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

| | |
|---|---|
| SARAH BRAXTON | APPELLANT |
| VS. | |
| RESORTS CASINO (RESORTS TUNICA) | APPELLEE |
| AND | |
| AMERICAN INTERNATIONAL INSURANCE COMPANY | APPELLEE |

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

---

# BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

---

LAWRENCE J. HAKIM, ESQ.
MS BAR NO[redacted]

CHARLIE BAGLAN & ASSOCIATES
ATTORNEYS AT LAW
100 Public Square
Post Office Box 1289
Batesville, MS 38606
Tel.: (662)563-9400
Fax: (662)563-4633
Email: info@baglanlaw.com
Counsel for the Appellant

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

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

## CERTIFICATE OF INTERESTED PARTIES

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

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

This the 9th day of January, 2012.

**LAWRENCE J. HAKIM, ESQ.**
**MS BAR NO. 9362**

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**CASES** **Page**

## STATUTES AND OTHER AUTHORITIES

## STATEMENT OF THE ISSUES

I. Whether the Order of the Administrative Judge as affirmed by the Full Mississippi Workers' Compensation Commission contains error of fact and law and is not supported by substantial evidence and is, in fact, contrary to the law regarding the issues at hand.

II. Whether the Administrative Judge as affirmed by the Full Mississippi Workers' Compensation Commission was incorrect in its concluding that the Appellant did not suffer a compensable injury to her right knee while working for Resorts Tunica on September 21, 2007, as that Decision was not supported by law, facts or medical testimony presented at the hearing. The Administrative Judge's finding affirmed by the Full Mississippi Workers' Compensation Commission was contrary to the law, facts as presented at the hearing and the medical testimony and should therefore be reversed.

III. Whether the Tunica County Circuit Court erred in affirming the Order of the Mississippi Workers' Compensation Commission in this matter.

## I. Statement of the Case

Appellant, **SARAH BRAXTON**, (hereinafter "Sarah") suffered a compensable injury on September 21, 2007, to her left knee, left hip, right shoulder, and right knee when she fell down a stairwell at work. While the Appellee, (hereinafter "Employer"), provided worker's comp medical benefits, (including surgery), for nine months, as well as temporary-total and temporary-partial disability benefits for the right knee, they ultimately denied treatment and eventually the right knee claim when it became apparent Sarah would need a total right knee replacement.

Consequently, a hearing was held before Honorable Robert J. Arnold, III, Administrative Judge, on August 6, 2009.

At hearing the parties stipulated the following:

a. That Sarah suffered an on the job injury, September 21, 2007;

b. That Sarah injured her left knee, left hip and right shoulder;

c. That Sarah has returned to work post-injury for the pre-injury Employer herein;

d. Sarah's average weekly wage at the time of her injury was $380.34 per week;

e. That Sarah was paid TTD in the amount of $325.80 for time missed in February, 2008;

f. TPD was paid in the amount of $1,683.50 from February 27, 2008 to June 4, 2008.

The issues were:

1.) Whether Sarah suffered an injury to her right knee as a result of the September 21, 2007 incident; and,

2.) Whether the current treatment of Sarah's knee, including a possible total/partial knee replacement is reasonable, necessary, and casually related to the fall in September 21, 2007.

On January 14, 2010, the Administrative Judge entered his Order of Administrative Judge, erroneously finding against the overwhelming weight of the evidence that Sarah had

[allegedly] failed to meet her burden of proving she sustained an injury to her right knee, September 21, 2007.[1]

Sarah timely filed her Petition of Review of Order of Administrative Judge and formally requested Oral Argument on same, which the Commission denied.

On August 25, 2010, the Commission affirmed without comment the January 14, 2010 Order of Administrative Judge and Sarah timely perfected her Notice of Appeal of same.

On August 5, 2011 the Tunica County Circuit Court affirmed the Order of the Commission.

## II. Background Facts

At the time of her hearing Sarah was 53 years old and had been employed by the Employer herein for approximately 2 ½ years as a dealer (R.6)[2]

In addition to her employment with the Employer herein, Sarah also works as a bus driver for *ICS* Headstart. (R.8)

At the time of her hearing Sarah's rate of pay was $5.80 - $5.90, plus tips. (R. 7) Sarah has worked in the casino industry since 1994 and has a CDL license. (R. 8, 9)

At the time of her hearing Sarah weighed approximately 245 pounds. (R. 50)

Prior to her September 21, 2007 work injury, Sarah was briefly and successfully treated for right knee symptoms at Campbell Clinic. (Gen'l Exh. 1, Deposition of Dr. Gregory Dabov; Gen'l Exh. 2). Significantly, Dr. Dabov, the Commission IME, actually saw and treated Sarah for her right knee on April 21, 2006. This placed Dr. Dabov in an especially advantageous and superior position to testify about the condition of Sarah's knee, pre-injury and post-injury, and to render opinions

[1] Additionally, the Administrative Judge ruled that despite the Employer/Carrier's providing medical treatment to Sarah's right knee, ***including surgery***, as well as worker's comp benefits for same, he could "not find where this creates any kind of estoppel." (Order of Administrative Judge at P. 14)

[2] References to the hearing transcript will be shown as (R.__).

regarding the casual connection between Sarah's work injury and the current condition of her right knee. In fact, Sarah's right knee was problem free for approximately seventeen months before her September 21, 2007 work injury. (Id.)

