part.

Likewise, Ms. Braxton's likening her case to *White v. Mississippi Department of Corrections* is quite a stretch as *White* can easily be distinguished from Ms. Braxton's situation. 28 So. 3d 619 (Miss. Ct. App. 2009). In *White*, the claimant injured her lower back when she

slipped and fell against the back of a toilet while she was at work. *Id.* Although she did not initially report the lower back injury as workers compensation related, she did do so less than two (2) months after the accident. *Id.* Ms. Braxton, on the other hand, initially reported a *left* knee injury and then three months later complained of an injury to a totally different body part.

Rather, the recently handed down case, *Ball v. Ashley Furniture Industries,* from the Mississippi Court of Appeals, is instructive to Ms. Braxton's case. *See Ball v. Ashley Furniture Inds.,* No. 2010-WC-01627-COA (Miss. Ct. App. Oct. 11, 2011). In the *Ball* case, Ms. Ball suffered injuries, in part, to her right knee after she slipped and fell while working at Ashley Furniture. *Id.* at (¶ 2). Even though the physician she saw in the emergency room the day following her fall noted there were no fractures or obvious abnormalities with her knee, she met with another physician, Dr. Johnny Mitias ("Dr. Mitias"), alleging continued right knee pain. *Id.* Just two months after her fall, Dr. Mitias reviewed an MRI of Ms. Ball's knee and determined she "suffered from early patella femoral compartment degeneration, pre-existing, degenerative condition in her right knee." *Id.* Further, Dr. Mitias reported that Ms. Ball's condition, while not wholly or directly related to her work injury, would continue to worsen due to the degenerative process. *Id.* Nevertheless, Dr. Mitias concluded his report by releasing Ms. Ball to work, regular duty, with a zero-percent impairment rating. *Id.* Ms. Ball subsequently filed a petition to controvert against Ashley Furniture for workers' compensation payments related to her ongoing disability in her right knee. *Id.* After reviewing the evidence, the Administrative Judge concluded "that the injury was a temporary aggravation of [Ms.] Ball's preexisting, degenerative condition and that the temporary aggravation ended . . . when Dr. Mitias released [Ms.] Ball back to work with a zero-percent impairment rating." *Id.* at (¶ 7). These findings were affirmed by

the Commission, the Pontotoc County Circuit Court, and the Mississippi Court of Appeals. *Id.* at (¶ 8).

Like Ms. Ball, Ms. Braxton was released to work without any restrictions just two days following her fall at Resorts Casino. Therefore, even if she complained of pain to her right knee at that time, which she did not, that pain had arguably resolved within days of her injury, given her returning to work full duty. Therefore, like Ms. Ball, Ms. Braxton's visits related to any right knee injury in December 2007 and January 2008, cannot and are not related to her fall at the casino on September 21, 2007. Therefore, Resorts Casino and the Carrier were not responsible for Ms. Braxton's medical treatment beyond September 22, 2007.

Despite Ms. Braxton's insistence that her testimony has been "beyond a shadow of a doubt," her testimony throughout this case has been anything but. The Commission, being the ultimate judge of the credibility of the witnesses, agreed. *Barber Seafood, Inc. v. Smith*, 911 So. 2d 454 (¶27) (Miss. 2005). Because there was substantial evidence supporting the Commission's decision, this Court should affirm the Commission's order.

D. MS. BRAXTON'S PROPOSED JOINT RIGHT KNEE REPLACEMENT IS NOT RELATED TO THE FALL ON SEPTEMBER 21, 2007.

Just as the Administrative Judge noted in his order, because Ms. Braxton is unable to prove that her right knee was injured on September 21, 2007, the issue of whether any future medical care of the right knee is related is moot. The Commission affirmed this finding in its order. However, even if this Court wishes to entertain Ms. Braxton's argument, substantial evidence shows that Ms. Braxton's proposed right knee replacement is not related to her fall on September 21, 2007. Although on its face it appears that two doctors are giving conflicting testimony (Drs. Lochemes and Dabov), one opinion, given by Dr. Lochemes, is unequivocal, and Dr. Dabov's opinion was replete with caveats and uncertainty. As such, this Court should affirm

the Commission's order denying any proposed future medical treatment of Ms. Braxton's right knee.

For the first time on appeal, Ms. Braxton argues that even if Ms. Braxton did not injure her right knee in the subject accident, "the carrier nonetheless and after investigating the claim, provided nine months of medical treatment for the right knee, including a meniscectomy surgery. The overwhelming medical evidence from the Commission IME, Dr. Dabov, is that [Ms. Braxton] became a candidate for knee replacement surgery as a direct result of the meniscus surgery the Carrier approved." *See* Ms. Braxton's Brief at pp. 19. However, Dr. Lochemes, whose opinion was relied upon by the Administrative Judge, provided an unequivocal opinion to the contrary.

Dr. Lochemes, who performed surgery on Ms. Braxton's knee in February 2008, discussed his opinion that the effusion she complained of in August 2008 was consistent with osteoarthritis and discussed potential joint replacement to address the arthritis which would "not be workers' comp related treatment." On September 24, 2008, Ms. Braxton was last seen by Dr. Lochemes who noted "she doesn't want to acknowledge that [the knee symptoms] are from osteoarthritis." He further noted that she had effusion but stated that was nothing that would be unexpected with an underlying arthritic condition. Dr. Lochemes felt that ongoing weight loss, activity modification, and use of anti-inflammatory medications would be prudent, but because of the frequency of her visits, total joint replacement might be indicated. The last sentence for the September 24, 2008 office notes read, "so a recommendation was made for total joint replacement for the underlying osteoarthritic condition *that has not been advanced or aggravated by the work comp injury*" (emphasis added). This, unlike Dr. Dabov's opinion, is unequivocal.

