#558

Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER)

Report to
the Mississippi Legislature

The Mississippi Workers' Compensation Commission: A Review of Its Adjudicative Functions

In Mississippi, the adjudication of workers' compensation claims utilizes a three-member Workers' Compensation Commission and eight administrative law judges. The commission is the ultimate trier of fact in all cases and may derive new findings of fact or weigh evidence differently from the administrative law judge who initially hears the case. Administrative law judges are commission appointees who hear contested matters, including motions, and hearings on the merits. Their decisions are appealable to the full commission.

PEER found that the commission often modifies administrative law judges' findings of fact without a clear basis for doing so. Additionally, the commission often orders reversals and modifications without clearly explicated reasons. Such actions result in parties not being able to rely on the results of an administrative law judge's decision and add time to the adjudication of claims.

Also, the commission's rules and practices have not ensured statutorily compliant and efficient operations. A portion of General Rule 9 of the commission (regarding hearings to compel medical treatment under certain conditions when a claimant's temporary total disability benefits have been terminated) is not in conformity with MISS. CODE ANN. Section 71-3-17 (1972). Rule 10 gives the commission discretion regarding oral argument, which could work to the detriment of a party if such party is not able to argue against new evidence. Also, because the commission assigns a limited number of administrative staff to support the administrative law judges, the commission does not ensure efficient production of orders in controverted cases.

December 13, 2011

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The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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On December 13, 2011, the PEER Committee authorized release of the report entitled **The Mississippi Workers' Compensation Commission: A Review of Its Adjudicative Functions.**

Representative Harvey Moss, Chair

This report does not recommend increased funding or additional staff.

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Problem Statement

In Mississippi, the adjudication of workers' compensation claims utilizes a three-member Workers' Compensation Commission and administrative law judges appointed by the commission. In recent years, some members of the Mississippi Bar have raised concerns about potential biases of the current commission and whether its purpose is to adjudicate claims of injured workers fairly or whether its purpose is solely to protect the economic interests of employers.

A legislative request was made to the PEER Committee to review certain aspects of the adjudicative process to determine whether the commission's practices have resulted in the fair administration of the Workers' Compensation Act [MISS. CODE ANN. Section 71-3-1 et seq. (1972)].

Scope

PEER limited this review to the following issues:

- Has the Workers' Compensation Commission adequately provided clear, principled legal grounds for reversal or modification of orders in cases wherein it specifically set aside a ruling of an administrative law judge consistent with commonly accepted standards of review and the need for expeditious delivery of benefits to claimants?
- Has the commission adopted rules and practices to ensure statutorily compliant and efficient operations?

Background: The Workers' Compensation Commission

In 1948, the Mississippi Legislature adopted the Workers' Compensation Act and made the Workers' Compensation Commission responsible for administering that law. By statute, the commission has three members, one of which

must be an attorney. The other two members represent employers and employees, respectively.

The commission has both rulemaking and adjudicative functions. Administrative law judges hear contested matters, including motions, and hearings on the merits. Their decisions are appealable to the full commission. The commission is the ultimate trier of fact in all cases and may derive new findings of fact or weigh evidence differently from the administrative law judge who initially hears the case.

The Concept of Workers' Compensation

Workers' compensation laws evolved during the early twentieth century in recognition of the fact that tort doctrine required that cases of workplace injury be litigated, thereby causing employees to wait for long periods for any recovery that they might receive. Workers' compensation remedies ensured an expeditious provision of benefits to the injured employee in exchange for the employee's surrendering any rights he or she might have had to sue in tort for negligence.

The decision upholding the constitutionality of the 1948 Mississippi workers' compensation statute found compelling the need to provide an expeditious remedy for workplace injury and, while providing the employee with a relatively quick remedy, inured benefit to the employer by narrowing the benefits available to the claimant.

The courts have set out certain principles of statutory construction that are to guide adjudicators in making decisions regarding claims for workers' compensation benefits. These principles make it clear that the purpose of the statute is not to make a "level playing field" for the resolution of claims, but to give all doubts in close cases to the claimant over the employer or carrier.

Conclusions Regarding Adjudicative Functions of the Workers' Compensation Commission

PEER notes that state law gives the Workers' Compensation Commission broad authority to review all matters of law and fact in any matter brought before the commission. This gives the commission broader authority than most appellate bodies in the legal system, as it essentially permits a re-trial of issues of fact already tried at the administrative hearing before an administrative law judge.

In appellate courts, the basis for deciding cases should be clearly articulated and understandable (i. e., applying the

principle of transparent reasoning) for all interested parties in workers' compensation cases. The need for transparent reasoning is just as compelling for workers' compensation cases, as such explication may impact how decisions are made in similar cases in the future.

Also, the standards of review applied in appellate court are the most appropriate for ensuring that the processes of handling workers' compensation appeals will be expeditious. In Mississippi, appeals courts generally will not reverse a trial court's finding of fact except in those cases in which the court finds that the finding is clearly erroneous or not supported by substantial evidence. Additionally, courts have held that the trier of fact in a bench trial has sole responsibility for determining the credibility of witnesses.

Regarding the two questions that the review addressed, PEER found the following:

- Has the Workers' Compensation Commission provided clear, principled legal grounds for reversal or modification of orders in cases wherein it specifically set aside a ruling of an administrative law judge consistent with commonly accepted standards of review and the need for expeditious delivery of benefits to claimants?

  No. The Workers' Compensation Commission often modifies administrative law judges' findings of fact without a clear basis for doing so. Additionally, the commission often orders reversals and modifications without clearly explicated reasons. Such actions result in parties not being able to rely on the results of an administrative law judge's decision and add time to the adjudication of claims.

- Has the commission adopted rules and practices to ensure statutorily compliant and efficient operations?

  No. A portion of General Rule 9 of the commission (regarding hearings to compel medical treatment under certain conditions when a claimant's temporary total disability benefits have been terminated) is not in conformity with MISS. CODE ANN. Section 71-3-17 (1972). Rule 10 gives the commission discretion regarding oral argument, which could work to the detriment of a party if such party is not able to argue against new evidence. Also, because the Workers' Compensation Commission assigns a limited number of administrative staff to support the administrative law judges, the commission does not ensure efficient production of orders in controverted cases.