Sarah's injury occurred when she was going back on duty from the break room and fell down a stairwell, landing on the right side of her body. (R. 16) Sarah tried to report her injury to the security guard on duty, but was directed to provide the notice to the security supervisor. (Id.)

Sarah thought she informed security that she had also injured her right knee. (Id.) Due to the shock of the injury, Sarah testified that she might have reported that her left knee was hurting the night of her injury. (R. 21)[3]

Before the Employer/Carrier would provide medical treatment to Sarah, they had her sign a Choice of Physician form for Baptist-DeSoto. (R. 22) However, Sarah thought the form was applicable only for treatment that night and testified without rebuttal that no one at the Casino informed her that she had a choice of physician. (Id.)

Sarah first received treatment at Baptist Memorial Hospital-DeSoto, September 22, 2007. (Gen'l Exh. 4) Those records show that on the night of the injury Sarah was complaining of pain in her left knee and right shoulder. Sarah did testify the following day, after she went to the hospital, that both of her knees were hurting. (R. 25)

Because of her Employer's point system, Sarah returned back to work Monday[4], but experienced increasing pain in her right knee. (R. 26) During this period of time Sarah attempted to self-treat her injury to the right knee, with icepacks, heating pads, ibuprofen, and even a knee brace that she bought herself. (R. 26-27)

---

[3] The Employer/Carrier did not produce any witnesses with direct knowledge of what Sarah verbally reported regarding her injury; nor did they produce any rebuttal testimony to refute Sarah's claim she injured her right knee when she fell down the flight of stairs.

[4] The injury occurred on a Saturday.

***Within a week of her injury*** Sarah requested medical treatment for her right knee through the Employer's insurance adjuster, Lula McIntyre. (R. 27-28; 31-32) Sarah testified without rebuttal that Ms. McIntyre finally instructed her, "To go back to Baptist-DeSoto. We have a line of physicians that you can go see." At the direction of Ms. McIntyre, Sarah returned to Baptist-DeSoto, January 5, 2008.[5]

The Employer/Carrier directed Sarah to orthopedic surgeon, John Lochemes, M.D. (Gen.l Exh. 2) Dr. Lochemes first saw Sarah on January 9, 2008. Dr. Lochemes took x-rays of the right knee, which showed only minimal degenerative changes. Dr. Lochemes initially diagnosed Sarah with mild right knee sprain. (Id.)

Sarah returned six days later and Dr. Lochemes ordered an MRI of the right knee, which was done, January 30, 2008. Said MRI showed a peripheral tear of the posterior horn of the medial meniscus. As a result of the MRI findings, Dr. Lochemes performed a partial medial menisectomy and chondroplasty of the patella on February 28, 2008. His surgical notes reflect that Sarah had a "significant size tear, ..., which was more irregular and significant than the MRI suggested." Following surgery, Dr. Lochemes had Sarah off work and ordered physical therapy for her. (Id.)

On March 5, 2008, Dr. Lochemes stated that Sarah could continue in sedentary work if a wheel chair was made available to her due to the problems Sarah was having getting from her vehicle to her work duties.[6] (Id.)

On March 12, 2008, Sarah returned to Dr. Lochemes' office complaining of pain and swelling in her right knee. On that visit 38 cc's of fluid were aspirated from Sarah's right knee. (Id.) This in fact was the very first time that any doctor had removed fluid from Sarah's knee. (R. 40) On

---

[5] While waiting for workers' comp approval to see another doctor, Sarah sought and received treatment from Lydia Franklin, F.N.P., who saw Sarah, December 17, 2007, noting, "knee pain for the past few days that was not getting any better." (Gen'l Exh. 3)

[6] This light duty consisted of "folding laundry." In addition to severe difficulties getting to and from her work station, Sarah was having difficulties getting to and from the bathroom. (R. 38-39)

April 2, 2008, Dr. Lochemes aspirated 60 cc's of fluid from Sarah's right knee. He also began a series of joint fluid replacement injections, called Supartz injections on that visit. (Gen'l Exh. 3; R. 41)

Dr. Lochemes' records reflect that Sarah returned to him several times in April, 2008, complaining of pain and swelling in her right knee. (Id.) On those visits Dr. Lochemes administered supartz injections and also aspirated more fluid from Sarah's right knee. (Id.) On June 4, 2008, ***and for the first time,*** Dr. Lochemes diagnosed Sarah with osteoarthritis in her right knee. Dr. Lochemes wrote that the osteoarthritis was unrelated to Sarah's on the job work injury. (Id.)

