IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO.: 2013-WC-00409-COA

SARA PULLIAM — APPELLANT

VS.

MS STATE HUDSPETH REGIONAL CENTER
AND
MS STATE AGENCIES WORKERS' COMPENSATION TRUST — APPELLEES

APPEAL FROM THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION

BRIEF OF EMPLOYER AND CARRIER/APPELLEES

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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 disqualifications or recusals.

1. Sara Pulliam
   Claimant/Appellant

2. Howard Gunn, Esquire
   Counsel for Claimant/Appellant

3. MS State Hudspeth Regional Center
   Employer/Appellee

4. MS State Agencies Workers' Compensation Trust
   Carrier/Appellee

5. Ginger M. Robey, Esquire
   Daniel Coker Horton & Bell, P.A.
   Counsel for Employer and Carrier/Appellees

Respectfully Submitted,

MS STATE HUDSPETH REGIONAL CENTER AND MS STATE AGENCIES WORKERS' COMPENSATION TRUST, EMPLOYER AND CARRIER/APPELLEES

BY: Ginger M. Robey
DANIEL COKER HORTON & BELL, P.A.

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STATEMENT OF THE ISSUES

I. Whether the Commission erred in allowing into evidence the medical report of Dr. David Collipp, who performed an Employer's Medical Evaluation, pursuant to an order by the ALJ.

II. Whether the Commission erred in denying compensability of injuries other than to Claimant's back and right shoulder.

III. Whether the Commission erred in finding that Claimant failed to prove that she sustained any permanent disability as a result of her work related accident and resulting injuries.

I. STATEMENT OF THE CASE

A. Nature of the Case and the Course of the Proceedings and Its Disposition in the Court Below.

On January 25, 2007, Claimant filed a Petition to Controvert alleging that she sustained work related injuries to her back, right shoulder and body as a whole on March 26, 2006, in the course and scope of her employment as a direct care worker. *Record* ("R.") at p. 1, *Claimant's Record Excerpts* ("R.E.") at pp. 30-31. On February 15, 2007, Employer and Carrier filed an Answer to the Petition to Controvert, admitting that Claimant sustained injuries to her low back and right shoulder only and disputing the nature and severity of the injury. R. p. 4; R.E. p. 32. On May 12, 2008, Employer and Carrier filed a Form B-52, *Employer's Notice of Controversion*, specifically disputing that Claimant's Chiari Malformation and cervical spine problems were causally related to her work injury of March 26, 2006. R. p. 6. Claimant filed a Prehearing Statement on September 4, 2008, which was ruled incomplete by the Commission. R. p. 11. On that same date, the Claimant filed a *Motion for Extension of Time* to file a Prehearing Statement, indicating that she needed more time to obtain and finalize her medical records affidavits. R. p. 13. On September 5, 2008, Employer and Carrier filed their initial Prehearing Statement. R. p. 16. On October 20, 2008, Employer and Carrier filed a *Motion to Compel* an Employer's Medical Evaluation ("EME") with Dr. David Collipp. R. p. 20. Claimant filed her *Response* to said motion, objecting to the EME with Dr. Collipp. R. p. 29. On November 3, 2008, the Administrative Judge ordered Claimant to attend the EME with Dr. Collipp. R. p. 32. Claimant filed an Amended Prehearing Statement on December 23, 2008. R. p. 34. Employer and Carrier filed a *Motion for Continuance* on December 30, 2008, indicating that they had not yet received the EME report from Dr. Collipp as the evaluation had been delayed due to Claimant's objection and the necessity of the motion hearing on their *Motion to Compel*. R. p. 36.

Employer and Carrier stated therein that the EME report was necessary to determine if a vocational expert would be retained and/or if a Functional Capacity Evaluation ("FCE") would be performed. As such, Employer and Carrier asked that the hearing on the merits, which was then set for January 7, 2009, be continued. Claimant objected to the same, but the Administrative Judge ruled that the hearing should be continued. R. pp. 39, 42. On March 6, 2009, Employer and Carrier filed an Amended Prehearing Statement, citing to the report and opinions rendered by Dr. Collipp, and attaching Dr. Collipp's report as an Exhibit to their Prehearing Statement.[1] R. p. 43, "*Record Excerpts of Employer and Carrier*" ("R.E. of E/C") at pp. 4-20. Employer and Carrier filed a Second Amended Prehearing Statement on June 17, 2009, once again citing the opinions of Dr. Collipp, and filing the medical records affidavit of Dr. John Davis of New South NeuroSpine which contained the report of Dr. Collipp. R. p. 45, R.E. of E/C pp. 21-50. Claimant subsequently requested that the hearing be continued so that she could obtain an FCE, and the hearing was once again continued and reset for July 29, 2009. R. pp. 48, 49. At Claimant's request, the hearing was again continued. R. p. 51. Of note, the EME report of Dr. Collipp had been produced to Claimant's attorney and filed with the Commission on multiple occasions. It was once again referenced in the *Motion for Status Conference*, and the Third and Fourth Amended Prehearing Statements filed by the Employer and Carrier. R. pp. 51, 56, 60, R.E. of E/C pp. 51-67, 68-84.

A hearing on the merits was ultimately held on March 24, 2011, with Judge Cindy Wilson presiding. The parties agreed to the following stipulations: 1) On March 26, 2006, the Claimant sustained lumbar and right shoulder strains; 2) At the time of the work related injuries, Claimant was

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[1]Per the Commission's practice and procedures in effect at the time, the actual exhibits filed with Prehearing Statements were not scanned into the Commission's record. As such, the actual exhibits filed by the parties are not forwarded to this Court as part of the record. Employer and Carrier have provided complete copies of their Prehearing Statements in the Employer and Carrier's Record Excerpts filed with this Court.