Policy Options and Recommendation

Policy Options for Legislative Consideration

The Legislature may wish to eliminate the commission or to make procedural modifications in the commission's functions to ensure that cases are professionally adjudicated by persons knowledgeable in the workings of the workers' compensation system.

To address the problems set out in this report, PEER sees two policy options for the Legislature to consider:

- *Option One: Eliminate the Workers' Compensation Commission*--The Legislature could abolish the Workers' Compensation Commission and subsequently create an office with an Executive Director appointed by the Governor, establish a procedure for appointing administrative law judges with set terms of office, and provide for appeals to the Mississippi Court of Appeals.
- *Option Two: Revise the Role and Composition of the Workers' Compensation Commission*--The Legislature could amend MISS. CODE ANN. Section 71-3-85 (1972) and revise the commission's membership to reflect the need for members who have extensive legal training. Also, the Legislature could amend MISS. CODE ANN. Section 71-3-47 (1972) to require the commission to review the appeals brought before it entirely on the record.

Administrative Recommendation

Whether the Legislature eliminates the commission and creates a new office, revises the role and composition of the commission, or retains the commission in its present form, the entity that administers Mississippi's workers' compensation law should:

- make internal adjustments in the duties of staff to provide the administrative law judges with necessary clerical and editing support for the preparation of orders; and,
- review the entity's rules for conformity with statutes. In cases wherein the rules do not comport with statutes, the entity should make appropriate amendments to the rules or recommend that the Legislature make substantive changes to enabling legislation to reflect appropriate policy.

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The Mississippi Workers' Compensation Commission: A Review of Its Adjudicative Functions

Introduction

Authority

The PEER Committee reviewed the adjudicative functions of the Mississippi Workers' Compensation Commission. The Committee acted in accordance with MISS. CODE ANN. Section 5-3-51 et seq. (1972).

Purpose

In Mississippi, the adjudication of workers' compensation claims utilizes administrative law judges and the members of the Workers' Compensation Commission (see pages 4 and 5 for a more detailed discussion of the functions of Mississippi's commission).

Because of concerns raised by several members of the bar and communicated to a member of the Legislature (see "Problem Statement," below), the PEER Committee sought to determine whether the Mississippi Workers' Compensation Commission's practices have resulted in fair administration of the state's Workers' Compensation Act (MISS. CODE ANN. Section 71-3-1 et seq. [1972]).

Problem Statement

In recent years, some members of the Mississippi Bar have raised concerns about potential biases of the current Workers' Compensation Commission and whether its purpose is to adjudicate claims of injured workers fairly or whether its purpose is solely to protect the economic interests of employers.

In August 2009, concerned attorneys presented information to the Insurance Committee of the Mississippi House of Representatives regarding what they considered to be bias in the process by which the Workers' Compensation Commission handled appeals. The Chairman of the commission noted that the statistics presented were misleading because they did not consider

instances in which the commission affirmed decisions of the administrative law judges.

Subsequent to 2009, concerned parties continued to seek review of the processes of the Workers' Compensation Commission. A legislative request was made to the PEER Committee to review certain aspects of the adjudicative process to determine whether the commission's practices have resulted in the fair administration of the Workers' Compensation Act (MISS. CODE ANN. Section 71-3-1 et seq. [1972]).

Because considerable discretion is to be expected in the process by which facts are found and weighed and principles of law are applied, legislative committees such as PEER must be circumspect in their study of adjudicative functions. However, in some cases, legitimate questions of policy may arise that require the investigation of the adjudicative process.

Scope

In view of what has been set out above, particularly the support from the Mississippi Bar's Workers' Compensation Section for the administrative law judges, the PEER Committee chose to limit this review to the following specific issues:

- Has the Workers' Compensation Commission adequately provided clear, principled legal grounds for reversal or modification of orders in cases wherein it specifically set aside a ruling of an administrative law judge consistent with commonly accepted standards of review and the need for expeditious delivery of benefits to claimants?
- Has the commission adopted rules and practices to ensure statutorily compliant and efficient operations?

Method

In conducting this review, PEER:

- reviewed statistics on 1,434 of the Workers' Compensation Commission's decisions in which the commission reviewed decisions of administrative law judges between the years 1997 and 2011. These decisions were identified in data provided by the commission. This analysis excluded instances wherein the commission ruled on discovery motions, motions to dismiss, matters held in abeyance, or were matters that did not result in a ruling on the merits;

- sampled 200 cases from the pre-2007 period and 173 from the post-2007 period[1] to determine the amount of time it takes an administrative law judge to produce an opinion from the close of hearings. Because complete data for cases in the sample was not available, PEER could only make conclusions about the particular cases for which data was available;
- of the 173 cases sampled from the post-2007 period, PEER individually reviewed 24 cases from 2010 and 2011 to determine the amount of time the commission's review added to the process of adjudication;
- reviewed the texts of approximately 200 decisions rendered by the commission between the years 1997 and 2011;
- reviewed the rules of the commission; and,
- reviewed the commission's budget information and organization chart.

[1] January 1, 2007, was the point at which the current gubernatorial administration gained control of the majority of appointments to the Workers' Compensation Commission.

Background: The Workers' Compensation Commission

Statutory Authority, Structure, and Functions of the Commission

The Mississippi Workers' Compensation Commission is the administrative agency charged with the responsibility of administering the workers' compensation law. The commission is the ultimate trier of fact in all cases and may derive new findings of fact or weigh evidence differently from the administrative law judge who initially hears the case.

Statutory Authority

In 1948, the Mississippi Legislature adopted a workers' compensation law (MISS. CODE ANN. Section 71-3-1 et seq. [1972]) and made the Workers' Compensation Commission responsible for administering that law.

In 1948, the Mississippi Legislature adopted a workers' compensation system for Mississippi's workers (see MISS. CODE ANN. Section 71-3-1 et seq. [1972]). This system represented a balancing of the rights and interests of workers and their employers. Workers receive certain benefits to be determined expeditiously without having to prove that the employer was at fault. In exchange, the worker gives up the right to sue in tort. The employer, while giving up protections of the common law system and bearing the burden of providing insurance against such claims, has liability limited to lost wages and medical costs associated with the injury, thereby sparing the employer from other things generally compensable under the common law system--e. g., pain and suffering, punitive damages.