Sarah returned to Dr. Lochemes on August 6, 2008, complaining of continued pain and swelling in her right knee. She also reported that her left knee and back were beginning to hurt. ***For the first time***, Dr. Lochemes diagnosed Sarah with patella tendonitis. (Id.)

Because of Sarah's continued severe symptoms a second MRI was ordered. Dr. Lochemes' August 13, 2008 office note interprets the MRI as showing:

> "Medial joint space narrowing and patella femoral changes, that is in addition to, they said, an atypical appearance of the posterior medial meniscus that we resected. We knew the posterior medial meniscus, it's of course the peripheral portion, is abnormal. Whether or not there is an unstable fragment back there remains [sic] is certainly a question."
>
> The actual MRI narrative report states:
>
> "There is near – complete absence of the mid and posterior horn of the medial meniscus with an irregular posterior fragment identified. The history of the patient has had meniscectomy here, but this does not have the normal post – meniscectomy appearance."
>
> Said MRI further describes:
>
> "Advanced degenerative changes, medial joint compartment, as well as degenerative changes of the patella femoral joint."

Dr. Lochemes last saw Sarah, September 24, 2008, and at that time he recommended a total knee replacement. (Id.)

Following Sarah's final visit with Dr. Lochemes the Employer/Carrier thereafter denied Sarah any further medical treatment for her right knee injury. Sarah filed a Motion to Compel Medical Treatment. Then presiding Administrative Judge, Honorable Mark Henry, ordered an Independent Medical Examination with Campbell Clinic.[7] Consequently, Sarah underwent an IME with orthopedic knee specialist, Gregory Dabov, M.D. at Campbell Clinic. (Gen'l Exh. 1, Gen'l Exh. 12) Dr. Dabov noted the following:

> This is a 52 year old female, who I actually saw back in April, 2006 for knee pain. We were able to calm things down. She was doing okay. She did not have great knees, but certainly nothing, at that time, seemed to be operative, that she was doing okay. She sustained a work injury while on the job on September 21, 2007. She was seen initially at the Baptist-DeSoto emergency room. She was an employee of the Resorts Casino in Tunica. Since that injury she has been treated by Dr. John Lochemes, who got her other areas calmed down, but her knee continued to be painful. He obtained a MRI which some medial meniscus tear. He performed a medial menisectomy and has continued to follow her. It has now been over a year since the surgery. She continues to have knee pain and difficulty with walking. It doesn't look like she has recently been on anti-inflammatory medications. She was recently placed on a dose pack by Dr. Baldwin at the Woman's Clinic and this has calmed things down for her to some degree. She has been through a number of Cortisone injections, as well as a Hyaluronic Acid series since her surgery and none of this has given her much benefit. Dr. Lochemes last saw Sarah in September, 2008, and felt that there was really not much more that he could do and recommended a total knee arthoplasty. She is here because there is some question by the insurance company as to whether or

---

[7] The Medical Records Affidavit of Campbell Clinic, (Gen'l Exh. 12), indicates Sarah sough treatment for bi-lateral knee pain, July 16, 2001. On that visit she was seen by Dr. Robert Pickering, who diagnosed her with patellafemoral arthritis. She returned to Dr. Pickering, August 13, 2001, and on that occasion he injected her right knee with a steroid lidocaine and marcaine mix. On Sarah's next visit to Campbell Clinic she was seen by Dr. Gregory Dabov, (later to be the Commission IME), April 21, 2006. His records reflect that following Dr. Pickering's injection in August, 2001, Sarah's right knee was pain free for at least four years. X-rays on that visit only showed mild arthritic changes and Dr. Dabov's diagnosis was internal derangement of the right knee with some patellafemoral syndrome. His treatment plan consisted of therapy, a depo-medrol marcaine injection, and anti-inflammatory medication as needed. **According to Dr. Dabov's records and deposition testimony, as well as the unrebutted testimony of Sarah, herself, Dr. Dabov's conservative treatment plan was successful and Sarah had no further problems in her right knee until her admittedly compensable September 21, 2007, fall down the stairwell at work.**

not it is their responsibility to cover this knee problem and whether or not it is related to her injury. She is here for my evaluation today.

Dr. Dabov ordered x-rays, which showed "significant medial compartmental disease with near bone on bone arthritic change. These x-rays are markedly different in comparison with her x-rays obtained in April, 2006. Her April, 2006 x-rays show absolutely no medial joint space collapse."