employed as a direct care worker; 3) An FCE was performed on July 7, 2009 at the Claimant's request; 4) Temporary total disability benefits were paid from October 25, 2006 through November 27, 2006, at a compensation rate of $197.34 weekly; and 5) Claimant's employment was terminated July 9, 2007. R. pp. 65-88, R.E. pp. 4-27. The issues in dispute included: 1) The existence and extent of permanent disability and/or loss of wage earning capacity; 2) The reasonableness and medical necessity of certain treatment; 3) Claimant's average weekly wage on the date of injury; 4) Date of MMI; 5) Causal relation of any injury other than Claimant's lumbar and/or right shoulder strains; 6) Statute of limitations as it relates to any other injuries other than to the back and right shoulder; and 7) The failure of Employer and Carrier to pay certain medical bills of the Claimant. *Id.* Judge Wilson entered an order on February 22, 2012, finding as follows: 1) It was the opinion of the Administrative Judge that the medical opinions of Dr. Davis, a neurosurgeon, and Dr. Collipp, a physical medicine doctor, carried more weight than those of Dr. Ozborn, a family practitioner, as it related to Claimant's medical conditions; 2) Claimant failed to prove that she suffered any permanent disability as a result of her work related accident; 3) The average weekly wage on the date of injury was $296.01; 4) Claimant reached MMI on July 1, 2006, per Dr. Collipp; 5) The only injuries that were work related were the lumbar strain and the right shoulder strain; 6) All claims other than as to Claimant's low back and right shoulder would be barred by the applicable statute of limitations; 7) Employer and Carrier are responsible for medical expenses related to Claimant's lumbar strain and right shoulder injuries but not the Chiari Malformation, the disk herniation at T6-7 and the cervical spine complaints. *Id.* Thus, the Claimant's claim for permanent disability benefits was denied. *Id.* Claimant filed her *Petition for Review* by the Full Commission on March 1, 2012. R. p. 89; R.E. pp. 84-86. The Full Commission rendered its Order on February 22, 2013, affirming the decision of the Administrative Judge but clarifying that

the ALJ included the Claimant's thoracic spine complaints as a compensable injury. R. pp. 99-100; R.E. pp. 28-29. Claimant filed her appeal of the Full Commission Order on March 7, 2013. R. p. 101; R.E. pp. 82-83.

B. Facts Relevant to the Issues Presented for Review

Lay Testimony

Sara Pulliam, Claimant

Claimant's date of birth is November 9, 1955. Transcript ("T.") at p. 53. She was 55 years old at the time of the hearing. T. p. 53. Claimant testified that she graduated from high school but has no further vocational training or education. *Id.* Her work history includes working as a sewing machine operator, as a teacher's aide, at a glove factory and as an operator at a cotton gin. T. pp. 55-56. She began working at Hudspeth Center on November 4, 2004. T. p. 53. Her job duties as a direct care worker involved helping individuals learn to do things on their own, such as cooking, washing, ironing and making beds. T. p. 56. The job also involved taking clients on field trips and to restaurants. *Id.* She testified that the job required lifting, standing and walking. T. p. 57.

On March 26, 2006, she was doing laundry when she observed two other employees lifting a resident. T. p. 57. She went into the patient's room to assist with lifting and felt a pop in her back. T. p. 58. She reported her injury to Ruby Glover. *Id.* She stated that her pain was in her right shoulder and in the low back. T. pp. 58-59. An accident report was completed. T. p. 59. Claimant admitted that she had prior back problems. T. p. 60. Following the work accident, she sought treatment from Dr. Ozborn. *Id.* In April of 2007, the Claimant stated that she had an aggravation of her back and shoulder injuries, when assisting a resident to bed following a fire alarm. T. p. 61. Dr. Ozborn sent her for physical therapy, but she continued to work. T. p. 62. She stated that her pain continued, and Dr. Ozborn referred her for an MRI and then for a neurosurgical evaluation. T.

pp. 64-65. Her last day to work was in October 2006. T. p. 54. Claimant testified that Dr. Ozborn never released her to return to work after January 25, 2007.[2] T. p. 66. Claimant testified that her employer told her that her FMLA would expire June 12, 2007, and that she would need to return to work on June 13th. T. p. 67. However, she stated that she was still under the care of Dr. Ozborn. She received a termination notice dated July 9, 2007. T. p. 66. Claimant has since performed a job search, contacting approximately 40 employers from October 2007-March 2011, although only completing five job applications. T. p. 69, Exhibit 11. She had not found employment at the time of the hearing. Claimant testified that she continues to have back and shoulder pain, weakness, numbness in her right arm and is unable to sit or stand for extended periods of time. T. pp. 70-75.

On cross-examination, Claimant acknowledged that Dr. Ozborn had been her primary care physician all of her life. T. p. 75. Claimant was asked about her treatment with Dr. Ozborn for back problems prior to her work accident, to which she had responded that it had been "years and years before." T. p. 76. However, the medical records from Dr. Ozborn showed otherwise. T. pp. 77-78. When questioned about the inconsistency, she stated she "did not know" whether her symptoms involving her low back had waxed and waned over several years, which was the testimony of Dr. Ozborn. T. p. 77. She also could not recall that in April of 2004, Dr. Ozborn had provided her with a work excuse that restricted her from heavy lifting and pulling due to osteoporosis. T. p. 78. Claimant also stated that she was unaware that her FCE concluded that she could perform medium duty work. T. p. 87. She also could not recall that Dr. Ozborn had stated she could return to full duty work on November 28, 2006. T. pp. 80-81. Claimant testified that Dr. Bobo took her off work when he performed the surgery for her Chiari Malformation on January 27, 2007. T. p. 79. She was

[2]Claimant underwent surgery for her Chiari Malformation on January 29, 2007, by Dr. Bobo.

on FMLA leave following that time. *Id.* She acknowledged that her termination was due to exhausting all available FMLA leave, following her surgery for the Chiari Malformation.

Claimant testified that she signed an *Employee Accident and Injury Form* in which she stated that the only body parts that were injured included her back and right shoulder. T. pp. 81-82. Claimant further acknowledged that she was already on Social Security disability when she completed her job search. She admitted that she never returned to Hudspeth to seek re-employment and completed only five applications during her job search. T. pp. 83-85; Exhibit 11. She also admitted that she did not leave an application with Manpower, stating that they told her they were not hiring. T. p. 85. She testified that she no longer drives, but stated that she guessed she would have to drive if she got a job. T. p. 87. Claimant testified that she weighs 127 lbs. and admitted that she has never been able to lift a 100 lb. patient by herself. T. p. 83. Claimant also agreed that if her personnel file reflected that her monthly salary was $1,282.71 per month for the calendar year of March 2005 to March 2006, then she agreed "that's about right." T. p. 84.

Ruby Glover

Ruby Glover was previously employed as a direct care worker at the Hudspeth Center. T. p. 18. She testified that Ms. Pulliam's job required her to lift more than 100 pounds and about 30% of her time was spent lifting patients. T. p. 20. The job also required a lot of standing, walking and bending. T. p. 21. She testified the Claimant did not have any difficulty performing her job duties prior to the work accident. T. pp. 22-23. She stated that Claimant returned to work after the accident until October of 2006, but that she could hardly lift and that she would complain about pain going down her legs. T. pp. 23-24. She testified there are no light duty jobs available. T. p. 25. Although Glover testified that Claimant was under her supervision for a period of time, she admitted that she only worked with the Claimant about 50% of the time, and further, she would only actually observe

her for less than half of that time. T. pp. 19, 29-31. Glover also acknowledged that she was not familiar with FMLA and had no responsibilities with documenting medical or sick leave or with hiring or firing of employees. T. p. 32.

