

## 2004 Workers' Compensation Case Law Summary

1. Pilate v. Am. Federated Ins. Co., 865 So.2d 387 (Miss.Ct.App. 2004)

**FACTS:** Pilate filed a bad faith claim against Am. Fed. and its adjuster, Mark Guillory, for failure to conduct a prompt and adequate investigation of his claim, and make timely payment of temporary total disability benefits. Pilate injured himself on January 21, 1995, but continued working that day. He reported this injury to his supervisor a couple of days later. He first obtained medical treatment on January 23, 1995 and, but for evidence of an old compression, everything was normal. Pilate obtained other medical treatment beginning February 1, 1995 and continuing regularly through 1996.

Pilate filed a petition to controvert on April 10, 1995 and Am. Fed assigned the claim to Guillory. T. G. Bolen was in turn retained by Am. Fed. as counsel. Guillory first contacted Pilate's attorney on April 28, 1995 but was not allowed to take a statement from Pilate. Guillory asked for and was granted an extra 30 days to file an answer to the claim with the Commission, and on June 1, 1995, he set about to obtain medical records from Pilate's physicians. In the meantime, Bolen answered the Petition and formal discovery ensued. It was not until September 14, 1995 that Guillory received the last of the pertinent medical records concerning Pilate.

Pilate submitted to a deposition on October 17, 1995, and Bolen thereafter advised Am. Fed. that Pilate's claim was probably compensable. He recommended Guillory schedule an independent medical evaluation for Pilate. Pilate missed the scheduled IME and it was rescheduled for March 11, 1996. In the meantime, Bolen advised Guillory that Pilate had made an "outrageous" settlement demand, and in Bolen's opinion, Pilate was entitled to no more than a few weeks of TTD. On January 22, 1996 Am. Fed. tendered a check to Pilate for temporary total disability benefits covering the period from Jan. 21, 1995 to May 3, 1995. The AJ hearing Pilate's claim ultimately awarded him TTD benefits from Jan. 21, 1995 to May 3, 1995, plus a 10% penalty for late payment. No other benefits were awarded. This decision was affirmed by the FC, the CC and the Ct. of Appeals.

**ISSUE: *Whether the actions of Guillory and Am. Fed. constituted bad faith?*** The Court considered it significant that Pilate's claim is based on a *delay* in payment as opposed to an outright denial of a claim, and held that not all delays in payment are actionable wrongs. The question was whether Am. Fed.'s investigation was reasonably undertaken and concluded, and the Court found that it was. It was noted that Am. Fed. never denied the claim, it paid all TTD that was due, it conducted a reasonable investigation in accordance with the law and rules of the Commission once it received notice of the claim, Pilate and his attorney were not very cooperative and contributed to some of the delay. "Neither AmFed nor Guillory were or could have been liable for Pilate's claims before the receipt of notice of the claim" on April 24, 1995. And, after this notice, Am. Fed. and Guillory were actively investigating this claim and trying to obtain the necessary information to determine the extent of benefits owed to Pilate. *The duty to timely investigate and pay workers' compensation claims is a mutual obligation of both the claimant and the employer and carrier.* Am. Fed's conduct did not rise to the level of bad faith.

2. McDonald v. I. C. Isaacs Newton Co., 879 So.2d 486 (Miss.Ct.App. 2004), *cert. denied*, 882 So.2d 234 (2004).

**FACTS:** Claimant was 40 years old with a high school education who began work as a seamstress for Newton Co. in 1982 or 1983. After 8 years, she moved to Bonhome Shirt Factory, and returned to Newton after a year at Bonhome. During her first 8 years at Newton she worked in a "back pocket tacking" job, and when she returned in 1993, she was placed in a "hemming" job. On about September 17, 1996 she injured her wrists, and subsequently underwent surgery on one wrist. She attempted to return to her "hemming" job but was unable. She was also unable to perform a light job offered by Newton. She remained employed until April 21, 1998 when she had surgery on her other wrist, and the Newton Co. closed its plant shortly thereafter.

Prior to and after her injury, McDonald worked part time as a custodian at her church, although she claims her duties post injury have been lightened by the church. She claimed to have sought employment at various places without success. She says her grip strength has been greatly diminished, and her hands go numb.

One of her treating physicians rated her medical impairment at 5% of the left wrist, and another physician rated her impairment at 10% of the right arm and 0% of the left arm. She could return to work with restrictions against overhead work, lifting greater than 15 pounds occasionally, pushing or pulling greater than 20 pounds and repetitive motion.

The AJ awarded benefits for a 25% occupational loss of use of the left arm, and 50% loss of use of the right arm. The FC affirmed, as did the CC. The Ct. of Appeals reversed.

**ISSUE:** McDonald argued that she had suffered a 100% loss of use of each arm. She specifically did not claim she was permanently and totally disabled, i.e. wholly unable to work and earn wages. Nonetheless, the Court held that under *Jensen*, the Claimant had raised a presumption of total loss of use of each arm with proof that she could no longer perform the work she engaged in at Newton. The issue was ***whether the employer and carrier successfully rebutted the presumption of total occupational loss of use?*** The Court found the proof to show that McDonald had only ever worked repetitive type, assembly line jobs, and that she is forever barred from performing this kind of activity. The Court also looked at her age and limited education and concluded she was permanently and totally disabled.