Dr. Dabov's diagnosis was osteoarthritis of the right knee status, post-medial meniscectomy. Dr. Dabov concluded,

> "It is my belief with a high degree of medical certainty that her current x-rays and current condition of her knee is directly related to her injury which occurred in September, 2007. We have irrefutable documentation with radiographs that shows advancement of her arthritis. It is my belief that this is directly related to her meniscectomy, which was medically necessary and performed by Dr. Lochemes. This is not an uncommon occurrence for patients to develop arthritis status post meniscectomy."
>
> "Given Ms. Braxton's x-rays and clinical appearance, I think she would be a good candidate for a partial knee replacement."

The Employer/Carrier took Dr. Dabov's deposition on March 2, 2009. Dr. Dabov reinforced his opinion that Sarah's ongoing right knee problems and need for surgery were related to her original injury.

> "The injury got her into the condition that she had a painful knee that could not be managed non-operatively and then required an operation. That operation unfortunately as it is not infrequently, was not successful. It is my belief that that surgery then helped her arthritis progress, which we see, ...., quite frequently. Where after surgery, then we start to see the arthritis really start to collapse, and we get markedly different x-rays in a matter of two years from x-rays that I obtained in April of 2006 compared to November of 2008, which were markedly different where somebody would consider either total joint replacement or as I recommended in my notes, ..., a partial knee replacement."
>
> (Gen'l Exh. 1 at p. 34-35)

With regard to no mention of the right knee in the initial incident reports and September 22, 2007 records from Baptist Memorial Hospital-DeSoto, Dr. Dabov explained:

> "She had this fall and by the time she was referred to the orthopedic surgeon, her main complaint was her right knee, ..., it is not uncommon for people that are in car accidents or have these falls to initially complain of some areas. Then a few days later they come back and say, well, man, since things have kind of calmed down in these other areas, my other - - this other joint or - - or condition seems to be really bothered and I'm not - - I'm having trouble with that, so it's - - that we do see all the time."

(Gen'l Exh. 1 at P. 35-36) Sarah still experiences significant problems in her right knee:

> "I wear a knee brace everyday of my life. And when I take the knee brace off, it's just so much pain in my knee. It's like a knife sticking in it in certain areas. And when I go home at night - - I've got an icepack and I've got a heating pad, and I put the icepack on it some nights and then I put the heating pad on it and I have like a cushion - - when I go to bed, I prop my knee up on it at night, and that's how I sleep at night most of the time, and sometimes the knee brace don't [stop the pain, and I am constantly taking ibuprofen and everything else,...(R. 49)

## III. Summary of the Argument

Over forty years of case law precedent demonstrates that the applicable standard of review is not a straight jacket on the process of appellate review of worker's compensation claims. Appellate review in the instant case is to be flexible and nuanced in order to ensure the Commission has properly and evenly considered all the facts, has correctly applied the pertinent law to the facts and has done so in compliance with the mandate that the Comp Act be interpreted liberally, for the injured worker in order to achieve the Act's consistent beneficent purpose. The Mississippi Workers' Compensation Commission is required to resolve issues of doubt in favor of the injured worker.

In the instant case the overwhelming weight of the lay and medical evidence and testimony supports only one conclusion: that Sarah, in fact, injured her right lower extremity, falling down the stairs at work.

The testimony of record is uncontroverted that within days of her injury, Sarah was in repeated contact with the adjuster seeking treatment for her right knee, which was injured in the fall. Mississippi Case Law properly applied to the facts of this case requires reversal of the Commission's decision, which on all points was erroneous and prejudicial to the Appellant.

## IV. Law and Discussion

### A. Standard of Review

An appellate court must reverse a decision of the Commission if, a.) said decision is not based on substantial evidence, b.) is arbitrary or capricious, c.) is based on an erroneous application of the law, d.) was beyond the power of the Commission to make, or e.) if it violates a statutory or constitutional right of the Appellant. Smith v. Jackson Construction Co., 607 So. 2d 119, 1124 (Miss. 1992); Piney Woods Country Life School v. Young, 946 So. 2d. 805 (Miss. Ct. App. 2006).

A decision is said to be based on substantial evidence if it is not clearly erroneous and contrary to the overwhelming weight of the evidence. Piney Woods Country Life School at 807. Even though the Commission is the ultimate fact finder, the appellate court will reverse when the findings of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of evidence. DiGrazia v. Parkplace Entertainment, 914 So. 2d 1232 (Miss. Ct. App. 2005).