The Mississippi Workers' Compensation Commission is the administrative agency charged with the responsibility of administering the workers' compensation law. Specific to the operations of the commission, MISS. CODE ANN. Sections 71-3-95 through 71-3-100 (1972) set out the agency's structure and general responsibilities for administering the state's workers' compensation program.

Structure

By statute, the commission has three members, one of which must be an attorney. The other two members represent employers and employees, respectively.

The commission is comprised of three commissioners appointed by the Governor with the advice and consent of

the Senate. Commissioners are appointed for staggered terms. One member must be a licensed attorney, one member is to be a representative of employers, and one member is to be a representative of employees. The Governor designates the chair of the commission.

MISS. CODE ANN. Section 71-3-93 (1972) authorizes the commission to hire administrative staff, including eight administrative law judges, secretaries, and other employees necessary to the administration of the workers' compensation law.

Functions

The commission has both rulemaking and adjudicative functions. The commission is the ultimate trier of fact in all cases and may derive new findings of fact or weigh evidence differently from the administrative law judge who initially hears the case.

The commission carries out both rulemaking and adjudicative functions. Rulemaking functions are subject to public disclosure requirements in law. As for adjudication, the commission is not bound by the *Mississippi Rules of Civil Procedure* or the *Mississippi Rules of Evidence*, which are mandatory for practices and judges in the state's trial courts. The commission sets its own rules of relaxed practice, which may be dispensed with from time to time.

The commission is the ultimate trier of fact in all cases and may derive new findings of fact or weigh evidence differently from the administrative law judge who initially hears the case. Regarding the role of the commission as trier of fact, see MISS. CODE ANN. Section 71-3-47 and *Dependents of Moon v. Erwin Mills Inc*, 244 Miss. 573, 145 So. 2d 465 (1962); *Mississippi Products Inc. v. Skipworth*, 238 Miss. 312, 118 So. 2d 345 (1960); and *Railway Express Agency Inc. v. Hollingsworth,* 221 Miss. 668, 74 So. 2d 754 (1954).

The Role of Administrative Law Judges in Workers' Compensation

Administrative law judges are commission appointees who hear contested matters, including motions, and hearings on the merits. Their decisions are appealable to the full commission.

When claimants file cases and employers/carriers file answers, the commission refers the case to an administrative law judge. Administrative law judges are appointees of the commission who hold their positions at the will and pleasure of the commission. At present, eight administrative law judges serve the commission. These judges hear contested matters, including motions, and

hearings on the merits. These are appealable to the full commission.

Administrative law judges may hear and rule on dispositive motions, oversee the conduct of discovery, and conduct hearings, as well as enter final orders.

Orders of Administrative Law Judges

The administrative law judge may consider all evidence and pleadings and enter an order granting or denying benefits. The order will become final if the party does not file a written petition for the commission's review within twenty days.

After hearing, the administrative law judge may consider all evidence and pleadings and enter an order granting or denying benefits. The order will become final if the party does not file a written petition for the commission's review within twenty days after the administrative law judge's order. The commission's receipt of the petition within twenty days is critical to perfect a petition for review.

Parties are not responsible for paying for the production of a transcript, as the commission's secretary will produce such. Oral arguments may be granted upon a petition. Briefs may proceed in letter form or the format required by the *Mississippi Rules of Appellate Procedure*.

The commission's administrative law judges are generally well thought of by the legal profession. On April 21, 2009, the Workers' Compensation Section of the Mississippi Bar Association adopted a resolution commending the administrative law judges of the Workers' Compensation Commission. The resolution cites the professionalism, commitment, and impartiality of the eight administrative law judges who hear controverted claims. (See Exhibit 1, page 7, for the complete text of the resolution.)

The Commission's Duties for Review of Orders

The commission may affirm the administrative law judge's order, reverse the order in whole or in part, adopt the order as its own without additional findings, adopt its own order with additional findings of fact and law, or remand matters to the administrative law judge for further finding.

The commission may affirm an order of an administrative law judge. It may also reverse such an order in whole or in part. The commission may adopt the administrative law judge's order as its own without additional findings or it may adopt its own order with additional findings of fact and law. The commission is the finder of fact and may hear additional evidence as a basis for findings. It may also remand matters to the administrative law judges for further finding.

Exhibit 1: The Mississippi Bar's Resolution Commending the Workers' Compensation Commission's Administrative Law Judges, April 24, 2009

RESOLUTION OF COMMENDATION

WHEREAS, the Workers' Compensation Section of The Mississippi Bar has determined that the Administrative Judges of the Mississippi Workers' Compensation Commission have conducted themselves in a forthright and honorable manner in fulfilling their Constitutional, Judicial and Ethical duty to the People of the State of Mississippi, to wit:

1. By administering justice in a fair and timely manner;

2. By applying the Act and Law on an unbiased and unprejudiced basis, irrespective of the identities of the parties;

3. By affording all parties to litigation both due process and equal protection under the law;

4. By putting their sacred duty to the people of the State of Mississippi before personal interest, philosophical inclination or political gain;

5. By their selfless dedication to the search for the truth;

6. By their tireless effort, long hours and endless journeying; and

7. By at all times recognizing that the singular purpose pervading the Mississippi Workers' Compensation Act is to promote the welfare of laborers within the state and that as remedial legislation to compensate and make whole, it should be construed fairly to further its humanitarian aims.

On this day, the Workers' Compensation Section of The Mississippi Bar hereby recognizes and commends the Administrative Judges of the Mississippi Workers' Compensation Commission for their exemplary service to the people of the State of Mississippi.

This the 24th *day of* April, *2009.*

The Workers' Compensation Section of
The Mississippi Bar, by acclamation

By: Betty B Grinder
Section Chairperson

According to PEER's review of the commission's records, the commission will often affirm, but modify, an order of an administrative law judge. While technically not a reversal, the effect of such is to affirm an order in part and reverse in part. Often the partial reversal addresses either the amount of compensation for which a claimant is eligible or the degree of disability the claimant has suffered.