Patricia Marriott

Patricia Marriott was also formerly employed as a direct care worker at Hudspeth Center. T. p. 38. She testified that she would have to lift clients weighing up to 140 pounds, and that 30%-40% of her job involved lifting. T. p. 39. However, she later acknowledged that one person would not lift a patient alone and would have assistance to do so. T. p. 43. Claimant was assisting her with a resident when she was injured. T. p. 40. Claimant told her that her back and shoulder were injured. *Id.* She testified that after the Claimant's injury, she no longer lifted the residents and had problems doing her job. T. pp. 40-41.

Gary Spurgeon

Gary Spurgeon is the division director at Hudspeth Center. T. p. 44. He is over safety, insurance and workers compensation. T. p. 48. Mr. Spurgeon testified that Claimant was terminated on July 9, 2007, after exhausting all available FMLA leave. T. pp. 52, 94. He further testified that Claimant's salary was increased in July of 2006, when the legislature approved a pay raise. T. p. 95.

Expert Witnesses

Kathy Smith, Vocational Expert (Employer and Carrier Exhibit 7)

Ms. Smith is a vocational rehabilitation counselor employed by Rehabilitation, Inc. in Brandon, Mississippi. T. p. 96. The parties stipulated to her qualifications as an expert witness in the field of vocational rehabilitation. T. p. 96. Ms. Smith performed a transferable skills analysis. T. p. 97. She was able to identify jobs in the sedentary, light and medium duty categories in Claimant's labor market area for which the Claimant would be qualified. T. p. 98, Exhibit 7. Ms.

Smith testified that the current minimum wage is $7.25 an hour, which at a 40 hour work week, would be an average weekly wage of $290. *Id.* Ms. Smith further testified that the Claimant resides in Webster County, and the unemployment rate at the time of the hearing was 13.7%, which was 3 points above the state average of 10.7%. T. p. 99. Further, the neighboring counties all had unemployment rates higher that the state average. *Id.* Statistically, it would be more difficult for a person in Webster County to find employment than in other counties within the state. T. p. 100. Smith further testified that a medium duty job, according to the Dictionary Occupational Titles, is defined as lifting of 50 pounds on an occasional basis or 25 pounds on a frequent basis, and standing at 80% of the work day. *Id.* Light duty would be lifting of 10 pounds on a frequent basis and 20 pounds on an occasional basis. *Id.* She also testified that the jobs of sewing machine operator, teacher's assistant and a glove factory sewing position would all fall under the light duty classification. T. p. 101. The D.O.T. classification for direct care worker is medium duty. *Id.* Smith further testified that she was familiar with job placement services such as Manpower. T. pp. 102-103. She described this company as a placement service that is retained by employers to help them find employees. T. pp. 103-104. She stated that in 11 years of working with Manpower, she has never had them tell her that they were not accepting applications, which was inconsistent with Claimant's testimony. *Id.*

On cross-examination, Smith testified that she did not contact the Claimant directly to inform her of job opportunities, but instead, provided the information to Claimant's attorney. T. p. 107. She further testified that in identifying jobs available to Claimant, she identified jobs in sedentary, light and medium duty categories. T. pp. 109-110. When questioned by Claimant's counsel as to job availability within Dr. Ozborn's restrictions, Smith responded that the job search would be irrelevant, as he stated she was completely disabled based on an array of health problems. T. pp. 111-112.

Medical Records and Affidavit of Eupora Family Medical Clinic and Deposition Testimony of Dr. Ozborn. (General Exhibits #2 and #3)

Dr. Ozborn is a family practitioner at Eupora Family Medical Clinic. *Deposition Dr. Ozborn, December 7, 2007* ("Depo. T."), p. 6. He has been the Claimant's primary care physician for over 20 years. Depo. T. p. 8. Following her work injury of March 26, 2006, he saw her the following day for complaints of lower and mid-back pain. *Id.* He diagnosed a lumbosacral strain, which he described as being primarily the low back. *Id.* p. 9. On April 17, 2006, he diagnosed a thoracic strain. *Id.* pp. 9-10. It was not until October 11, 2006, that Claimant began to report symptoms of upper back and right shoulder pain. *Id.* p. 14. She also reported that she had been hospitalized for a staph infection. *Id.* X-rays obtained revealed scoliosis. *Id.* p. 15. Dr. Ozborn diagnosed Claimant with a soft tissue injury and treated her conservatively. *Id.* p. 16. On November 13, 2006, she had a new complaint of radiculopathy and weakness of the left leg. *Id.* He described her as "a very thin, fairly fragile, patient." *Id.* p. 17. On November 27, 2006, he released Claimant to return to full duty effective the following day. *Id.* p. 18. However, he stated that her symptoms were chronic. *Id.* pp. 18-19. On November 30, 2006, he took her off work again stating that he wanted to try to increase her strength and her ability to work. *Id.* p. 19. In January of 2007, he ordered a lumbar MRI, which was normal, and a thoracic MRI, which revealed a central disk protrusion at T6-7. *Id.* pp. 21-22. He also found evidence of a Chiari Malformation on the studies. *Id.* p. 22. Claimant was then referred to a neurosurgeon for further evaluation of the Chiari Malformation. *Id.* p. 23. Dr. Ozborn felt Claimant reached maximum medical improvement ("MMI") for her problems on September 18, 2007. *Id.* pp. 27-28. When asked about physical limitations, Dr. Ozborn stated, "She's a thin person with poorly developed muscles who's had problems with nutritional state and who has chronic disc - now a chronic disc problem that's going to continue to limit her to some extent." *Id.* p. 30.

Dr. Ozborn acknowledged on cross-examination that he has treated Claimant for longstanding problems of shoulder and back pain, and particularly for left leg radiculopathy, dating back as far as 2000. *Id.* p. 32. She had x-rays in June of 2002, that revealed arthritic and degenerative changes of her lumbar spine. In May of 2003, she continued to have intermittent low back pain with decreased range of motion. *Id.* p. 33. Claimant discussed with Dr. Ozborn that she was unable to work consistently due to continued back pain. *Id.* pp. 33-34. He further admitted that the Claimant's back symptoms had waxed and waned over a number of years. *Id.* p. 34. In fact, when the Claimant initially saw him on March 27, 2006, Dr. Ozborn did not relate her back complaints to a work injury. *Id.* It was not until April 17, 2006, that a work injury was reported. *Id.* p. 35. He admitted that the Claimant's first mention of right shoulder pain was not until October 2006. *Id.* p. 36. Her first complaint of radicular pain in the left leg was not until November of 2006. *Id.* p. 37. When asked if he could relate her radiculopathy to her work injury, Dr. Ozborn responded "not necessarily." *Id.* Dr. Ozborn further admitted that Claimant's Chiari Malformation was an abnormality that occurred during fetal development, and he could not testify to a reasonable degree of medical probability that the Chiari Malformation became symptomatic due to the work accident. *Id.* p. 39. He deferred to the treating neurosurgeon with regard to causation of her Chiari Malformation. *Id.* p. 41. He further stated that a Chiari Malformation can cause symptoms of radiculopathy and may have contributed to the Claimant's weakness "all along." *Id.* pp. 38-39. Dr. Ozborn was also asked how he could relate Claimant's cervical complaints, first mentioned months after the accident, to the Claimant's work injury of March 2006. His response was that her persistent muscle spasms in her thoracic and lumbar area continued up into her neck, although he admitted it was not radicular pain or acute injury pain. *Id.* p. 44.