The substantial evidence rule is sufficiently flexible to permit an appellate court to examine the record as a whole and where such record reveals that the Order of the Commission is based on a mere scintilla of evidence and is against the overwhelming weight of the evidence, the court will not hesitate to reverse. Smith v. Commercial Trucking Co., Inc. and USF&G, 742 So. 2d 1082, 1085 (Miss. 1999).

An appellate court has the power to broaden the Commission's authority to meet the munificent purpose of the Workers' Compensation Act and there is a broad public policy behind the act to provide the necessary treatment to restore the injured worker to health and productivity. 742 So. 2d at 1087.

If the Workers' Compensation Commission commits prejudicial error, the appellate court does not need to defer to Commission decisions on issues of fact and credibility. Barber Seafood, Inc. v. Smith, 911 So. 2d 454 (Miss. 2005).

Where the Commission merely affirms the Administrative Law Judge's decision, the appellate court must examine the findings of fact made by the Administrative Judge as those of the Commission. McDowell v. Smith, 856 So. 2d 581 (Miss. Ct. App. 2003).

An appellate court is charged with determining whether there has been an error of law made by the Workers' Compensation Commission and judicial review of errors of law is *de novo*. Weatherspoon v. Croft Metals, Inc., 881 So. 2d 204 (Miss. Ct. App. 2002).

A finding of the Workers' Compensation Commission is clearly erroneous when although there is slight evidence to support it, the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been made by the Commission in it's findings of fact and in it's application of the Worker's Compensation Act and where only a

scintilla of evidence supports the Commission decision the Appellate Court must reverse. Mississippi Dept. of Transp. v. Moye, 850 So 2d 114 (Miss. Ct. App. 2002).

An Appellate Court has a duty to review the facts contained in the record of a Worker's Compensation proceeding, and to determine whether those facts substantiate the Order of the Commission; Appellate review of the facts will determine whether the Commission was manifestly in error in its interpretation of those facts. Flake v. Randall Reed Trucking Co., 458 So. 2d 223 (Miss. 1984).

**B. The Mississippi Workers' Compensation Commission committed prejudicial and reversible error as a matter of law and fact and acted arbitrarily and capriciously in failing to find, contrary to the overwhelming weight of the evidence, that Appellant sustained a compensable injury to her right knee arising out of and in the scope and course of her employment with the Appellee and that all residual problems, including the need for surgery, were and are the direct and causal result of said work injury.**

The primary purpose of the Mississippi Workers' Compensation Act is to promote the welfare of workers in Mississippi. (Miss. Code Ann. §71-3-1) (Rev. 1995); Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 889 (Miss. 1980). "As remedial legislation to compensate and make whole, it should be construed fairly to further its humanitarian aims." Id. (citations omitted). In any event, doubtful cases are to be compensated. Id. (citing Evans v. Continental Grain, Co., 372 So. 2d 265, 269 (Miss. 1979). Stated another way, the Supreme Court has directed that the workers' compensation statutes are to be liberally construed in favor of payment of compensation in order to achieve the Acts beneficent purpose. Id.

In order to obtain entitlement to workers' compensation benefits, Sarah must prove: 1.) an accidental injury; 2.) arising out of and in the course of employment, and 3.) a causal connection between the injury and the claimed disability. Metalloy Corp. v. Gathings, 990 So. 2d

191 (Miss. Ct. App. 2008). The claimant bears the burden of proving each element by a preponderance of the evidence. Id.

In the instant case, the Appellees ***stipulated*** that Sarah suffered a work related accident when she fell down a flight of stairs while returning from her break on September 21, 2007. There is no dispute that after accepting her right knee injury claim as compensable the Appellees paid for nine months of treatment by Dr. Lochemes, which treatment included arthroscopic surgery, and also provided temporary total and temporary partial benefits to Sarah exclusively as a result of her right knee injury. It wasn't until Dr. Lochemes declared Sarah a candidate for a total knee replacement, following the failed surgery that he performed on her, and then had the gall to state that the knee replacement was the result of osteoarthritis that was allegedly not work related, that the Appellees began to deny treatment for the right knee.

After Sarah began treating with Dr. Lochemes, at no point in time did the Appellees ever ask Dr. Lochemes to address the causation issue, nor did the Appellees ever question the causation issue themselves, even though they were aware of the contents of Sarah's incident report, and September 22, 2007 emergency room report – the very documents the Appellees would later use to attempt to deny the claim, following Sarah's failed arthroscopic surgery and her resulting need for a knee replacement.

However, in Dr. Lochemes February 29, 2008 post-operative note he clearly opined that Sarah injured her right knee in September, 2007, when she fell down a flight of stairs at work, which required the February 22, 2008 surgery. Further, Dr. Dabov's testimony clearly established causation and fully satisfied the third prong of the above test.