Commission orders are final thirty days after rendition unless a party files a notice of appeal. Commission rules do not allow for petitions for rehearing before the commission.

Judicial Review of the Commission's Decisions

Effective July 1, 2011, decisions of the Workers' Compensation Commission are appealable to the Mississippi Supreme Court.

Prior to July 1, 2011, decisions of the Mississippi Workers' Compensation Commission were appealable to the circuit court wherein the claimant resided. Effective July 1, 2011, H. B. 1078, Regular Session 2011, amended MISS. CODE ANN. Section 71-3-51 (1972) to provide for direct appeals of Workers' Compensation Commission awards to the Supreme Court. This eliminates the step in the process that has been occupied by the circuit courts, which were formerly the courts to which appeals were taken.

Reviewing courts grant great deference to decisions of the commission. Historically, courts have not overturned commission decisions unless one of the following conditions is found:

- the decision was not supported by substantial evidence;
- the decision was arbitrary and capricious;
- the decision was beyond the power of the commission; or,
- the decision violated a party's statutory or constitutional right.

While commentators specifically cite rule 5.03, *Uniform Circuit and County Court Rules*, as the basis for these limited grounds for review, these standards have been traditionally applied by courts reviewing administrative action. (See *Town of Enterprise v. Mississippi Public Service Commission,* 782 So. 2d 733 [Miss, 2001]). Findings of administrative bodies are given great deference by appellate courts (see *Byrd v. Public Employees Retirement System* 774 So. 2d 434 [Miss, 2000t]).

The Concept of Workers' Compensation

As noted on page 4, Mississippi adopted a workers' compensation statute in 1948, thereby becoming the last state in the union to do so. The statute accomplishes what workers' compensation statutes accomplished in the other states: the creation of a no-fault remedy for persons injured in the course and scope of employment.

Workers' compensation laws evolved during the early twentieth century in recognition of the fact that tort doctrine required that cases of workplace injury be litigated, thereby causing employees to wait for long periods for any recovery that they might receive. Workers' compensation remedies ensured an expeditious provision of benefits to the injured employee in exchange for the employee's surrendering any rights he or she might have had to sue in tort for negligence.

Weaknesses of the Common-Law Tort System

Workers' compensation systems eliminated weaknesses of the common-law tort system by delivering benefits quickly through an administrative process rather than a judicial process. The costs of insuring against injury became a cost of doing business for an employer.

Workers' compensation statutes were adopted to provide a solution to the weaknesses seen in the common law of torts as it applied to injuries workers suffered on the job. Briefly, these weaknesses in the common law system were:

- it generally placed the burden of proving fault (e. g., negligence) on the employee;
- in negligence actions, the employer had the possibility of asserting the affirmative defenses of contributory negligence and/or voluntary assumption of a known risk;
- it was slow in delivering a remedy; and,
- it created friction between employer and employee.

Workers' compensation systems eliminated these weaknesses by delivering benefits quickly through an administrative process rather than a judicial process. The costs of insuring against injury became a cost of doing business for an employer.

Constitutionality of Workers' Compensation Systems

The decision upholding the constitutionality of the 1948 Mississippi workers' compensation statute found compelling the need to provide an expeditious remedy for workplace injury and, while providing the employee with a relatively quick remedy, inured benefit to the employer by narrowing the benefits available to the claimant.

Because the system of workers' compensation abrogated certain common rights to sue and deprived employers of certain defenses available at common law, the constitutionality of these statutes was challenged early in their history in both federal and state courts.

The first challenges to the constitutionality of both the plaintiff and the counterclaiming defendants in New York litigation challenged the constitutionality of the New York workers' compensation statute. In *New York Central v. White*, 243 US 188, 37 S Ct. 247, 61 L. Ed. 667 (1917), the claimant in the initial administrative proceeding for workers' compensation benefits challenged the statute as constituting taking without just compensation, violative of the Fourteenth Amendment because of the extremely circumscribed level of benefits offered under New York law. The defendant railroad challenged the statute as violating the amendment's substantive due process because the defendant was not allowed to defend on the basis of fault or lack thereof. The court upheld the statute, noting that the loss suffered by a claimant for complete compensation under the tort system was balanced by the claimant's being absolved from proving fault on the part of the employer. This is a form of interest balancing often practiced by the court. The court went on to note that persons do not have a vested right in the common law of torts and that the states are generally free to abrogate such tort doctrine in the public interest.

The Mississippi decision upholding the constitutionality of the 1948 statute drew heavily on the 1917 court decision (see *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d. 433 [1954]). In short, courts found compelling the need to provide an expeditious remedy for workplace injury and while providing the employee with a relatively quick remedy, inured some benefit to the employer while narrowing the benefits available to the claimant.

Types of Benefits Paid to Injured Workers

In a workers' compensation case, while the employer surrenders his common law rights to be determined at fault prior to having liability imposed, the employee also surrenders rights to potentially receive a broad range of damages provided for under law.

While the employer surrendered his common law rights to be determined at fault prior to having liability imposed, the employee also surrendered rights to potentially receive a broad range of damages provided for under law. Under Mississippi's workers' compensation statute, employees may receive two types of damages: (1) disability benefits, under which the claimant receives compensation for lost wages; and, (2) medical benefits. The latter is not capped, but the former is.

The employer is required by law to pay the above-described benefits and to secure insurance or self-insurance for coverage if the employment he engages in is covered under the workers' compensation statute. The statute defines covered employment.

Failure of an employer to secure coverage when the work his firm engages in is covered will make him liable in tort for injuries. Such defendants may not assert the contributory negligence and voluntary assumption of a risk defenses.

Application of the Statute: Principles of Statutory Construction

The courts have set out certain principles of statutory construction that are to guide adjudicators in making decisions regarding claims for workers' compensation benefits, but to give all doubts in close cases to the claimant over the employer or carrier.