Dr. Ozborn was of the opinion that Claimant is totally disabled from any kind of work

activity. *Dr. Ozborn deposition, September 19, 2008 ("*Depo 2. T."), p. 6. Contrary to his own medical records, Dr. Ozborn stated that the Claimant's symptoms were not consistent or disabling before her March 2006 work accident. Depo 2 T. p. 10. On January 25, 2007, he completed a *Statement of Attending Physician Regarding Disability*, stating Claimant was off work "indefinitely" due to thoracic disc and Chiari Malformation. R.E. p. 75. He listed the date of accident and first appearance of symptoms as 10/11/06 -- not the date of her work injury. *Id.* He also testified that she was developing fibromyalgia secondary to her trauma. Depo. 2 T. p. 8. He defined fibromyalgia as an increased pain perception. *Id.* He treated her with non-narcotic medications and muscle relaxants. *Id.* p. 9. He did not believe that physical therapy would improve her condition. *Id.* He testified that she would need long-term maintenance medications. *Id.* pp. 9-10. He further did not think that a Functional Capacity Evaluation would be beneficial, as it was his opinion that she could not work in any capacity. *Id.* p. 13. However, he admitted that her small bone mass, gastric problems and continued weight loss all contributed to her physical limitations. *Id.*

Medical Records Affidavit of Dr. Bobo (Claimant Exhibit #9)

Dr. Bobo performed a suboccipital decompression of a syrinx, or Chiari Malformation on January 29, 2007. Dr. Bobo did not render any opinion as to causation of the Chiari Malformation.

Dr. John Davis (Exhibit ID-A, E/C's Exhibit 12)

Dr. Davis performed an Employer's Medical Evaluation on April 2, 2008. Dr. Davis is of the opinion that the Claimant had a Chiari I Malformation which was a developmental abnormality unrelated in any way to trauma or to her work related injury of March 2006. Dr. Davis noted Claimant had a small disc herniation at T6-7. He stated there is no way whatsoever to know whether this disc herniation was caused by injury or whether it was an incidental finding as it is very common in patients her age to have a thoracic disc protrusion. He did not think she needed additional

treatment for her low back or thoracic spine. With regard to Claimant's neck pain, the first mention of this complaint was on November 27, 2006, which was eight months after the work accident. He found no causal relation between the patient's work injury and the discomfort in her cervical spine. He did not think that she needed surgery for her cervical, lumbar or thoracic complaints. He recommended that she be evaluated by a physical medicine rehabilitation specialist to further assess MMI, work restrictions and any permanent impairment.

Dr. David Collipp (Exhibit ID-A, E/C's Exhibit 12)

Dr. Collipp is a physical medicine specialist, who is partners with Dr. Davis at NewSouth NeuroSpine. Upon the recommendation of Dr. Davis, Employer and Carrier had the Claimant evaluated by Dr. Collipp.[3] It was Dr. Collipp's opinion that Claimant sustained a lumbar strain with some thoracic involvement as a result of her March 2006 injury. He did not believe the injury led to an aggravation of her preexisting T6-7 disk protrusion or the preexisting Chiari I Malformation. He felt that the Claimant reached MMI within three months of her injury, or by July 1, 2006. He stated that her medical records confirmed that her pain resolved at times, consistent with her situation prior to the work injury, with waxing and waning of pain. He felt Claimant had sustained a 2% permanent partial impairment to the whole body. He also believed that her left upper and lower limb radiculopathy was consistent with her Chiari Malformation. He did not think she had any permanent restrictions as a result of her work related back strain. He also believed that Claimant was physically capable of performing light to medium work with a maximum lift of about 35 pounds. However, he did not think the restriction was related to her work injury, but instead, was related to her overall body habitus. Dr. Collipp also noted that Dr. Ozborn was providing medication

[3]The Claimant was ordered to undergo the evaluation by Dr. Collipp by the Administrative Judge.

and documentation for the Claimant to be off work and receive food stamps based on her subjective reports of disability and pain. Dr. Collipp did not think that Claimant's pain complaints were causally related to the work injury.

Dr. Collipp went on to state that he felt there were several issues that required specific note. He emphasized that there was clear documentation of chronic back pain prior to her work injury of 2006. He stated that Claimant has a diagnosis of osteoporosis and had documented upper and lower limb numbness and dizziness predating her 2006 work injury. He also pointed out that in May of 2003, she had requested disability for her ongoing back pain. She continued to work after her work injury in March 2006 until October 2006, and was again released to return to work without limitations on November 28, 2006. Dr. Collipp was of the opinion that Dr. Ozborn provided disability from work, based on subjective symptoms as opposed to objective measures. He even noted that Dr. Ozborn placed the Claimant off work for the first time as a result of a telephone request made by her. He also noted that she had a prior right shoulder injury and chronic medical conditions, including chronic anemia, frequent respiratory and urinary tract infections and unexplained weight loss, which were all pre-existing. Dr. Collipp also opined that fibromyalgia syndrome is not caused or aggravated by trauma and the diagnosis is highly debated. He stated there is no objective test for confirmation of her reported symptoms. He stated that the Claimant's thoracic disk was not surgical and was degenerative in nature, not causally related to trauma. He also pointed out that her initial complaint of cervical pain was long after her first report of injury. Her neurological examination from Dr. Bobo improved after surgery for her Chiari Malformation. Her mechanism of injury as it related to her work injury was consistent with a muscle strain.

FCE Performed at Crossroads Rehabilitation (General Exhibit #4)

Pursuant to a request by Claimant's counsel, an FCE was completed at Crossroads

Rehabilitation on July 7, 2009, by Kevin Park, OTR/L,CHT. Claimant's minimal overall level of work fell within the medium range. The FCE concluded that Claimant could exert 20-50 pounds of force occasionally and/or 10-25 pounds of force frequently and up to 10 pounds of force constantly. Claimant's overall level of work was significantly influenced by the Claimant's self-limiting and inconsistent behavior. It was noted that Claimant self-limited on 28% of the 18 tasks. Therefore, the medium level of work indicates a minimum ability rather than a maximum ability.