Once a compensable injury is shown under workers' compensation law, the Appellees can rebut only with evidence that rises above mere speculation or possibility. Spencer v. Tyson Foods, 869 So. 2d 1069, 1075 (Miss. Ct. App. 2004).

Medical evidence is to be given a liberal construction with doubtful cases resolved in favor of compensation and the Workers' Compensation Commission is called upon to apply common knowledge, common experience and common sense when weighing the evidence. Janssen Pharmaceutical, Inc. v. Stewart, 856 So. 2d 431 (Miss. Ct. App. 2003).

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. Moore v. Independent Life & Accid. Co., Inc., 7088 So. 2d 106, 112 (Miss. 2001).

On the issue of causation, the Commission must look at the substance of the medical opinions based upon the whole of the doctor's testimony. Airtran, Inc. v. Byrd, 953 So. 2d 296, 299 (Miss. Ct. App. 2007).

All that Sarah has to show is that her symptoms ***more likely than not*** relate to the work injury. A.F. Leis Co. v. Harrell, 743 So. 2d 1059, 1061 (Miss. Ct. App. 1999)

The general rule in Mississippi is:

> When the primary injury is shown to have arisen out of and in the course of employment, *every natural consequence that flows from the injury likewise arises out of the employment*, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct.
>
> Bradley & Thompson, Miss. Workers' Compensation §54:24 (emphasis ours)

Sarah's prior symptoms in her right knee, which by evidence of Campbell Clinic were of relatively short duration, can not preclude her claim of injury and request for medical treatment.

> "An injury arises out of the employment "if contributed to or aggravated or accelerated by the employment." In other words, a claimant's pre-existing weakness or infirmity does not defeat her claim for benefits when the work

incident is a contributing cause of the disability. This is so even if the employer has no knowledge of the worker's pre-existing condition."

As the Court has said, "The employer takes his employees as they are."

"The aggravation issue can be carried further, when an injury is work connected all medical problems or disabilities that derive from that primary injury or the process of the worker's recovery there from are also compensable, so long as the progression of complications has some causal relation to the original injury *and is not the result of an intervening independent injury.*"

(Id.) (emphasis ours)

The law is therefore settled in Mississippi that the Employer remains liable to a worker's compensation claimant for *subsequent* injuries related to a prior work-related injury, and remains liable for all manifestations of said injury absent an independent intervening cause. Wal-Mart Stores, Inc. v. Fowler, 755 So. 2d 1182, 1185-1186 (Miss. Ct. App. 1999); A.F. Leis Co. v. Harrell, 743 So. 2d 1059.

In the instant case, page 13 of the Order of Administrative Judge states:

"The Claimant clearly began to receive treatment for her right knee in December, 2007, from DeSoto Baptist Hospital and in January, 2008, from Dr. Lochemes for which the Employer and Carrier paid. *It appears that no one realized at that time* that she was switching and now complaining of pain to her right knee where she had only complained of left knee pain prior to this point."

(emphasis ours) This specific finding is highly speculative and conjectural, is not based on any facts or evidence in the record, and in fact conflicts with the facts and evidence in the record. Sarah testified without rebuttal that she in fact notified her Employer within seven days of her fall that her right knee had been injured and had ongoing discussions with Lula McIntyre, concerning which knee was hurt, as well as her need for treatment.

"[I] called Ms. Lula McIntyre. *She was aware of what was going way before I went to see another doctor*, and I asked her about giving information so I could treated and she never would. And so eventually I went to Lydia Franklin and she recommended me to go see a Dr. Barr, ..., she had called me and told me she needed to discuss about my injury because her papers showed that my left knee

> was injured and I'm claiming - - told her my right knee. But her paperwork said it was my left knee and so we had a little discussion about that. But she would never okay me to go see a doctor.
>
> And *later on* when I went to Lydia Franklin, when she referred me to Dr. Barr, I gave them Ms. McIntyre's number and had them to call her and Mr. DeFazio, while I was in the office to try to get information so I could get treated that day. I sat there in the office all day waiting on one of those people to call the office to get the information so I can get treated. No one never would call. So the following day I called Ms. Lula McIntyre again and I told her I was tired of making appointments to go see doctors and never could see a doctor, so she said, "I'll tell you. You go back to Baptist DeSoto. We have a line of physicians that you can go see."

(R. 29-31) (emphasis ours) The clearest import from this uncontradicted and unrebutted testimony is that a.) *beyond a shadow of a doubt* Sarah placed the Appellees on notice that her right knee was injured in the fall down the stairwell, well before she sought treatment on her own; b.) based upon the Incident Report, the Appellees were under the original impression this was a left knee injury; c.) despite their initial confusion on this issue, the Appellees cleared up their confusion in order to convert the right knee injury into a compensable claim, **providing nine months of medical benefits, including surgery, and temporary partial and temporary total disability benefits for same.**

Therefore, the Order of Administrative Judge in this regard does not conform at all to the facts of the case and is unsupported by substantial evidence.