**Of note**, the Court noted that McDonald was working as a part time church custodian, but at far less wages than she earned pre-injury. This fact notwithstanding, the Court held that PTD benefits were appropriate because "*neither the Commission, nor the Newton Company, nor the dissenting opinion offered any proof that . . . McDonald has the ability to earn the same wages that she was receiving at the time of her injury.*" *Absent such proof, "she is entitled to permanent and total disability compensations."*

The **dissenting opinion** points out very correctly that the Court essentially retried this case and reweighed the evidence instead of performing a narrow appellate review to determine if the Commission's award of PPD benefits was supported by substantial evidence. And we all know it is just plain wrong to state that a claimant is PTD if she can no longer earn the "same" wages as before the injury. As the dissent says: "*Just to state the proposition is to highlight its error. . . . If the evidence reveals that the claimant cannot earn the level of wages as before but may still be gainfully employed despite a permanent injury to a scheduled member, then there is some permanent disability but it is not total.*"

3. McMillian v. Delphi Packard Electric Systems, 2004 WL 503923 (Miss.Ct.App. 3/16/04)

**FACTS:** McMillian experienced a knee injury when he slipped and fell at work on a recently mopped floor on September 6, 1998. He sought medical treatment for both knees on September 14, 1998, from his personal physician, Dr. Kyle Bateman. Dr. Bateman did not take him off work but did recommend light duty work. Dr. Bateman later opined that McMillian's condition did not improve because of his failure to follow the treatment recommendations and failure to lose weight. It is noted that McMillian weighted about 500 pounds at the time of the accident. Dr. William Dudley also provided treatment to McMillian and to the contrary, on October 8, 1998, found McMillian able to return to work without restrictions. In a letter to Dr. Bateman from Dr. James Sikes, an orthopedist, dated October 14, 1998 it was noted that McMillian's "overlying pathology is his weight". Once again the weight issue as a contributing factor to his limitation was raised in a letter dated September 17, 1999 by Dr. Peter Cole stating McMillian's knee problems were "exacerbated and perpetuated by his morbid obesity..." Delphi reassigned McMillian to a position at a higher hourly rate where the job was self-paced allowing him to work within his physical restrictions set forth by his physician. On June 17, 1999 McMillian voluntarily left his employment.

McMillian was ordered to submit to an independent medical examination on December 12, 2000, by Dr. Howard Katz. Dr. Katz determined from his examination, medical history and review of his medical records that MMI was reached on September 17, 1999. Dr. Katz further opined the slip and fall at work was the initial cause of the knee problem but at the present time his problems are perpetuated and caused by his obesity and his gait because of his obesity. With reference to McMillian's knees Dr. Katz further stated that "all of the patient's current symptoms are related to his obesity" and that he should be limited to light duty work. Dr. Katz's report went on to list other medical problems McMillian was experiencing unrelated to the actual knee problems. His finding was chronic bursitis in McMillian's knees and Dr. Katz rated him 3% impairment to each lower extremity.

**ISSUE:** Whether the Commission erred in affirming the decision of the Administrative Judge to award benefits for the 3% impairment rating assigned to each lower extremity. The Court held the Commission decision was supported by substantial evidence, including medical evidence that McMillian's present problems were the result of his obesity. In affirming the Commission, the Court stated it would reverse only where the Commission order is clearly erroneous and contrary to the overwhelming weight of the evidence.

4. USF&G v. Moss, 873 So.2d. 76 (Miss. 2004)

**FACTS:** This matter arose from a bad faith claim and was brought before the Court on an interlocutory appeal on the issue of venue. Richard K. Moss, a resident of Hinds County filed a bad faith claim against USF& G in the Circuit Court of Hinds County, the county of his residence on November 13, 2001. Subsequently on November 28, 2001, USF& G paid all past due compensation. The defendants then filed a Motion to Transfer Venue to Lauderdale County, Mississippi pursuant to Miss. Code Ann. §§ 11-45-25 & 11-11-7. The Circuit Court denied the motion without explanation. The Defendants filed an interlocutory appeal.

**ISSUE:** Whether the Circuit Court erred in denying motion to transfer venue to Lauderdale County Mississippi. The Court, utilizing “ a de novo” standard in reviewing questions of law , held that the controlling law of venue in this action was found under those sections of the Mississippi Torts Claims Act, Miss. Code Ann.§§11-46-1 to 11-46-23. Because the City of Meridian is a defendant in this action, Miss. Code Ann. § 11-46-13 (2) controlled their determination of proper venue. That statute states in pertinent part:

*Venue for any suit filed under the provisions of this chapter against the state or its employees **shall be** in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter **shall be** in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. **The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.** (emphasis added).*

Furthermore, Rule 82 (d) of the Mississippi Rules of Civil Procedure states:

***When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion , shall transfer the action to the Court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.***

The court held that venue was proper in Lauderdale County because the City of Meridian, a political subdivision, was a defendant. It ordered the case transferred accordingly.

5. McArthur v. Ingalls Shipbuilding, Inc., 879 So.2d 500 (Miss.Ct.App. 2004), *cert. denied* 882 So.2d 234 (2004).

**FACTS:** McArthur suffered injuries while working at Ingalls Shipyards as a diver employed to make underwater repairs to the shipyard's dry docks. An unpowered floating platform was pushed from one site to another by an outboard motor powered skiff and was used by the divers as a work area for a substantial part of this job. McArthur was injured after being sucked into the opening on this floating platform. McArthur alleged he was performing the duties of a seaman within the meaning of the Jones Act at the time of the injury. Summary judgment for Ingalls.

**ISSUE:** The issue in this claim is two-fold: (1) whether, at the time of his injury, McArthur could arguably be classified as a seaman within the meaning of the Jones Act ; and (2) whether certain floating structures serving some purpose in the maritime service fail, as a matter of law, to qualify as a "vessel in navigation" for purposes of the Jones Act.

The court first set out the test of who qualifies as a seaman, noting it involves not only the nature of the duties being carried out by the individual but necessarily includes the requirement that those duties be undertaken in connection with a vessel in navigation. While the Court noted that it is possible that one of two individuals involved in maritime-related activities and routinely performing the same tasks could qualify as a seaman while the other did not based solely on the question of whether the individual in question was sufficiently associated with a vessel in navigation, it concluded that this was not the instant case.