David M. Brick, OTR/L (General Exhibit #5)

David Brick also performed an impairment rating based on a diagnosis of chronic lumbar strain, chronic cervical strain and thoracic disk herniation, and assessed a 5% whole person impairment for the thoracic spine region, a 2% whole person impairment for the lumbar spine and a 2% whole person impairment for the cervical spine, for a combined total of 9% whole person impairment.

II. SUMMARY OF THE ARGUMENT

Employer and Carrier request that this Court affirm the Commission's finding that Claimant did not sustain any permanent disability, or loss of wage earning capacity, as a result of a work-related injury. This determination is supported by credible and substantial evidence and should be upheld. The medical evidence presented by the parties show that Claimant had pre-existing health problems that restricted her to medium duty work prior to the work accident. Following her work accident, she continued to work in her pre-injury position as a direct care worker, up until she was placed off work by her primary care physician, Dr. Ozborn, for conditions that were unrelated to her work accident -- a thoracic disc and a Chiari Malformation. Claimant then underwent surgical removal of the Chiari Malformation and never returned to work. Her employment was terminated once she exhausted all available FMLA leave.

Claimant would argue that she is totally disabled from returning to work in any capacity. However, Claimant underwent a Functional Capacity Evaluation, which concluded that despite her self-limited efforts, she could return to work at medium duty - the same level of work of which she had been capable prior to her work accident. Dr. Ozborn performed no objective testing to determine Claimant's abilities, and his testimony regarding Claimant's pre- and post-injury physical capabilities was contrary to his own medical records. On the other hand, the opinions expressed by Dr. David Collipp, a physical medicine and rehabilitation specialist, who performed a Commission ordered Employer's Medical Evaluation, were consistent with a review of Claimant's pre-injury medical records and the FCE findings. As such, the Commission, as the ultimate finder of fact, did not err in finding his opinions more credible than those of Dr. Ozborn.

At the hearing, Claimant made a motion objecting to the admissibility of the EME report of Dr. Collipp. The Commission held that the report was admissible, and Employer and Carrier would ask this Court to uphold that ruling. Employer and Carrier would show that Procedural Rule 9 of the Mississippi Workers Compensation Act establishes certain safeguards when it comes to offering medical records of treating and evaluating physicians in lieu of costly live testimony of those physicians at the hearing. Those safeguards are to ensure notice and due process as well as authenticity of medical reports. Employer and Carrier contend that Claimant was given notice of Employer and Carrier's intent to offer the EME report of Dr. Collipp as opposed to having him testify live at the hearing, Claimant had ample opportunity to depose Dr. Collipp, but chose not to, and Claimant has no reasonable basis to question the authenticity of Dr. Collipp's report. It is undisputed that it was an EME report issued by Dr. Collipp following his evaluation, which she was ordered to attend. Furthermore, Claimant failed to timely object to the form of the affidavit as required by Procedural Rule 9(A), and therefore, waived any objection that she may have. Employer and Carrier

contend that the Commission did not err in allowing Employer and Carrier to offer the medical records of Dr. Collipp and considering his report when rendering her opinions as to the controverted issues of this case. Alternatively, if this Court finds the medical record was not offered in proper form, Claimant nonetheless suffered no prejudice as Claimant was given adequate notice and opportunity to cross-examine Dr. Collipp. Therefore, it was harmless error.

Employer and Carrier would further show that even if the opinions of Dr. Collipp are excluded, the FCE findings cannot be ignored. Claimant tested at the medium duty work level, at a minimum. Employer and Carrier's vocational expert identified jobs, for which Claimant would be qualified, in the sedentary, light and medium duty work levels, that would give her an average weekly wage equal to or greater than her pre-injury average weekly wage.

Considering the evidence, the Commission held that Claimant failed to show that she sustained any permanent disability, as result of her work related accident and the injuries which resulted therefrom. This finding is supported by substantial evidence, is not clearly erroneous, and is not arbitrary and capricious, and therefore, Employer and Carrier ask that this Court to affirm.

III. ARGUMENT

A. The Commission is the ultimate finder of fact; Because its findings are supported by substantial evidence and the applicable law and are neither arbitrary nor capricious, this Court should uphold the Commission's Order.

The standard of review to be utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well established. The Mississippi Supreme Court has stated that "the findings and order of the Workers' Compensation Commission are binding on the Court so long as they are supported by substantial evidence." *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314,317 (Miss.

1988)). This Court should not review the facts on appeal to determine how it would resolve the factual issues if it was the ultimate trier of fact, but instead, should only determine whether the Commission's factual determinations were supported by substantial credible evidence. *South Central Bell Tel. Co. v. Aden*, 474 So.2d 584, 589 (Miss. 1985). Further, as in this case, when the Commission adopts the findings and conclusions of the administrative judge, this Court will review those findings and conclusions as if they were determined by the Commission. *McDowell v. Smith*, 856 So. 2d 581, 585 (Miss. Ct. App. 2003). The Court of Appeals should not overturn the Commission's decision unless it is based on a misapplication of law or if it is unsupported by the clear facts presented. *J.R. Loggins v. Halford*, 765 So. 2d 580 (Miss. Ct. App. 2000). Because the Commission properly applied the law and because its findings are supported by substantial evidence, its decision should be affirmed.

B. The Commission did not err in allowing the medical report of Dr. Collipp into evidence.

Claimant contends that the Administrative Judge erred by admitting into evidence and relying on the records of Dr. David Collipp. The Administrative Judge, as affirmed by the Commission, held that the Medical Records Affidavit of Dr. John Davis, which included Dr. Collipp's report, was properly offered and was allowed into evidence as E/C Exhibit 12. Employer and Carrier would show that such ruling was proper.

As cited in the Claimant's brief, Procedural Rule 9 of the Mississippi Workers' Compensation Commission sets forth the guidelines by which medical records may be received into evidence at a hearing in lieu of live testimony from a physician. Procedural Rule 9 specifically lists several requirements for medical records to be admissible evidence. Subsection (1) explains that the party wishing to offer the medical records must give opposing parties 30 days written notice prior

to the scheduled hearing. Subsection (2) states that a copy of the medical records shall be attached to the written notice. Subsection (3) states that the records must include a sworn statement from either the physician or the physician's medical records custodian stating that the records are a true and correct copy of the medical records as kept in the regular course of the physician's practice. Subsection (4) states that the contents of the medical reports shall be subject to the same objections as to relevancy and competency as the testimony of the reporting physician had he/she been present to testify live at the hearing, and further, than any objection to the use of an affidavit must be made within 15 days after receipt by the objecting party of a notice of intent to use such affidavit. Subsection (7) specifically states that "[a]ffidavits shall not contain opinions or other matters composed by attorneys for the signature of physicians. The Commission intends for this Rule to pertain to narrative notes and reports composed and generated by the physician in the ordinary course of medical practice."