The Mississippi workers' compensation statute was created for the purpose of providing a remedy for the workers of the state who suffered injury on the job. The courts have set out certain principles of statutory construction that are to guide adjudicators in making decisions regarding claims for benefits. These principles are:

- *The doctrine of liberal construction.* Under liberal construction (see *Ross v. Ross* for liberal construction 240 So. 2d 89, 126 So. 2d 512 [1961] and *Big 2 Engine Rebuilders v. Freeman* 379 So. 2d 888 [Miss, 1980]), adjudicators, both administrative and judicial, are to recognize the beneficent purpose of the legislation: to provide an expeditious remedy for those injured in work-related accidents. This principle is buttressed by the courts' perceived need to carry forward the

beneficent purposes of the statute to provide a low threshold of proof because the employee has at least a valuable right--a tort action.

- *Doubtful claims are resolved in factor of the claimant and not the carrier/employer.* Under this approach to construction, the commission and courts will look to the facts in any close case and resolve them in favor of the claimant if there is doubt. Again, the purpose of the statute is to provide compensation to injured workers. This issue often arises in cases wherein questions regarding whether a person was acting in the course and scope of employment arise. (See Bradley and Thompson, *Mississippi Workers Compensation,* Mississippi Practice Series, 2011.)

In summary, these principles make it clear that the purpose of the statute is not to make a "level playing field" for the resolution of claims, but to give all doubts in close cases to the claimant over the employer or carrier.

Conclusions Regarding Adjudicative Functions of the Workers' Compensation Commission

In reviewing the adjudicative functions of the Workers' Compensation Commission, PEER notes that state law gives the commission broad authority to review all matters of law and fact in any matter brought before the commission. This gives the commission broader authority than most appellate bodies in the legal system, as it essentially permits a re-trial of issues of fact already tried at the administrative hearing before an administrative law judge. While PEER does not doubt the legality of the practices discussed below, it does question the wisdom and prudence of continuing an "appellate" system such as the one in place at the Workers' Compensation Commission.

The first section of this chapter contains a discussion of the standards by which PEER reviewed the adjudicative functions of the commission. PEER focused on the adjudicative functions of the commission rather than the administrative law judges. As noted earlier at page 6 of this report, the Workers' Compensation Section of the Mississippi Bar Association has commended the administrative law judges for their professionalism and competence. In view of this commendation, it would appear that the practitioners of workers' compensation law, both plaintiffs and defense bar, generally believe that the administrative law judges do not pose any problems in the adjudicative process.

This chapter then addresses the following questions:

- Has the Workers' Compensation Commission adequately provided clear, principled legal grounds for reversal or modification of orders in cases wherein it specifically set aside a ruling of an administrative law judge consistent with commonly accepted standards of review and the need for expeditious delivery of benefits to claimants?
- Has the commission adopted rules and practices to ensure statutorily compliant and efficient operations?

Criteria For Reviewing the Adjudicative Functions of the Commission

In appellate courts, the basis for deciding cases should be clearly articulated and understandable (i. e., applying the principle of transparent reasoning) for all interested parties in workers' compensation cases. Also, the standards of review applied in appellate court are the most appropriate for ensuring that the processes of handling workers' compensation appeals will be expeditious.

As noted previously, the administrative law judges have become the commission's "trial judges" insofar as they conduct hearings and rule on motions prior to cases reaching the full commission. While the commission hears appeals, it steps beyond the role commonly assigned to appellate tribunals.

Consistent with the statements made above, PEER offers certain principles of appellate review as compelling standards by which the work of the commission should be reviewed for these reasons:

- The standards used in appellate court reporting ensure that *transparent reasoning* applied in the decision can be reviewed and followed by the bench bar and the general public.
- The *standards of review applied in appellate court* review ensure efficiency in review of lower court decisions.

PEER believes these standards are the most appropriate for ensuring that the processes of handling appeals will be expeditious and that the basis for deciding cases will be clearly articulated and understandable for all interested parties.

Transparent Reasoning

A fundamental principle of appellate adjudication is that judges render opinions that set out their basis for decisions. The need for transparent reasoning is just as compelling for workers' compensation cases, as such explication may impact how decisions are made in similar cases in the future.

A fundamental principle of appellate adjudication is that judges render opinions that set out their basis for deciding as they have. The commission writes opinions on cases appealed to it. A written opinion gives the tribunal an opportunity to explicate fully its basis for taking action. This is considered important for the following reasons:

- it provides a reviewing tribunal with a clear basis for the decision;
- it provides a check on arbitrary power; and,

- it helps persons understand what the court will do in analogous situations.

While PEER notes that the Workers' Compensation Commission is not a court, the need for explication is just as compelling, as reviewing tribunals, attorneys, and other interested parties must understand how the commission came to a decision on a particular matter, as it may impact how decisions are made in similar cases handled in the future.

Standards of Review

In Mississippi, appeals courts generally will not reverse a trial court's finding of fact except in those cases in which the court finds that the finding is clearly erroneous or not supported by substantial evidence. Additionally, courts have held that the trier of fact in a bench trial has sole responsibility for determining the credibility of witnesses.

In general, appellate courts are highly deferential toward trial courts' findings of fact and weighing of evidence. Even when reviewing bench trials, appellate courts show great respect for the findings of trial judges sitting without a jury.

In Mississippi, the courts have applied these standards of deference toward trial court verdicts. Generally, appeals courts will not reverse a trial court finding of fact except in those cases in which the court finds that the finding is clearly erroneous or not supported by substantial evidence. The string of Mississippi cases that take this position is too lengthy to cite completely. Recent illustrative examples include *Richardson v. Norfolk and Southern Railroad*, 923 So. 2d 1002 (Miss, 2006) and *In re Estate of Temple,* 780 So. 2d 639 (Miss, 2001). Findings may not be set aside unless manifestly wrong (see *Ciba Geigy Corp. v. Murphree* 653 So. 2d 857 [Miss, 1994]).

Additionally, courts have held that the trier of fact in a bench trial has the sole responsibility for determining the credibility of witnesses (see *University of Mississippi Medical Center v. Pounders*, 970 So. 2d 141 [Miss, 2007]; *Beacham v. City of Starkville, School System,* 984 S0 2d. 1073 [Miss App, 2008]). Generally, appellate courts consider the trial court to be in a superior position to assess witnesses' credibility and to make findings (see *University Medical Center v. Martin*, 994 So. 2d 740 [Miss, 2008]).

Thus, in Mississippi, it can be said that lower court findings are:

- given great deference by appellate bodies;
- not modified unless manifestly wrong or clearly erroneous; and,

- given almost exclusive finality as to the credibility of witnesses.