The Order of Administrative Judge also makes the following statement:

> He [Dr. Lochemes] was never shown [Sarah's] previous records and history and asked whether his previous treatment was related to her fall in September of 2007.

Sarah respectfully submits that this is a totally moot point in so far as it was not *her duty* to present her previous records and history to Dr. Lochemes; it was the duty of the Appellees,

*had they had any qualms, concerns or question about the work connectedness of her right knee injury.*

The Administrative Judge correctly notes:

> "Also, the testing between the fall and before her [allegedly] unrelated knee surgery only showed mild degenerative changes consistent with the testing done in 2006 by Campbell Clinic. It was only after the [allegedly] unrelated knee surgery that the tests showed significant advanced degenerative changes."

Sarah respectfully submits that the Administrative Judge's *interpretation* of this key fact is in error and fails to take into account Dr. Dabov's opinions and testimony about the traumatic changes in appearance in the knee on x-ray before and after the surgery and how those traumatic changes fit into the role of causation in this case. It is also noteworthy that the pre-surgery MRI did show a peripheral tear of meniscus horn, whereas no pre-injury tests ever showed same.

In short, the Commission fully failed to give Sarah any benefit of the doubt, as is required under the law, and to the contrary resolved any and all issues of doubt <u>against</u> Sarah. The plain and simple truth is that Dr. Lochemes' records and course of treatment verify that he was of the <u>correct</u> opinion that the September, 2007 fall injured the Sarah's right knee and the right knee injury necessitated the arthroscopic surgery.

Miss. Code Ann. §71-3-3(b) states in part:

> "Injury" means accidental injury or accident death arising out of and in the course of employment without regard to fault, which results from an untoward event or events, if contributed to or aggravated, or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results.

Under this basic statutory definition, there can be no doubt that Sarah's fall at work, which the Appellees stipulated to was "an untoward event" that caused a significant and life changing injury to Sarah.

A recent Mississippi Court of Appeals case supports a finding of compensability in this claim. White v. Mississippi Dept. of Corrections, 28 So. 3d 619 (Miss. Ct. App. 2009). In White, claimant, a security guard at Parchman, slipped and fell against the back of a toilet, March 22, 2005. Id. Although a fellow officer observed Officer White in considerable pain after exiting the restroom, White did not report this as a work-related injury and in fact informed the emergency room and later her neurosurgeon on their respective admission/intake forms that her subject injury was neither work-related nor a worker's compensation case. 28 So. 3d at 621.

White had back surgery in April, 2005, and it was not until June 13, 2005 that White completed a new incident report, indicating that her back injury was now work-related. Id.

Following a hearing on the merits the Administrative Judge found that White had in fact injured her back in the course and scope of her employment. Id. Upon appeal, the Commission reversed in part because the medical records indicated that White had a pre-existing degenerative condition and that the disc rupture in her low back could have been brought about "by any one of a number of everyday motions, at home or at work." 28 So. 3d at 622-623.

The Commission was also concerned that White did not immediately report her injury as a worker's compensation case. Id. White appealed to the Sunflower Circuit Court, which reversed the decision of the Commission. The Mississippi Court of Appeals affirmed the Circuit Court, noting that the medical testimony indicated that White's pre-existing degenerative condition was "insignificant", and further noting that White did report her injury, (albeit months later), as a worker's comp claim after discussing the circumstances with the MDOC's worker's comp representative. 28 So. 3d at 623.

In the instant case, the parties stipulated that Sarah had suffered a fall down the stairwell while in the course and scope of her employment resulting in injury to her, but the record also

indicates that Sarah testified without rebuttal, contradiction or challenge that within seven (7) days of the work injury she reported that her right knee was injured in the fall to Lula McIntyre, the comp adjuster.

The Appellees have alleged, without any supporting evidence, that they did not have notice that Sarah injured her right knee until December/January, 2008, and that Sarah's alleged failure to report a right knee injury in closer proximity of time to the date of injury is fatal to her claim.[8] When one parts the veil of Appellees' defense, they are essentially arguing that somehow and against the overwhelming weight of the evidence, Sarah's claim should be denied on *notice grounds*. However, "absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice." Adolphe Lafonte U.S.A, Inc. v. Ayers, 958 So. 2d 833, 838 (Miss. Ct. App. 2007), quoting Miss. Code Ann. §71-3-35(1).

The unrefuted facts in the instance case show that Sarah provided ample and ongoing notice of her right knee injury to Lula McIntyre long before she independently sought treatment with Lydia Franklin, F.N.P. The Appellees' weak claim that they did not have knowledge of Sarah's injury to her right knee until either December or January, is a false claim and totally unsupported by the facts in evidence. Moreover, the Appellees have not attempted to, nor can they show how they could conceivably have been prejudiced by the alleged delay in notice.