Employer and Carrier would show that the medical records of Dr. Collipp were submitted in compliance with Procedural Rule 9. Employer and Carrier gave Claimant notice that they intended to offer the medical records of Dr. Collipp in lieu of live testimony a year and a half prior to the hearing on the merits. In fact, the evaluation by Dr. Collipp was pursuant to an Employer's Medical Evaluation ("EME"), which Claimant initially refused to attend. Employer and Carrier filed a motion to compel the EME, which was ordered by the Administrative Judge in an order dated November 3, 2008. The report of Dr. Collipp was attached to Employer and Carrier's Prehearing Statement filed with the Commission in March 2009, and the medical records affidavit, to which Claimant now objects, was filed on June 17, 2009, with Employer and Carrier's Second Amended Prehearing Statement under the "Proposed Exhibits" section. The hearing was held in March 2011. Thus, Claimant had more than the required 30 days notice -- she had almost two years notice.

Claimant specifically takes issue with whether Employer and Carrier complied with Subsection (3) of Procedural Rule 9. Subsection (3) states that the medical records must contain a sworn statement of either the physician or the medical records custodian stating that the medical records are a true and correct copy of the medical records of the physician as kept in the regular course of his/her medical practice. In this instance, Dr. Collipp was not a treating physician, but instead, performed a one-time evaluation, as allowed under General Rule 9, and in this case, that the Claimant was ordered to attend by the Administrative Judge. Dr. Collipp's report clearly identifies his report as such in the first page of his report and to which he affixed his signature on the final page of his report. As stated above, Dr. Collipp's report was filed with Employer and Carrier's Amended Prehearing Statement in March 2009. Therefore, Claimant had ample opportunity to cross-examine the physician on his opinions, but chose not to. On June 17, 2009, Employer and Carrier filed their Second Amended Prehearing Statement, which contained as a "Proposed Exhibit" the medical records affidavit of Dr. John Davis, which also contained the report of Dr. Collipp. The affidavit was signed by the medical records custodian for Dr. John Davis of Mississippi Neurosurgery and Spine Center. Both Dr. Davis and the practice group were listed, along with the business address. Employer and Carrier would show that both Drs. Davis and Collipp are in the same practice group and share the same medical records custodian. Further, in this case, Dr. Davis, a neurosurgeon, performed the initial EME and then recommended that Claimant be further evaluated by his partner, Dr. Collipp, a physical medicine and rehabilitation specialist. When Employer and Carrier requested medical records from Dr. Davis' medical records custodian, all records from the clinic were returned[4]. Pursuant to Procedural Rule 9(4), Claimant was required to raise any objection to this

[4]Employer and Carrier acknowledge that the medical records affidavit is dated October 6, 2008, which predates the report of Dr. Collipp. Employer and Carrier had previously requested an affidavit be returned

affidavit within 15 days of receiving Employer and Carrier's Second Amended Prehearing Statement in which they listed the affidavit as a proposed exhibit. Claimant failed to raise any objection until March 24, 2011, the day of the hearing, and because her objection was not timely made, she waived her right to object to the Employer and Carrier's offering the affidavit as an exhibit at the hearing.

Claimant cites the case of *Ball v. Ashley Furniture Industries*, in support of her objection to the medical records affidavit offered by Employer and Carrier. 71 So. 3d 1251 (Miss. Ct. App. 2011). However, Employer and Carrier would show that the Court excluded the medical records at issue in the *Ball* case because the objecting party was not given the requisite notice of her intent to offer the records, and further, because the records were not prepared in the physician's ordinary course of practice. In *Ball*, the medical report offered by the Claimant and objected to by Ashley Furniture and its workers' compensation carrier was not associated with any specific medical treatment provided to the Claimant and was found to be inadmissible hearsay. The report was not generated in the ordinary course of the physician's practice, but was, instead, a handwritten notation that did not include a sworn statement from the doctor or his medical records custodian. Ball failed to give the Employer and Carrier 30 days notice of her intent to offer the medical report. In fact, Ball did not submit the contested report until after the parties had agreed to close the record. Thus, there was no compliance with Procedural Rule 9 in the *Ball* case, and therefore, the Court held that the record was inadmissible.

Claimant also cites the case of *Robinson Property Group v. Newton*, 975 So. 2d 256 (Miss.

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from Dr. Davis, prior to Dr. Collipp's report, and Employer and Carrier can only assume this was a clerical error. Nonetheless, Claimant was ordered to attend the evaluation, was given ample notice and opportunity to cross-examine Dr. Collipp, and as such, cannot reasonably make an argument that her due process rights were denied. Thus, it was harmless error.

Ct. App. 2007). In reading the arguments made in the *Robinson Property Group* case, Employer and Carrier therein objected to certain medical records because the Claimant failed to identify the records in her Prehearing Statement (no notice given), the records had no accompanying affidavit and they contained multiple opinions going to the heart of the issues that were based on incorrect facts. Specifically, those records contained numerous opinions put in the medical records at the request of an attorney. Further, because Employer and Carrier were not given notice that the Claimant was going to offer the records into evidence, they had no opportunity to cross-examine the doctor by deposition. So, the Court ruled in *Robinson Property Group* that by allowing the records into evidence, Employer and Carrier were not provided due process.

The safe harbors put in place by Procedural Rule 9 were recommended by the court in *Georgia Pacific v. McLaurin*, 370 So. 2d 1359 (Miss. 1979). The Court's recommendation was made to "insure protection of the adversary system and the principle of non-admission of hearsay evidence under common law directives." *McLaurin,* 370 So.2d at 1362. In *McLaurin*, the Claimant was allowed to introduce into evidence, over the objection of the employer, unsworn reports of the doctor not present or available for cross-examination. *Id.* p. 1360. The reports were actually a series of letters written to the doctor by Claimant's attorney. *Id.* The Employer had no advance notice that the Claimant intended to offer the reports into evidence and had no prior notice that Claimant would not call the doctor to testify in-person. *Id.* The Court held that the Commission's power does not extend to admitting incompetent evidence where such admission would amount to a denial of due process. *Id.* p. 1361. The Court's reasoning behind the rejection of the controversial medical reports in *McLaurin, Robinson Property Group* and *Ball* cases was because the opposing parties were not given advance notice that the reports would be offered into evidence and the opposing parties were not given an opportunity to cross-examine the physicians on their opinions.

That is simply not the case here.