Legal Grounds for the Commission's Reversals and Modifications

Has the Workers' Compensation Commission provided clear, principled legal grounds for reversal or modification of orders in cases wherein it specifically set aside a ruling of an administrative law judge consistent with commonly accepted standards of review and the need for expeditious delivery of benefits to claimants?

No. The Workers' Compensation Commission often modifies administrative law judges' findings of fact without a clear basis for doing so. Additionally, the commission often orders reversals and modifications without clearly explicated reasons. Such actions result in parties not being able to rely on the results of an administrative law judge's decision and add time to the adjudication of claims.

Decisions Sometimes Lack Transparency in Reasoning

The Workers' Compensation Commission's decisions do not always offer a transparent statement of reasons for reversing or modifying an administrative law judge's decision.

PEER found that the Workers' Compensation Commission's decisions do not always offer a transparent statement of reasons for reversing or modifying an administrative law judge's decision.

While, as PEER noted, courts clearly defer to the findings of lower courts respecting facts and evidence on which findings were based, the commission takes a more wide-ranging approach to its authority. When the commission acts to reverse or modify decisions of an administrative law judge, its reasoning is not always clear or transparent. Recent examples of such a lack of clarity or transparency include the following decisions.

- *Cox v. National Bedding:* In *Cox*, the administrative law judge found that a pre-existing cervical injury was exacerbated by repetitive motion at the workplace. The administrative law judge conceded that such injuries are compensable under law. The administrative law judge also found that the claimant suffered 60% loss of wage-earning capacity and 30% loss of right upper extremity.

  The commission modified the findings for both earning capacity and disability without providing a clear understanding of how or why the administrative law judge's decision was defective. The reduction in earning capacity was based on the commission's reliance on wages earned by the claimant in a job provided her by the employer as an accommodation for the position she was no longer able to hold. The claimant had testified in the administrative law judge's

hearing that she could not perform the duties of that job because of pain.

- *Cole v. Ellisville State School*: In *Cole*, the commission amended an administrative law judge's decision to find a person totally permanently disabled following an injury. In modifying the permanent disability from 100% to 50%, the commission simply noted that there was evidence that the claimant had once had some training in clerical skills and had not looked for a job. In reducing the determination to 50%, the commission concluded that cases of this sort leave much to the uncertainty of a factual estimate, which is necessarily lacking in mathematical accuracy. (Citing Dunn, *Mississippi Workers' Compensation*, 3rd Ed. Section 67.)
- *Holcomb v. George County Hospital*: In *Holcomb*, the commission modified an administrative law judge's decision to find the claimant 50% disabled despite the fact that the claimant was receiving higher wages than before the injury. While there is a presumption that there is no disability when this occurs, the presumption can be rebutted in cases wherein the claimant can show such things as tenuous current employment position, age, or other facts to show that the wage being earned now is not necessarily what can be expected reasonably in the future.

  The commission reversed and found the disability to be 25%, citing the same Dunn text noted above in the discussion of the *Cole* case.
- *Edmondson v. Blood Services*: In *Edmondson*, the commission reversed, amended, and modified an administrative law judge's finding of 100% disability for a sixty-five-year-old claimant who had suffered serious injury and testified that she could not work. The commission reduced this to 50% disability and concluded that the person, while sixty-five, still had some skills that could result in her being employable. The commission also noted that the claimant had worked at a job for the former employer in a different capacity. The commission did not, however, attempt to refute the administrative law judge's basis for concluding that these factors--skills and holding another job--were not compelling and probative of a decision to determine total disability.

In all of these cases, the commission has evidenced an unwillingness to explain clearly why a decision of a presumptively competent administrative law judge is wrong. In cases in which the commission finds that determinations are not subject to mathematical certainty, a question arises: should the decision of the administrative law judge stand when the commission obviously cannot find a more compelling basis for decision?

Commission is Less Deferential to Administrative Law Judges' Findings than an Appellate Court

The commission is less deferential to administrative law judges' findings than an appellate court would be when reviewing lower court decisions.

In several cases, the commission's records show that the members reviewed the record and chose to give greater weight to certain evidence than the administrative law judge chose to do, thereby impacting the administrative law judge's findings. In doing so, the commission stepped beyond the customary standard of review applied by appellate tribunals in reviewing the findings of trial courts. While permissible under law, there is no clear standard to govern the decisions of the commission. Examples of such cases include:

- *Sandifer v. City of Jackson*: In *Sandifer*, the commission amended an administrative law judge's order finding that a claimant had suffered permanent total disability and changed it to permanent partial disability.

  The case involved a city worker who suffered disability from contact with asbestos while serving as a Jackson city firefighter. The commission, contrary to the decision of the administrative law judge, found the claimant's testimony that he could drive his children to school, do laundry, and tend to his children's horses to be an indication that he could perform some work activities. Additionally, a physician expert witness believed that the employee could perform sedentary employment.

- *Hopper v. Joe's Garage*: In *Hopper*, a question arose as to whether back injuries attributable to a sneeze that occurred at work were work-related. The administrative law judge found that they were linked to work. The commission, in reviewing the record, decided that the claimant did not meet his burden of showing that the injuries were work-related. The commission, contrary to the administrative law judge, did not believe that the claimant showed that there was an earlier work-related injury associated with unloading tires that resulted in an injury that would be exacerbated by the sneeze. The commission also noted that there was no testimony that the sneeze occurred at work except for that of the claimant.

  While admittedly contradictory evidence was presented at the hearing regarding whether the claimant had suffered an injury, this is an example of the commission's choosing to place different weight than did the administrative law judge on evidence taken at the hearing.

- *Ladner v. Zachary Construction*: In *Ladner*, the commission reversed an administrative law judge's decision and found that a claim was barred by the two-year statute of limitations. In doing so, the commission had to set aside a finding of fact that the claimant was being paid wages in lieu of compensation but was actually being paid wages for work performed. When injured workers are paid in lieu of compensation--i. e., paid a benefit by the employer for little or no work instead of seeking workers' compensation--they may still seek workers' compensation. If there is a determination that the worker actually was being paid for work performed, then he must bring his claim within two years of injury.