The simple fact, supported by the lay testimony and expert opinions and testimony is that Sarah suffered a compensable injury when she fell down a stairwell at work. This fall caused injuries to her left knee, left wrist, right shoulder ***and*** right knee. At Sarah's hearing the Appellees did not provide any evidence or testimony to even remotely suggest that Sarah could

[8] It is highly suspicious that the Employer/Carrier did not produce either Lula McIntyre, or her claims file, to refute Sarah's claims that she informed Ms. McIntyre only seven days after the fall down the stairwell that her right knee was injured and that she was seeking treatment for same.

not have also injured her right knee in her September 21, 2007 fall down the stairwell. Equally significant, the Appellees did not show any superceeding intervening injury after September 21, 2007. In short, it stretches the limits of one's imagination and common sense to argue that Sarah did not or could not injure her right knee in such a traumatic fall. But even if Sarah did not allegedly injure her right knee in the subject fall, 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 Sarah became a candidate for knee replacement surgery as a ***direct result*** of the meniscus surgery the Carrier approved.

## CONCLUSION

Under the applicable Workers' Compensation statutes, and case law, Appellant, Sarah Braxton, suffered a major work injury to her right knee, resulting in arthroscopic surgery and necessitating in the opinions of both, the treating specialist and the Commission IME, the need for a partial to full knee replacement. The *Commission IME*, Gregory Dabov, M.D., an orthopedic surgeon and knee specialist, at the prestigious Campbell Clinic was the only expert called upon to render testimony regarding the casual connection of Sarah Braxton's right knee injury and whether a partial to total knee replacement was causally connected to same. Dr. Dabov's answers and opinions were resoundingly and unequivocally "yes" on both issues.

Accordingly, Appellant, Sarah Braxton, respectfully prays that the Court of Appeals reverse in full the Orders of the Tunica County Circuit Court and Mississippi Workers' Compensation Commission, and based upon the substantial and overwhelming weight of the evidence, find that she suffered a compensable right knee injury as a result of her September 21,

2007 fall down the stairwell at work, and further, order the Appellees to provide reasonable and necessary medical care and treatment for same, including the knee surgeries recommended by either the treating specialist, Dr. John Lochemes, or the Commission IME, Dr. Gregory Dabov.

**RESPECTFULLY SUBMITTED,** this the 9th day of January, 2012.

**SARAH BRAXTON, APPELLANT**

**CHARLIE BAGLAN & ASSOCIATES**
**ATTORNEYS AT LAW**
**100 PUBLIC SQUARE**
**POST OFFICE BOX 1289**
**BATESVILLE, MISSISSIPPI 38606**
**TELEPHONE NUMBER: (662) 563-9400**

**BY:** _____
**CHARLIE BAGLAN, ESQ.**
**MS BAR NO. 1680**
**LAWRENCE J. HAKIM, ESQ.**
**MS BAR NO. 9362**
**MICHAEL W. DARBY, JR., ESQ.**
**MS BAR NO. 101465**
**ATTORNEYS FOR THE APPELLANT**

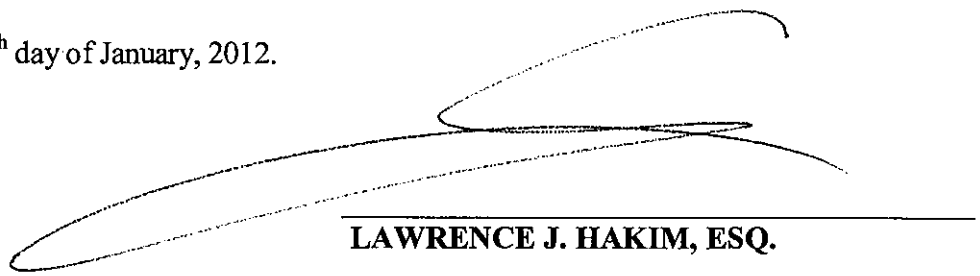
## CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, Attorney for the Appellant herein, do hereby certify that I have this day mailed, proper postage prepaid, a true and correct copy of the above and foregoing **Brief of the Appellant** to:

Honorable Albert B. Smith
Circuit Court Judge Tunica County
P. O. Box Drawer 478
Cleveland, MS 38732

Honorable Courtney L. Tomlinson
Watkins Ludlam Winter & Stennis, P.A.
6897 Crumpler Blvd., Suite 100
P. O. Box 1456
Olive Branch, MS 38654
**Attorney for the Appellees**

This the 9th day of January, 2012.



**LAWRENCE J. HAKIM, ESQ.**