Here, Claimant had ample notice and opportunity to cross-examine Dr. Collipp. Dr. Collipp's report was prepared as part of an Employer's Medical Evaluation that Claimant was ordered to attend by the Administrative Judge. Claimant was given adequate notice that Employer and Carrier intended to offer the records of Dr. Collipp into evidence at the hearing on the merits, thus allowing Claimant an opportunity to take the cross-examination deposition of Dr. Collipp should she have chosen, or alternatively, to have subpoenaed him to testify live at the hearing. Further, Procedural Rule 9(4), which Claimant did not choose to cite in her brief, specifically states that any objection to the use of an affidavit must be made within 15 days after receipt by the objecting party of a notice of intent to use such affidavit. Here, Employer and Carrier's Second Amended Prehearing Statement, which specified that they intended to offer the affidavit containing Dr. Collipp's records was filed in June 2009, more than one and a half years prior to the hearing on the merits. Claimant failed to raise any objection to the affidavit until the hearing on the merits held in March 2011. If Claimant herself had complied with Procedural Rule 9(4) and timely filed an objection, Employer and Carrier would have had ample time to remedy any deficiency in their affidavit from the doctor. However, Claimant made no such objection until the day of the hearing. Thus, Claimant waived her objection as it was not timely filed in compliance with Procedural Rule 9(4). As such, any error was harmless and caused no prejudice to the Claimant.

C. The Commission did not err in denying compensability of injuries other than Claimant's lumbar, thoracic and right shoulder strains; As the ultimate finder of fact, the Commission's order should be upheld.

With regard to compensability of any injuries other than as to Claimant's back and right shoulder strains, Dr. Ozborn's records are clear that Claimant's initial complaints following the work accident of March 26, 2006, only involved her low back and right shoulder regions. It was months

later that she complained of any other symptoms. Dr. Ozborn was of the opinion that every physical complaint following March 26, 2006, was aggravated or exacerbated by the work accident, despite the delayed onset of reported pain following the work accident and despite the well documented pre-existing complaints of neck, lower back, upper back and leg pain waxing and waning back to 2000. Further, the only injuries alleged in Claimant's petition to controvert were the right shoulder and back. Thus, if Claimant is now seeking a claim for benefits related to a cervical spine injury, any such claim would be barred by the applicable two year statute of limitation. Miss. Code Ann. Section 71-3-35(1) states that regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits is filed with the Commission within two years from the date of the injury, the right to compensation therefor shall be barred. Here, the only injuries accepted as compensable were Claimant's back and right shoulder. Further, these were the only injuries specifically alleged in Claimant's Petition to Controvert. Thus, any claim for compensation relating to any other injuries would be time barred.

Employer and Carrier likewise contend that Claimant failed to meet her burden of proof that the Chiari Malformation was causally related to any work injury. Dr. Davis was unequivocal in his opinion that there was no causal relation, and Dr. Ozborn agreed that he would defer to the specialist. Likewise, Dr. Davis did not believe that there was a causal connection between Claimant's neck pain and her work injury, noting the first mention of any such complaints were not made until November 2006. Dr. Collipp concurred. The Commission is not bound by the treating physician's opinions, and as the ultimate find of fact, this Court should affirm the finding that Claimant's Chiari Malformation and cervical spine complaints were not causally related to her work injury.

D. <u>As the ultimate finder of fact, the Commission concluded that Claimant failed to meet her burden of proof that she sustained any permanent disability resulting from her work injury; Because this finding is supported by substantial evidence, this Court should affirm.</u>

The Mississippi Supreme Court outlined a detailed analysis for reviewing a claim of permanent total disability in the case of *Martha Lott v. Hudspeth Center and MS State Agencies Workers' Compensation Trust*, 26 So. 3d 1044 (Miss. 2010). The Court therein reiterated that a claimant has the burden of proof to make a prima facie case of disability.[5] Citing *Georgia Pacific v. Taplin*, 586 So. 2d 823 (Miss. 1991). The trier of fact must determine whether the claimant has made a prima facie case based on the evidence presented. *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638, 641 (Miss. 1978). After a claimant has made a prima facie case, the burden then shifts to the employer to rebut or refute the claimant's evidence. *Thompson*, 362 So. 2d at 641. In order to determine that an employee is disabled, there must be a finding that "the claimant could not obtain work in similar or other jobs <u>and</u> that the claimant's unemployability was due to the injury in question." *Taplin*, 586 So. 2d at 828 (emphasis added). In proving total disability, the claimant must prove that she has made a diligent, yet unsuccessful, effort to garner some form of gainful employment. *Adolphe Lafont USA, Inc. v. Ayers*, 958 So. 2d 833, 839 (Miss. Ct. App. 2007) (citing *McCray v. Key Constructors, Inc.*, 803 So. 2d 1199, 1203 (Miss. Ct. App. 2000). In determining the reasonableness of a claimant's job search, the following factors are considered: job availability, economics of the community, the claimant's skills and background, and the nature of the disability. *Taplin*, 586 So. 2d at 828. Other factors must be considered in determining loss of wage-earning capacity, including "the amount of education and training that the claimant has had, [her] inability

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[5]The Mississippi Workers' Compensation Act defines disability as "incapacity because of injury to earn the same wages which the employee was receiving at the time of the injury in the same or other employment . . . . " Miss. Code Ann. § 71-3-3(i) (Rev. 2000)

to work, [her] failure to be hired elsewhere, the continuance of pain, and any other related circumstances." *Alumax Extrusions, Inc. v. Wright*, 737 So. 2d 416, 422 (Miss. 1998) (citing *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 167 (Miss. 1991). The Court emphasized that "a Commission['s] determination of disability constitutes a finding of fact." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 828 (Miss. 1991).

Here, the Administrative Judge, as affirmed by the Commission, denied Claimant's claim for permanent disability benefits. The standard of review in a workers' compensation appeal is limited to whether the Commission's decision is supported by substantial evidence. *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1245-47 (Miss. 1991). "The Workers' Compensation Commission is the trier and finder of facts in a compensation claim...." *Smith v. Container Gen. Corp.*, 559 So. 2d 1019, 1021 (Miss. 1990). This Court will reverse an order of the Workers' Compensation Commission only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). Because the Commission's decision is supported by substantial evidence, this Court should affirm.

Dr. Ozborn is the only medical opinion that substantiates that Claimant's work injuries resulted in any permanent work restrictions. He was of the opinion that Claimant was totally disabled from returning to any gainful employment. However, as noted by Dr. Collipp, Dr. Ozborn's opinions were based on subjective complaints unsupported by objective findings. Further, the medical records clearly show that Dr. Ozborn treated Claimant for an array of medical problems unrelated to her work injury both prior to and following the work accident. His records show that in May 2003, he opined that she was unable to work consistently. Likewise, on April 15, 2004, he restricted her from heavy lifting due to osteoporosis. This restriction was in place prior to her work accident. Dr. Ozborn never performed any objective testing after her work accident to determine her

physical capabilities. However, at the request of Claimant's attorney, an FCE was performed at Crossroads Rehabilitation and confirmed that Claimant's minimum physical capabilities fell in the medium duty range, noting self-limited efforts by Claimant. Thus, she in fact, had the same work restrictions before and after her March 2006 work accident. Claimant wants to exclude Dr. Collipp's opinions as it relates to permanent disability and permanent work restrictions. However, Claimant cannot exclude the FCE findings when the testing was done at her own request.