  The commission reviewed the evidence in the hearing and found that the claimant testified that while in a trailer of his employer, he did no work for a period and later performed twenty to thirty minutes of paperwork for the employer per day. The employer testified that the claimant was placed in a trailer so he could rest and was available for work during the workday and was doing his job. The commission found the evidence that the claimant was actually performing services to be compelling and found that he was being compensated for work. Under the conditions, the worker was barred by the statute of limitations from bringing an action for workers' compensation.

- *Fair v. Beau Rivage Resort:* In *Fair*, the commission reversed an administrative law judge's decision that Fair sustained disabling injury at work and was entitled to temporary disability benefits. The commission concluded, placing weight on certain expert testimony, that the fall suffered by Fair did no more than temporarily aggravate a pre-existing injury.

- *White v. Beau Rivage Resort*: In this case, the commission reviewed the records and concluded that the claimant's permanent disability was not complete, but 60%. No clear basis was discernable.

- *Whittle v. Tango Transport*: In this case, the commission reviewed the record and concluded that the claimant did not suffer from a compensable injury, but from the effects of other factors such as morbid obesity. Once again, the commission chose to rely on different evidence without explaining why.

Effects of the Commission's Reversals and Modifications

The broad scope of the commission's review authority has an impact on the stability and timeliness of determination of workers' compensation benefits.

The admittedly broad scope of the commission's authority to review decisions of administrative law judges creates the opportunity for a large number of reversals or modifications in decisions. As noted on page 2, PEER reviewed all decisions in the Workers' Compensation Commission data base for 1997 through 2011, with particular interest in decisions that were technically affirmed, but modified in some way. Modification could result in a change in the workers' compensation benefits granted or might simply show a doctrinal difference between the commission and the administrative law judges, but it does reflect what is effectively a partial reversal of an administrative law judge.

Exhibit 2, page 21, reflects the pre-2007 and post-2007 behavior in PEER's review of administrative law judges' decisions on the merits. As shown in Exhibit 2:

- PEER analyzed 1,434 cases (1,058 cases from 1997 to January 1, 2007, and 376 since January 1, 2007). As noted previously, the members of the commission changed in January 2007, giving the commission two appointees of the current governor.
- Prior to 2007, the commission affirmed administrative law judges' decisions without modification 70% of the time. Since 2007, the rate has fallen to 58%.
- Prior to 2007, the percentage of administrative law judges' decisions modified by the commission was approximately 8%. Since 2007, the percentage of decisions modified has risen to approximately 12%.
- During the same period, cases affirmed in part and reversed in part rose from 5% of cases to 8% of cases, reversals increased from 15% to 18%, and remands increased from 2% to 5%.

Ultimately, reversals or modifications can impact the amount of time it takes claimants and other parties to resolve their workers' compensation claims. To determine the approximate amount of time the commission's review has added to the process of adjudication, PEER sampled 173 cases from the post-2007 period and, of that number, individually reviewed 24 cases from 2010 and 2011. Exhibit 3, page 22, shows that, based on PEER's review of the sample, the commission's review adds approximately fifty-seven days to the process of adjudication, regardless of whether an order is modified.

Exhibit 2: Summary of Administrative Law Judges' Decisions on the Merits of Cases, 1997-2011[1]

	Pre-January 1, 2007	Percentage	Post-January 1, 2007	Percentage
Affirmed, No Modification[2]	743	70%	218	58%
Affirmed, Modification[3]	84	8%	44	12%
Affirmed in Part, Reversed in Part[4]	56	5%	31	8%
Reversed[5]	155	15%	66	18%
Other[6]	20	2%	17	4%

[1]PEER reviewed 1,434 cases from 1997 through 2011 (1,058 cases [74% of the total] prior to January 1, 2007, and 376 cases [26% of the total] after that date). January 1, 2007, was the point at which the current gubernatorial administration gained control of the majority of appointments to the Workers' Compensation Commission.

[2]Represents cases that were heard by the full commission, with the full commission returning an order affirming the decision of the administrative law judge with no modification to the award granted by the administrative law judge.

[3]Represents cases that were heard by the full commission, with the commission returning an order affirming the decision of the administrative law judge; however, the full commission had altered the award of benefits based on its understanding of the case.

[4]Represents cases that were heard by the full commission, wherein the commission affirmed one or more of the findings of the administrative law judge and the accompanying award of benefits, but in addition reversed one or more of the administrative law judges' findings and/or benefit awards.

[5]Represents cases that were heard by the full commission, with the full commission finding insufficient evidence to support the administrative law judge's decision or administrative law judges' decisions contrary to applicable law; thus, the full commission reversed the order of the administrative law judge and the benefits awarded.

[6]Represents cases that were heard by the full commission and remanded or other full decisions by the commission.

SOURCE: PEER review of Workers' Compensation Commission case files, 1997-2010.

In addition to the problems of reduced expediency in resolution of claims and the lack of clearly articulated reasoning for decisions, the practice of the commission's modification in cases could also be taken to violate the time-honored principles of liberal construction of the workers' compensation statutes in favor of injured claimants (see page 11). It would also appear that in cases wherein the commission cites the Dunn treatise provision opining that disability is not necessarily subject to a precise percentage determination that the commission's efforts at precision actually violate this principle. In such

cases, an administrative law judge's determination is no less valid than the commission's.

Exhibit 3: Length of Time Added to the Adjudication Process for the Commission's Review of Cases, Based on PEER's Review of 2010-2011 Cases Within the Post-2007 Sample

Total number of cases PEER individually reviewed	24
Number of cases that reported dates necessary to compute length of time between hearing and issuance of order	12
Mean[1] number of days added due to commission's review	77
Median[2] number of days added due to commission's review	57
Mode[3] number of days added due to commission's review	57

[1]*Mean*: the average of the values reported.

[2]*Median*: the middle value when all cases are ranked in ascending or descending order.

[3]*Mode*: the value that appears most often in the data set.

SOURCE: PEER analysis of Workers' Compensation Commission cases in 2010-2011.

The Commission's Rules and Operations

Has the commission adopted rules and practices to ensure statutorily compliant and efficient operations?