The Court further relied on precedent the Fifth Circuit that floating rigs, as a matter of law, fail to qualify as a vessel in navigation. This test was set out in *Bernard v. Binnings Constr. Co.*:

Since *Cook* we have, despite our reluctance to take Jones Act claims from the trier of fact, affirmed findings that, as a matter of law, other floating work platforms are not vessels. A review of these decisions indicates three factors common to them: (1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time of the accident; and (3) although they were capable of movement and were sometime moved across navigable waters in the course of normal operations, any transportation function they performed were merely incidental to their primary purpose of serving as work platforms.

*Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 841 (5<sup>th</sup> Cir. 1984).

The Court pointed out that the floating device in the instant case was a floating platform with no independent source of power and thus the granting of summary judgment was justified.

McArthur's alternative argument was, by virtue of the fact that he was working as a diver at the time of his injury, he was a seaman within the meaning of the Jones Act without regard to whether he had the necessary nexus at the time to a vessel in navigation, relying on *Wallace v. Oceaneering Int'l*, 727 F.2d. 427, 436 ( 5<sup>th</sup> Cir. 1984), which held that " a diver's work necessarily involves exposure to numerous marine perils, and is inherently maritime.....". The Court rejected this argument because *Wallace* further states that " a commercial diver.... has the legal protections of a seaman when a substantial part of his duties are performed on vessels." Id. ( emphasis added). In short, McArthur did not have the necessary nexus to a vessel in navigation, and that is an essential part of the definition of a Jones Act seaman.

6. Spencer v. Tyson Foods, Inc., 869 So.2d. 1069 (Miss.Ct.App. 2004)

**FACTS:** On April 20, 2000, Delores Spencer, while performing her job as a breast puller, experienced sharp pains in her neck, right shoulder, arm and hand. She reported this to the temporary nurse and was outfitted with a blue Ace bandage-like wrap. She was placed on “light duty” at a chicken washing station where she was not required to use the right arm. She was told she would lose the benefit of the upcoming holiday if she left work to see a doctor before the shift ended. She remained on the job, not willing to forfeit the upcoming holiday. Later that morning she tried to see her family doctor but was unable to because his office was closed for the holiday. By Friday, the motion on her right side was so limited that she was taken to the emergency room by her husband. Later she was treated by her family physician, Dr. L. C. Tennin. He opined that Spencer’s condition was the result of repetitive work motions which exacerbated an underlying condition, cervical spondylosis. Dr. Tennin referred her to a neurologist, Dr. Mitchell Myers, whose ultimate diagnosis was transverse myelitis, an inflammation of the spinal cord, with cervical spondylosis. Dr. Myers further opined that, while it was impossible to know which was the primary cause of the injury, there was no question that her work activities could exacerbate pre-existing spondylosis. Dr. Myers then consulted with a neurosurgeon, Dr. Adam Lewis, to operate on Spencer. Dr. Lewis felt that Spencer’s spinal cord was being compressed, and unless decompressed, Spencer would experience a worse problem.

Dr. Lewis’s operative notes gave a pre-operative diagnosis of cervical spondylosis with traumatic spinal cord injury. His diagnosis did not change after surgery. Dr. Lewis, through deposition, opined that it was repetitive motion from work that led to her injury. His reasoning was that traumatic events repeated over time led to weakness and there were no signs of upper respiratory infection or previous viral infection which is often present with transverse myelitis. His medical opinion that it was spondylosis was documented by an MRI. Spencer filed a petition to controvert alleging a workplace injury and the AJ awarded permanent total disability benefits. The Commission affirmed the award, but the Circuit Court reversed the Commission’s award, and Spencer appealed.

**ISSUE:** Whether the Commission’s decision was supported by substantial evidence? Tyson’s appeal was based in part on the fact Dr. Myers, a neurologist, diagnosed transverse myelitis as the primary cause of Spencer’s disability, and thus, not work related. Tyson further relies on the well-established rule that treating specialists’ opinion carry more weight than those of a general practitioner or a physician outside the specific area of expertise. Arthur Larson, Workers’ Compensation Law, § 130.05(4) (b) (2000). The court, rejecting this argument, noted that the Commission’s decision on the causal connection element was a factual decision determined by reconciling conflicting medical opinions, and was, therefore, based on substantial evidence. Commission decision reinstated.

7. Kitchens v. Jerry Vowell Logging, 874 So.2d 456 (Miss.Ct.App. 2004)

**FACTS:** Vernon Kitchens was injured in 1999. He was operating a skidder and was injured as one of the skidder doors struck him in the lower back. Following surgery he was referred to pain management treatment and diagnosed with a degenerative disc disease. Kitchens's shoulders required an arthroscopic surgical procedure as a result of that same injury. Due to the difficulty encountered in managing Kitchens' back problems a rehabilitation specialist, Dr. Howard Katz, was recommended to provide treatment. Dr. Katz testified by deposition and opined that Kitchens was exaggerating his symptoms. Dr. Katz subsequently referred Kitchens back to Dr. Lon Alexander the neurosurgeon. Finally, in January 2001, a lumbar discectomy was performed and a functional capacity report prepared on March 15, 2001 stated he could perform work at a sedentary level. On March 26, 2001, after Dr. Katz again examined Kitchens, Dr. Katz disagreed with the limitations and found that Kitchens had reached maximum medical improvement. He opined that Kitchens had persistent lumbago and degenerative disc disease that he felt was the basis of Kitchen's problems and assigned an impairment rating of 8%. He further opined that light work was possible. During a routine physical examination required by Mississippi Department of Transportation for a commercial license, Kitchens was found to have high blood pressure and thus "out of DOT range for passing the exam." There was no evidence offered that Kitchens' hypertension was related to his employment. The administrative judge found that the employer was willing to rehire claimant, with accommodations, at the same rate of pre-injury pay and that he had no loss of wage-earning capacity. The Commission agreed. The Appeals Court reversed and remanded. The Court found the fact that the market place would provide someone with Kitchens' limitations a position at his pre-injury wages only created a rebuttable presumption that there is no loss of wage-earning capacity and any other approach in evaluating the entitlement of benefits would ignore "the temporary and unpredictable character of post-injury earning."