Dr. Dabov's opinion, on the other hand, is replete with caveats. In addition to not having Ms. Braxton's complete medical history when he conducted the IME, Dr. Dabov ultimately wavered on his opinion, stating that he could not say with probability when the injury to the right knee occurred. This is hardly the "unequivocal" opinion as described by Ms. Braxton in her brief.

Although a claimant's treating physician's opinion is important, the Commission, bearing the responsibility of determining the credibility of witnesses, is not required to abide by or give greater weight to the testimony and opinion of the Claimant's treating physician over those proffered by other physicians. *See Sanderson Farms, Inc. v. Johnson*, 2009-WC-00840-COA (Miss. Ct. App. Oct. 5, 2010); *Langford v. Southland Trucking, LLC*, 30 So. 3d 1266 (Miss. Ct. App. 2010). The Mississippi Supreme Court has held that the Commission erred when it failed to give substantially more weight to the opinion of a physician who ordered all diagnostic tests necessary to identify or confirm the claimant's injury than to opinions of other physicians who did not perform all tests. *Smith v. Commercial Trucking Co.*, 742 So. 2d 1082 (Miss. 1999). In other words, had the Commission *not* afforded substantial weight to Dr. Lochemes's opinion (who had considered Ms. Braxton's complete medical history), the Commission would have committed prejudicial error. Therefore, the Commission did not commit prejudicial error if it afforded substantial weight to Dr. Lochemes's opinion over Dr. Dabov's.

Because Dr. Lochemes opined that any right knee replacement is completely unrelated to Ms. Braxton's worker's compensation injury, the Commission did not commit prejudicial error in denying any future medical treatment for Ms. Braxton's right knee.

E. RESORTS CASINO IS NOT ESTOPPED FROM CHALLENGING THE RELATEDNESS OF MS. BRAXTON'S RIGHT KNEE INJURY.

In her brief, Ms. Braxton argues that Resorts Casino should be estopped from challenging

the relatedness of her right knee injury to her work accident. Somehow, without citing to any case or statute, Ms. Braxton would like this Court to believe that she is entitled to some sort of equitable remedy, arguing that Resorts Casino "converted" her injury into a compensable injury. This idea is absurd. For one, how can she be compensated for future medical treatment for an injury that is unrelated to her fall at the casino? Such a finding would lead to absurd results and would ultimately deprive the employers/carriers of their day before the Commission. Further, if Resorts Casino "accidentally" compensated the unrelated injury, that is punishment enough, as Resorts Casino is not seeking to recoup the cost of Ms. Braxton's unrelated medical treatment from her. Ms. Braxton has already received gratuitous medical treatment for a reoccurring injury that is unrelated to her fall at the casino. As such, this Court should disregard Ms. Braxton's arguments regarding estoppel when determining the outcome of Ms. Braxton's appeal, just as the Commission did.

V. CONCLUSION

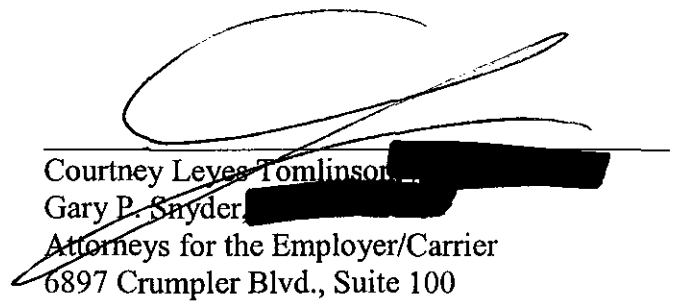
In her brief, Ms. Braxton asserts: "[i]t stretches the limits of one's imagination and common sense to argue that [Ms. Braxton] did not or could not injure her right knee in such a traumatic fall." *See* Ms. Braxton's Brief at 15. Nevertheless, there is substantial evidence supporting the Commission's decision that Ms. Braxton's right knee injury was unrelated -- from Ms. Braxton's initial hospital visit during which she complained of a left knee injury to Dr. Lochemes's unequivocal opinion that any subsequent right knee injury was unrelated to Ms. Braxton's on-the-job accident.

This is not a doubtful or "close" case. The facts are clear. Ms. Braxton has failed to carry her burden of proof regarding the nature of the injury sustained in the accident of September 21, 2007. Her so-called medical proof is based on possibilities and not on what is documented. "[R]ecovery . . . must rest upon reasonable probabilities, not upon mere

possibilities." *Metalloy Corp. v. Gathings*, 990 So. 2d 191, 196 (Miss. Ct. App. 2007) (internal quotations and citations omitted). Rather, the Commission and Administrative Judge based their decisions on the substantial evidence presented that Ms. Braxton's right knee was unrelated to her on-the-job accident. As such, this Court should affirm the Commission's order.

Respectfully submitted,

JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon the following counsel of record, by mailing a copy thereof, via U.S. Mail, postage prepaid on this the 30th day of January, 2012:

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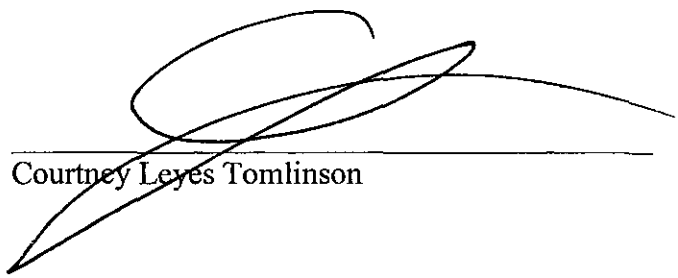

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