For reasons discussed *supra*, Employer and Carrier contend that the medical opinions of Dr. Collipp are admissible, and further, Employer and Carrier contend that the Commission did not err in finding his opinions more credible than those of Dr. Ozborn. Dr. Collipp is a physical medicine specialist, and assessing permanent impairment and permanent work restrictions are within his area of specialty. Further, although Dr. Ozborn has treated the Claimant for many years, his opinions were not based on objective findings. He related every subjective complaint that the Claimant reported after March 24, 2006, to her work injury of March 23, 2006, despite the same complaints having pre-existed the work related injuries, as documented by his own medical records. Dr. Ozborn admitted in his deposition testimony that Claimant is a person with poorly developed muscles, who has had problems with her nutritional state and who has had a chronic disc problem that limits her physical abilities. Dr. Collipp, on the other hand, was of the opinion that Claimant had no permanent work restrictions as a result of the work injury, and further opined that any limitations she does have are due to her overall poor health. Dr. Collipp's opinions are consistent with Claimant's medical records that predate her work injury and with the FCE that was performed after her work injury.

Employer and Carrier acknowledge that Claimant's employment was terminated on July 9, 2007, after she exhausted all FMLA leave following her surgery performed by Dr. Bobo for her Chiari Malformation. Claimant contends that she was off work per Dr. Ozborn as a result of her

work related injuries. However, on January 25, 2007, Dr. Ozborn stated on her disability form that she was disabled due to thoracic disc and Chiari Malformation, neither of which are work related conditions per Drs. Davis and Collipp. Claimant also signed a *Claim for Disability Benefits Application*, dated May 21, 2007, indicating that her disability was due to surgery performed by Dr. Bobo. (Claimant Exhibit #10). Claimant never returned to work following this surgery. Once her FMLA leave expired, due to a non-work-related condition, her employment was terminated.

Employer and Carrier would also show that if Claimant were to return to any employment paying minimum wage, her wages would be equal to her pre-injury average weekly wage. The only medical proof offered by Claimant that she is incapable of any gainful employment is the inconsistent opinions of Dr. Ozborn, as discussed above. Kathy Smith, the Employer and Carrier's vocational expert, performed a transferable skills analysis and labor market survey. She identified jobs, for which Claimant would be qualified, in the sedentary, light and medium duty work levels. Per the D.O.T. classification for a direct care worker, it is a medium duty job, which is consistent with her tested abilities on July 7, 2009, per the FCE. However, Claimant never attempted to return to work as a direct care worker. Claimant's work history included working as a teacher's aide and sewing machine operator, both of which fell in the light duty categories. Claimant testified that she looked for work on about forty occasions between January 2008 and March 2011, but only completed five job applications. She also testified that she had not found employment. Kathy Smith, Employer and Carrier's vocational expert, testified that Claimant lives in Webster County, MS, which at the time, had an unemployment rate of 13.7% which was 3 points higher than the state average. As such, the evidence shows that there are economic factors impacting Claimant's ability to find employment.

The credible and substantial evidence shows that Claimant was capable of medium duty work

both before and after her work accident. She continued to work until her Chiari Malformation, an unrelated health problem, was discovered. Both she and Dr. Ozborn related her disability to her thoracic disc and the Chiari Malformation when they completed disability paperwork. Claimant subsequently performed a job search, although she was already drawing Social Security disability benefits, completing only five job applications over a three and a half year time period. The labor market survey showed that there was work available for which she was qualified. The medical evidence further shows that Claimant has many health issues, unrelated to her work accident, that are the cause of any current physical limitations. In summary, the Commission, affirming the ALJ, took all of the evidence into consideration and concluded that Claimant failed to prove that she could not obtain work in similar or other employment and that her unemployability was due to a work related injury. The Commission's finding is supported by substantial evidence, is not clearly erroneous, and is not arbitrary or capricious, and therefore, this Court should affirm its findings.

IV. CONCLUSION

Employer and Carrier request that this Court affirm the decision of the Commission. Here, Claimant had pre-existing back, neck, and shoulder complaints and symptoms of radiculopathy that waxed and waned over many years prior to her work injury. Her primary care physician, Dr. Ozborn, a general practitioner, agreed that she sustained only soft tissue injuries as a result of her work accident. Her abilities and restrictions, as tested in an FCE performed by a therapist of Claimant's choosing, were determined to be equal to those that were in place, per Dr. Ozborn, prior to her work accident. She continued to work after her work accident, until October 25, 2006,when Dr. Ozborn placed her off work due to her thoracic disc and Chiari Malformation, neither of which are work related conditions. Claimant's Chiari Malformation was treated surgically by Dr. Bobo, which resulted in Claimant being placed off work indefinitely. Claimant's employment was terminated

when she exhausted all available FMLA leave, unrelated to any work related injury. She performed a job search after she was approved for Social Security disability. Based on the labor market survey, there were jobs available for Claimant in the sedentary, light and medium duty work categories, and based on minimum wage, would be equal or greater to Claimant's pre-injury average weekly wage. Thus, lies the obvious, the only evidence that supports Claimant's argument that her work injury resulted in a loss of wage earning capacity is based on the sole opinion of Dr. Ozborn that she is disabled from returning to any gainful employment. His opinions were scrutinized by Dr. Collipp as they were not founded in objective measures of Claimant's physical capabilities, but instead, were based on subjective complaints and unrelated health problems. Further, Dr. Ozborn's opinions and conclusions are inconsistent with his own records relating to Claimant's pre-injury conditions. The Commission held Claimant failed to demonstrate with substantial and credible evidence that she sustained a loss of wage earning capacity as a result of her March 26, 2006, work accident. Because the finding is supported by substantial evidence, is not clearly erroneous, and is not arbitrary and capricious, Employer and Carrier ask that this Court affirm. Employer and Carrier further request any additional relief to which they may be entitled.

Respectfully submitted,

ASHLEY FURNITURE INDUSTRIES AND EMPLOYEES INSURANCE OF WAUSAU, EMPLOYER AND CARRIER/APPELLEES

BY: Ginger M. Robey
OF COUNSEL

CERTIFICATE OF SERVICE

I, GINGER M. ROBEY, of counsel for the employer and carrier herein, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

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THIS, the 6th day of August, 2013.

Ginger M. Robey
GINGER M. ROBEY