**ISSUE:** There are two issues addressed ; 1) Whether a Commissioner acting as legal assistant in preparing a factual summary of medical evidence in the record to an administrative judge to relieve a backlog invalidated the Commission's action as ultimate fact finder, and ; 2) whether the offer to rehire at the pre-injury rate where there is an apparent and medically documented impairment negated a finding of loss of wage earning capacity. The Court of Appeals found no procedural invalidity to the Commission's resolution of this case based upon the fact that the one of Commissioner's assistance to the Administrative Judge did not rise to the level of taking charge of the administrative judge's decision making, and thus did not void the judicial deliberations of that administrative judge. As to the second issue, the Court reversed the decision denying permanent disability, and remanded the case for further deliberations to determine whether the workplace injury and present physical limitations were related, and whether Kitchens has a compensable permanent disability.

8. Bermond v. Casino Magic, 874 So.2d 480 (Miss.Ct.App. 2004)

**FACTS:** Claimant, Debra Bermond, slipped and fell while at work at Casino Magic. The administrative judge awarded temporary total disability beginning June 28, 2000 and ending December 12, 2000. The claimant's medical history revealed a preexisting condition for which she sought to attribute to the fall. Initially, the only reported injury was skinned kneecaps. Testimony revealed that Bermond specifically denied the problems in her left arm and fingers were work related according to her treating physician. She was diagnosed with degenerative changes to her spine and given work restrictions as to lifting. Claimant never returned to this doctor. Approximately six weeks later she saw a neurosurgeon and gave him a history of a fall at work. She presented an MRI and he performed a cervical discectomy. He opined that the fall at work caused "a considerable aggravation of her pre-existing condition" thus necessitating the surgery. The neurosurgeon admitted he was not aware of her initial failure to complain of a work related injury to any other portion of her body other than her knees prior to seeing him, but he still agreed that the fall and subsequent injury to her cervical region was work related. The administrative judge reopened the record to admit the accident report which shows the claimant initially reported injury to the knees only. After an award of benefits and medical services and supplies relating to Bermond's cervical injury, the employer/ carrier appealed. The Commission reversed the administrative judge and denied benefits.

**ISSUE:** Whether substantial evidence supported reversal of the administrative judge order. The findings and orders of the Mississippi Workers' Compensation Commission are binding on all appellate courts as long as its decisions are supported by substantial evidence. The Commission as the ultimate finder of fact was within its power to reject the administrative judge's opinion as long as substantial evidence supported the Commission's findings.

9. Cives Steel Co. Port of Rosedale v. Williams, 905 So.2d 661 (Miss.Ct.App. 2004), *cert. granted* 883 So.2d 1180 (2004), *judgment vacated* 903 So.2d 678 (2005).

**FACTS:** In November 1997 Walter Williams, Jr. suffered a compensable injury to his foot. Williams was awarded temporary total disability from November 12, 1997 to May 6, 1999. The nature of the crush injury required two surgeries on his foot, one in April of 1998 and the other in December of 1998. The claimant continued at Chives but was placed on “light duty” between the surgeries. After the second surgery he was demoted from a painter to a painter’s helper due to the length of his absence. He experienced swelling and sharp pain in his foot in this position which required long hours standing and walking. His treating physician referred him to a specialist in September 1999 and as a result he was restricted further to standing no more than sixty consecutive minutes. Chives would not allow him to return to work with these restrictions. Presently Williams is still under the care of a pain management specialist and is on several pain medications a day. Williams found employment with Federal Express as a driver and delivery person on a part-time basis. Federal Express accommodated him with an automatic transmission vehicle after he experienced problems clutching with the injured foot. He earns \$66.00 per day, and on average he works twenty-six days for every forty-five days. He also earns approximately \$100.00 per week mowing yards in the summer months. Dr. Mark Wolgin, Williams primary treating physician assigned a 7% rating to the whole body. The administrative judge awarded permanent partial disability benefits based on the whole body based impairment pursuant to § 71-3-17 (c) (25). The employer/carrier appealed and advanced the argument that the proper position was to adopt the opinion of Dr. Vohra, who performed an independent evaluation of Williams and opined he had a 10% disability rating to the left foot only.

**ISSUE:** The issue is whether Williams sustained a permanent partial disability to the whole body or permanent partial disability to a scheduled member. The Court held the proof was sufficient to justify a finding that the “effect” of claimant’s injury as opposed to the “point of impact” was more to the whole body than to the foot. The award of benefits under §71-3-17 (c) (25) for a loss of earning capacity was affirmed.

**Justice Southwick dissented**, arguing that because the Circuit Court had ordered a remand of the case to the Commission for additional evidentiary proceedings, the appeal to the Court of Appeals was interlocutory, and should be dismissed. Justice Southwick also disagreed with the conclusion that claimant’s foot injury should be treated as permanent partial disability under § 71-3-17 (c) (25).

10. Sherwin Williams v. Brown, 877 So.2d 556 (Miss.Ct.App. 2004)

**FACTS:** On October 7, 1999 claimant, Michael Brown, reported a compensable injury he received on September 23, 1999. Employer supplied the necessary medical and weekly benefits required by law. Upon completing his range of treatment one of his treating physicians opined he should not return to his job as a carpet installer and released him with a 10 % disability to the body and referred him to Dr. Michael Winkleman. After the institution of a vigorous physical therapy program, Dr. Winkleman also discharged the claimant with restrictions and a ten percent permanent partial rating to the whole body. Furthermore, a vocational rehabilitation specialist recommended against returning to the position of carpet installer. In view of the medical rating, job restrictions and usual occupation coupled with limited education and other factors the Commission awarded 100% permanent disability despite the 10% medical permanent partial rating to the whole body .

**ISSUE:** Whether the evidence supports the claimant's award of permanent total disability. The Court of Appeals affirmed an award of permanent total disability notwithstanding the medical rating of 10% permanent partial disability.

11. Hancock v. Mississippi Forestry Commission, 878 So.2d 1058 ( Miss.Ct.App. 2004)

**FACTS:** James D. Hancock received a compensable injury in 1995. Upon fulfilling their obligation as provided by law the employer/carrier presented the claimant a B-31 which he signed. This form was filed with the Commission on November 30, 1995. In May 2002, Hancock attempted to have his claim reopened.

**ISSUE:** Whether the employer/carrier is under obligation to give verbal notice of the one year statute of limitations at the signing of the B-31. The Court affirmed the Commission's decision on the barring of the claim making it clear that whether or not claimant had actual verbal communication as to the implications of the B-31 he signed, his attempt to reopen his claim is barred as notice was provided in the time and manner prescribed by law and properly filed with the Commission.

12. Sellers v. Tindall Concrete Products, Inc., 878 So.2d 1096 (Miss.Ct.App. 2004)

**FACTS:** Claimant, John Sellers, received a compensable injury February 1997. He returned to work on restricted duty in April 1997. In June 1997 he received steroid injections for pain and was prescribed a course of physical therapy. Dr. Howard Smith, a neurosurgeon who administered this treatment, opined claimant magnified his symptoms and did not give maximum effort in physical therapy. Dr. Smith ordered diagnostic studies, including a CAT scan and MRI which revealed a herniated disc, but he opined that claimant's symptoms were inconsistent with a herniated disc and did not believe surgery would be beneficial. Over the course of the next year several doctors were involved in claimant's care including Dr. Bazzone who opined claimant's pain was caused by scar tissue swelling. After a follow up visit to Dr. Bazzone in May 1998 he opined the claimant had reached maximum medical improvement. Sellers continued treatment with Dr. Bazzone who eventually referred him to Dr. Paul Stanton, an orthopaedic surgeon. Dr. Stanton recommended a fusion to stabilize claimant's spine, however, this procedure was never performed as Dr. Stanton moved away. Dr. Michael Lowry, a neurosurgeon felt a fusion would not be beneficial due to lack of evidence of instability in the lumbar spine. Instead, Dr. Lowry recommended a morphine pump.

Several doctors were sought out by claimant all with regard to pain. Eventually Dr. Carrie Alexander, a family physician, became concerned with the amount of narcotic medications the claimant was taking and released him from her care. Dr. McAfee, a specialist in pain management, evaluated Sellers for advanced pain therapy. Dr. McAfee later testified that Sellers' examination was inconsistent with the reported pain history. Finally, on May 19, 1998, the Commission ruled that Sellers had reached maximum medical improvement with a 25% loss of wage earning capacity. Claimant appealed the finding as to maximum medical improvement status and the 25% loss of wage earning capacity.

**ISSUE:** Whether claimant met his burden of establishing loss of wage earning capacity in excess of the 25% awarded by the Commission. The Court affirmed the Commission's award based on the fact claimant has varied experience, training and work history that left no doubt claimant could perform other jobs that would allow him to perform within his physical limitations. In addition, his failure to display full effort in physical therapy, the claimant's refusal to cooperate in the functional capacity evaluations and questionable efforts to find employment, all supported the Commission's determination.

13. Barber Seafood, Inc. v. Smith, 906 So.2d 1 (Miss.Ct.App. 2004), *cert. granted* 893 so.2d 1061 (2005), *aff'd in part, rev'd in part* 911 So.2d 454 (Miss. 2005)

**FACTS:** Sandra Louise Smith suffered a compensable injury from a slip and fall incident on December 31, 1998 . The next day she went to the emergency room where she was treated for pain in her back and right hand. Claimant reported her right hand was injured when she attempted to break her fall. Over the course of the next three months claimant visited Dr. McRaney, her family physician, and was referred to other medical care givers. She saw an orthopedic surgeon, a neurological-orthopedic surgeon, a physician who specialized in pain management, a physical therapist and a psychologist. Evidence from the many tests and examinations between February 23, 1999 and May 13, 1999 revealed that claimant was experiencing problems with two separate areas in her lower thoracic or lumbar region. The Commission found that claimant suffered a 25% loss of future wage earning capacity as a result of an injury at L5-S1, but found a lack of proof that the injury at L4-5 was work related.

**ISSUE:** Whether claimant's efforts to find other employment justifies an award of loss of wage earning capacity for the compensable injury. The Commission found that claimant's efforts to secure other work was not "so unreasonable as to preclude an award altogether", and the Court affirmed Commission's finding of a 25% loss of future earning capacity. Further the claimant's cross-appeal contends that the injury at L4-5 level was related to the work injury and that the introduction of contrary medical proof was in error because the employer/carrier did not give proper notice of the evidence adduced from a deposition taken after the hearing before the administrative judge. The Court found that this assignment of error was without merit because all parties were present for the deposition and the rules of the Commission specifically permit considering additional evidence taken after the initial hearing under Miss. Workers' Comp. Procedure Rules 8 & 9. The Court also affirmed the Commission's decision that one of the two claimed injuries was not work-related.

14. Descendants of Gilmer v. Nolen Sistrunk Trucking, Inc., 892 So.2d 825 (Miss.Ct.App. 2004)

**FACTS:** The natural daughter of the deceased employee filed a petition to controvert alleging she and the natural grandchildren were dependents of the deceased worker as defined by the Act. The employer carrier admitted the compensability of the claim but denied the existence of death beneficiaries. In an amended petition to controvert another grandchild was added, all of whom are the children of the same natural daughter. Based on the definition of dependants and evidence presented, the Commission denied benefits to all parties and the Circuit Court affirmed.

**ISSUE:** Whether substantial evidence supported denial of dependant status to the natural daughter and natural grandchildren of the deceased. Pursuant to the Mississippi Workers' Compensation Act all questions of dependency are determined as of the time of the injury. The definition of "child" includes only persons who are under eighteen years of age or persons over eighteen who are wholly depend upon the deceased employee and incapable of self-support by reason of mental or physical disability. Daughter failed to prove total dependency on the deceased due to her age (26) and marital status in spite of the fact she had a disability. Regardless of her testimony that she relied on the deceased "for almost everything", and the fact that he gave her cash each month during the year prior to his death, her dependency argument failed. Although the parties stipulated that the three children involved were the natural "grandchildren" as defined by the Act, the Commission's decision that the three grandchildren were also not dependents was supported by substantial evidence.

15. Richards v. Harrah's Entertainment, Inc., 881 So.2d 329 (Miss.Ct.App. 2004)

**FACTS:** Claimant suffered a compensable back injury in April 1995 and was released and given an impairment rating of two to seven percent to his whole body. He was given a weight lifting restriction of no more than twenty to twenty-five pounds. Claimant continued working for the same employer at the same rate of pay but was later terminated due to his contentions that he could not stand for long periods of time. He began working with a cleaning service in 1996 at a higher rate of pay and subsequently received a promotion to manager with a further increase in earnings. He was terminated from the cleaning job for reasons not related to his injury. Claimant worked at several cleaning jobs all involving the same type of work and his income varied within two or three dollars per hour more or less than his earnings at the time of his injury. The Claimant appealed an award from the Commission finding he had a fourteen percent loss of wage earning capacity. The Circuit Court awarded Claimant thirty percent loss of wage earning capacity.

**ISSUE:** Whether the award by the Commission was supported by substantial evidence. The Court held that the decision of loss of wage earning capacity is "largely factual and is to be left largely to the discretion and estimate of the Commission." It further found that the Commission's order of fourteen percent loss of wage earning capacity was supported by substantial evidence reversing the Circuit Court and noting that the Commission considered the claimant's age, education and work history as well as his medical impairment.

16. Merit Distribution Services, Inc. v. Hudson, 883 So.2d 134 (Miss.Ct.App. 2004)

**FACTS:** Claimant, Susan A. Hudson, received a compensable injury on December 7, 1998. As a trucker, claimant made an attempt to close the rear of her truck and fell to the concrete dock adjacent to the truck. She experienced immediate pain in her neck and back. On that same day she reported the injury to her employer's dispatcher in addition to reporting the completion of the delivery. Claimant sought treatment the next day from a physician. Five days later she collapsed due to severe pain and was treated at the emergency room. Claimant eventually underwent two surgeries associated with the injury. Finally, two years after treatment at the Methodist Pain Institute and the use of prescribed pain medication Dr. Roger Cicala, a pain management specialist, assigned her a whole body impairment rating of 14%. He further restricted her to lifting no more than twenty pounds and opined that she could no longer drive trucks. Employer disagreed with the findings of permanent total disability by the Commission and assigned two basis for their objections. The initial objections of the employer were, in their opinion, an insufficient effort to find employment and the inconsistencies in the lay witnesses' versions of the specifics of the injury the claimant sustained. The Circuit Court, however, found substantial evidence to support their decision for total disability.

**ISSUE:** Whether the claimant made a reasonable effort to find work within the restrictions given by her doctor, thus proving the essential element of her claim for permanent total disability. Despite inconsistencies by her lay witnesses as to the specifics of the accident, the Court agreed with the Commission that claimant had met her burden of proof and that her employer had failed to rebut her prima facie case. In affirming the Commission, the Court looked to *Thompson v. Wells-Lamont Corp.*, 362 So.2d 638,641 (Miss. 1978) for factors to be considered in deciding the issue of sufficiency of evidence as to a legitimate job search which include: (1) economic and industrial aspects of the local community, (2) the jobs available in the community, and (3) the claimant's general educational background, including work skills and the particular nature of the disability for which compensation is sought.

17. Alumax Extrusions, Inc. v. Hankins, 902 So.2d 586 (Miss.Ct.App. 2004)

**FACTS:.** On October 17, 1995 Paul Hankins, suffered a compensable injury when he stepped from the trailer portion of his tractor trailer, fell onto the concrete and fractured his right hip. Dr. Andrew H. Crenshaw treated claimant and immediately performed surgery to repair the multiple hip fracture on the day of the accident. On February 19, 1996 he was released to light duty but continued physical therapy until August 12, 1996 at which time he was released to full duty with a fifty pound weight restriction. In January 1997 claimant again was seen by Dr. Crenshaw who prescribed a shoe lift for the noticeably shorter right leg. Claimant had developed considerable pain in his back and in the opposite knee. He was prescribed pain medication and at that time it was recommended that he be allowed to use a lighter weight tarpaulin on his truck. Dr. Crenshaw also ordered a functional capacity evaluation to assess his work capabilities. In November 1997, prior to his releasing claimant, Dr. Crenshaw assigned a fourteen percent permanent impairment to the right lower extremity. In February 1998 an independent medical examination was performed by Dr. Mark Steven Harriman who opined that claimant did not have a leg-length inequality. He assigned a ten percent limitation to the whole person. Claimant continued to work while seeing various doctors including pain management professionals. The employer, on several occasions, alternated claimant's duties from long-haul to short-haul driving beginning May 1996. It was stipulated that claimant earned from \$400.00 to \$600.00 per week for the short-haul assignments whereas he earned approximately \$800.00 or more a week on long-hauls. The employer assigned light duty work for a period of eight months including a packer position, a dock worker in shipping and short haul assignments. The packing assignment required him to walk twelve hours a day as well as perform strenuous, repetitive bending and standing; therefore, he asked his safety manager for a transfer after only two hours. Claimant returned to shipping and despite his pain he was able to continue for eight months. Claimant on one occasion interviewed for a dispatcher job with the employer, but was not hired. He then requested a job as a short-haul driver, positions in security or in the office to map out deliveries.

Finally in March 1999, the employer informed claimant he must return to packing or long hauls or go home. Claimant seeing no other alternatives to packing returned to long-hauls. Three and one-half weeks later, realizing he could not physically perform, he tendered his resignation. The Commission awarded the claimant permanent disability of \$252.59 per week for 450 weeks beginning April 8, 1997, based on a \$400.00 per week LWEC.

**ISSUE:** Whether substantial evidence exist to justify the award based on claimant's inability to secure employment at this pre-injury salary. The employer contends that Commission's decision on claimant's effort to find work was not supported by substantial evidence. The Court however, pointed out that the claimant made several unsuccessful attempts with the employer and a local union for other positions, and this was a reasonable job search. In fact, he eventually secured part time work with the county school system as a bus driver. The Commission's finding that Claimant suffered a \$400.00 per week LWEC was supported by substantial evidence.

18. Gallagher Bassett Services, Inc. v. Jeffcoat, 887 So.2d 777 (Miss.Ct.App. 2004)

**FACTS:** Jeffcoat was injured in a company vehicle as the result of the negligence of an uninsured driver of another vehicle. Jeffcoat asserted a claim against the uninsured motorist insurance coverage maintained by his employer on all company vehicles. Eventually, Jeffcoat was forced to file suit against Gallagher Bassett claiming that Gallagher, as the claims adjusting agent of Reliance Insurance Company, was guilty of gross negligence, malice or reckless disregard of his rights in the handling of his uninsured motorist claim. Gallagher never denied the uninsured motorist claim made by Jeffcoat, but it took ten months after suit was filed before Gallagher paid any of the benefits which were due Jeffcoat. A large part of the delay was attributable to the fact that the Gallagher adjusters were not licensed in Mississippi, and hence were not familiar with Mississippi law regarding the stacking of uninsured motorist coverages; Gallagher also was not able to document how many uninsured motorist policies had been issued to the insured (Jeffcoat's employer) so that the total uninsured motorist limits could be determined.

**ISSUES:** (1) Was Gallagher independently liable to Jeffcoat for the actions it took in adjusting his claim? The Court noted the test of liability for an agent or adjuster is whether the agent's or adjuster's conduct amounted to "gross negligence, malice, or reckless disregard for the rights of the insured." Such an entity "may not be held independently liable for simple negligence in connection [with] its work on a claim." Here, the Court found that Gallagher was, at worst, negligent, and therefore, not independently liable to Jeffcoat. (2) Was Gallagher guilty of negligence *per se* based on its failure to comply with the adjuster licensing laws of the State of Mississippi? The Court held that "to prevail in an action for negligence *per se*, a party must prove that he was a member of the class sought to be protected under the statute, that his injuries were of a type sought to be avoided, and that violation of the statute proximately caused his injuries." The Court noted that "negligence *per se*" is but another method of establishing simple negligence, and because simple negligence would not make Gallagher independently liable to Jeffcoat, the point is moot. (3) Jeffcoat raised conspiracy and fraud claims as well, but the Court rejected these.

19. Tanks v. Lockheed-Martin Corp., Civil Action No. 4:03CV408LN (U.S.Dist.Ct., S.D.Miss. 8/13/04)

**FACTS:** Plaintiff Erica Tanks, as administrator of the estate of Thomas Willis, filed a wrongful death suit against Lockheed. This suit arose out of the shooting death of Thomas Willis by Douglas Williams, a Lockheed employee who entered the Lockheed facility in Meridian, MS on July 8, 2003 and went on a shooting rampage, killing Willis and six other employees. Unquestionably, Willis' death occurred while he was on the job.

**ISSUE:** The key issue is whether the wrongful death claim filed by Tanks should be barred by the exclusive remedy provision of the Workers' Compensation Law. The District Court held that Tank's civil claim arising out of the death of Willis was not to be barred by the exclusive remedy provision of the Workers' Compensation Law. The District Court interpreted Mississippi law as pronounced by the Supreme Court and Court of Appeals to permit suits outside the Workers' Compensation Law when, as in this case, the assailant (also an employee of Lockheed) committed an intentional act outside the course and scope of his employment, and this intentional act was not directed at the decedent because of his employment. The District Court reasoned that an employee's intentional torts against another employee which are committed outside the course and scope of employment, and which are not directed against the fellow employee because of his or her employment, are not covered under the Workers' Compensation Act because the employee/assailant in that scenario is not considered an "employee," but a "third" person instead; and, because the Act's definition of injury includes willful acts by a third person directed against an employee, but only if directed because of the employment.

20. Public Employees' Retirement System v. Smith, 880 So.2d 348 (Miss.Ct.App. 2004), *cert. denied* 880 So.2d 348 (2004).

**FACTS:** Smith, a former State Hospital employee, appealed from a PERS decision which denied his claim for disability benefits. Smith claimed that he was disabled as the direct result of a job related injury, an essential requirement for disability retirement through PERS.

**ISSUE:** The central issue was whether Smith's disability was the result of an on the job injury. One piece of evidence offered in support of this claim was a compromise workers' compensation settlement which Smith and his employer had previously entered into. In finding this settlement agreement unpersuasive, the Court stated that although "the State Hospital paid benefits and reached a settlement with Smith over the injury, the settlement does not support a conclusion that Smith's disabling injury occurred [on the job.]" The workers' compensation settlement stated in pertinent part that "without any admission of liability whatsoever, this employer joins in the foregoing Petition and prayer thereof for the specific purpose of concluding and compromising this disputed claim." Given this language, the Court held the workers' compensation settlement was not an admission of liability for an on the job injury, and "neither the circuit court nor this Court can or should treat it as such."

21. Alfa Insurance Corp. v. Ryals, 2004 WL 1326702 (Miss.Ct.App. 6/15/04), *cert. granted* 892 So.2d 824 (2005), *judgment reversed* 2005 WL 1704428 (Miss.Sup.Ct. 07/21/2005).

**FACTS:** Wrongful death beneficiaries brought action against their own insurance carrier to recover uninsured motorist benefits after Kenneth Ryals was killed by a falling tree which the Miss. Dept. of Transportation had failed to topple and remove with an uninsured DOT vehicle.

**ISSUE:** Whether recovery against MDOT under the Miss. Tort Claims Act was the exclusive remedy of the Ryals beneficiaries, and therefore, precluded them from recovering uninsured motorist benefits under their own insurance policy. Recovery under their own uninsured motorist coverage depended on whether the Ryals' were "legally entitled to recover", and it was ALFA's position the recovery under the Tort Claims Act represented the Ryals' exclusive remedy, in the same way that workers' compensation benefits represent an injured workers' exclusive remedy. The Court discussed the interplay between uninsured motorist benefits and workers' compensation benefits, and reiterated its earlier decisions to the effect that a person entitled to benefits under the Workers' Compensation Act is not entitled as well to uninsured motorist benefits from his insurer. "The employee was not entitled to recover uninsured motorist benefits from him insurer because workers' compensation is the employee's exclusive remedy." The Court went on to hold that recovery under the Tort Claims Act was not an exclusive remedy, and that uninsured motorist benefits were recoverable in this case.

22. Thornton v. W. E. Blain & Sons, Inc., 878 So.2d 1082 (Miss.Ct.App. 2004)

**FACTS:** Blain was a general contractor, and Magco was a subcontractor for Blain on a construction job. Thornton, an employee of Magco was killed when a piece of construction equipment on which he was riding was struck by a backhoe being operated by a Blain employee. Thornton's survivors commenced a wrongful death action against Blain, which the circuit court dismissed on summary judgment based on the exclusive remedy provision of the Workers' Compensation Law.

**ISSUE:** (1) Whether Blain, as the general contractor, was the statutory employer of Thornton under the Workers' Compensation Law, and thus immune from civil suit, or a third party amenable to civil suit? Relying on Miss. Code Ann. §71-3-7 which states that a general contractor shall be liable for and shall secure compensation to any uninsured employees of a subcontractor, the Court found that Blain was immune from civil suit. Thornton argued that because Magco, the subcontractor, was insured, Blain should not be able to enjoy the immunity afforded a statutory employer because Blain did not "secure" the payment of compensation to Magco employees. Blain's contract with Magco required Magco to supply its own workers' compensation insurance, and in fact, Magco had been insured for many years. Relying on precedent, however, the Court said that for exclusive remedy purposes, there is no distinction between general contractors who contractually require their subcontractors to carry insurance, and general contractors that hire subcontractors who are already insured. "[T]he overall responsibility fo the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of 'third party'." (2) Thornton also argued an exception to the exclusive remedy rule should be made "in those instances where the employer engages in misconduct knowing that death or serious injury is 'substantially certain to occur.'" The Court, again relying on precedent, refused to recognize this exception.

23. Hardaway Co. and St. Paul Fire and Marine Ins. Co. v. Harvey Bradley, 887 So.2d 793 (Miss. 2004).

**FACTS:** Harvey Bradley filed a workers' compensation claim for a work related injury. The dispute centered around whether claimant needed surgery for his injury. The Workers' Compensation Commission ruled the claimant did not need surgery and the Circuit Court reversed in favor of the claimant. The employer appealed to the Court of Appeals which affirmed the Circuit Court based on Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308 (Miss 1997). Dr. Frenz treated the claimant and found his condition warranted surgery after conservative treatments failed. Mr. Bradley was treated by various other physicians and finally an independent medical examination was conducted by Dr. Lon Alexander. Dr. Alexander concluded surgery was unwarranted. Dr. Howard Katz conducted four separate independent medical examinations finding the results unreliable, and no explanation for inconsistencies in the testing results. In addition, the physical therapist concluded that Bradley did not give maximum effort and magnified his symptoms. Two physicians concluded that Bradley did not need surgery one concluded he did.

**ISSUE:** Whether substantial evidence supported the decision of the Commission. The Court points out that, "*Spann* stands for the proposition that if all physicians agree that a certain medical treatment would benefit the employee and there is no credible evidence to the contrary, the Commission is then obligated to authorize the treatment." The Court concluded that substantial evidence supported the findings of the Commission, and reinstated its original ruling denying surgery based on the fact that two of three physicians opined surgery was unnecessary in this case. The Court clarified that *Spann* does not require the approval of surgery just because the treating physician deems it necessary.