No. A portion of General Rule 9 of the commission (regarding hearings to compel medical treatment under certain conditions when a claimant's temporary total disability benefits have been terminated) is not in conformity with MISS. CODE ANN. Section 71-3-17 (1972). Rule 10 gives the commission discretion regarding oral argument, which could work to the detriment of a party if such party is not able to argue against new evidence. Also, because the Workers' Compensation Commission does assigns a limited number administrative staff to support the administrative law judges, the commission does not ensure efficient production of orders in controverted cases.

Commission Rule Not in Conformity with State Law

Selected provisions of Workers' Compensation Commission Rule 9 do not comport with enabling legislation. These provisions address hearings to compel medical treatment under certain conditions when a claimant's temporary total disability benefits have been terminated.

MISS. CODE ANN. Section 71-3-17 (1972) provides a remedy for an injured worker who, because of a conflict in medical opinion, has lost his or her medical benefits based on a decision of the employer. Such injured workers may seek a hearing on the need for additional treatment. Specifically, MISS. CODE ANN. Section 71-3-17 (1972) provides, in part:

> *(b) Temporary total disability: In case of disability, total in character but temporary in quality, sixty-six and two-thirds percent (66-2/3%) of the average weekly wages of the injured employee, subject to the maximum limitations as to weekly benefits as set up in this chapter, shall be paid to the employee during the continuance of such disability not to exceed four hundred fifty (450) weeks or an amount greater than the multiple of four hundred fifty (450) weeks times sixty-six and two-thirds percent of the average weekly wage for the state.* ***Provided, however, if there arises a conflict in medical opinions of whether or not the claimant has reached maximum medical recovery and the claimant's benefits have terminated by the carrier, then the claimant may demand an immediate hearing before the commissioner upon five (5) days' notice to the carrier for a determination by the commission of whether or not in fact the claimant has reached maximum recovery.***
>
> [PEER emphasis added]

While the statute appears unambiguous as to the availability of a hearing within five days, the commission's rules on this subject do not comport with the statute. Workers' Compensation Commission Rule 9 provides, in part:

> *. . .Upon proper showing by any party of interest that the injured employee is suffering from improper medical attention or lack of medical treatment, further medical treatment may be ordered by the Commission or Administrative Judge at the employer's expense. If at any time during such period the injured employee unreasonably refuses to submit to medical or surgical treatment, the Commission or Administrative Judge shall, by order, suspend the payment of further compensation during such time as such refusal continues and no compensation shall*

be paid at any time during the period of such suspension.

***Any hearing required by the Commission or Administrative Judge under this Rule may, in the discretion of the Commission or Administrative Judge, be held no sooner than five (5) days after notice** to determine (1) if compensation payments should be suspended for refusal or failure to submit to a medical examination or to proper medical treatment or (2) that the injured employee is suffering from improper medical attention or lack of medical treatment.*

Thus, it appears that the commission's rule disregards the mandatory character of the language in CODE Section 71-3-17 by not mandating that hearings to compel medical treatment after termination of temporary total disability benefits be held with five days' notice to parties, by making a five-day hearing permissive, and leaving open the possibility that the hearing may be held after more than five days have elapsed.

In reviewing some orders for the compulsion of medical treatment after termination of temporary total disability benefits, PEER had noted that some hearings are held within five days, some are not. The existence of a rule that is not in harmony with the statute may create confusion among parties, attorneys, and judges as to what the law is on this point.

Commission Has Discretion Regarding Oral Argument

Mississippi Workers' Compensation Commission Rule 10 places the decision to grant oral argument before the commission at the discretion of the commission. This could work to the detriment of a party if such party is not able to argue against new evidence or argue for the support of the administrative law judge's findings of fact.

As noted earlier, the commission is the ultimate trier of fact in all cases brought before it. The commission may hear new evidence or consider evidence that was not previously placed before the administrative law judge in the initial hearing. When attorneys must represent clients before the commission, they are allowed to file briefs as they would in normal appellate practice. As in the case with appellate courts in this state, they may request oral argument before the commission. Commission Procedural Rule 10 provides the following respecting oral argument:

REVIEW HEARINGS. In all cases where either party desires a review before the Full Commission from any decision rendered by an Administrative Judge, the party desiring the review shall within twenty (20) days of

> *the date of said decision file with the Secretary of the Commission a written request or petition for review before the Full Commission. Any other party to the dispute may cross-appeal by filing a written cross-petition for review within ten (10) days after the petition for review is filed in the office of the Commission, except that in no event shall a cross-appellant have less then twenty (20) days from the date of decision or award within which to file a cross-petition for review.*
>
> ***Oral argument is not required and may, in the discretion of the Commission, be granted if one or more of the parties request same by filing a written request within fifteen (15) days after the date the petition for review is filed with the Commission. The Commission may also request the parties to give oral argument. Arguments of counsel will be limited to twenty (20) minutes for each party. . . .***
>
> [PEER emphasis added]

PEER notes that what makes the commission different from an appellate court is that the commission may take new testimony or review the record and give different weight to other facts. In such instances, the lack of mandatory oral argument could work to the detriment of a party if such party is not able to argue against the new evidence or to argue for the support of the administrative law judge's findings of fact.

Limited Number of Administrative Support Staff Assigned to Administrative Law Judges

Because administrative law judges have a limited number of administrative support staff assigned to them, delays may occur in preparing orders in hearings.

According to the organization chart in the commission's FY 2012 budget request, the commission assigns the administrative law judges a limited number of support staff to assist them in producing orders, opinions, and other documents necessary to the completion of their work. Statistics reported at the close of calendar year 2010 show that administrative law judges handle a considerable number of cases; for that year, cases in all phases, including discovery and pending hearings, totaled 3,838. While not all cases result in a hearing on the merits and many are settled, all require some work and preparation.

Because administrative law judges have a limited number of administrative support staff assigned to them, delays may occur in preparing orders after hearings. To determine the amount of time it has taken administrative law judges to produce opinions after the close of hearings, PEER sampled 200 cases from the pre-2007 period and 173 from the post-2007 period. Of cases that had the dates present that were necessary to compute the information, 147 cases had orders entered prior to January 1, 2007, and 94 had orders entered after January 1, 2007. Exhibit 4, page 27, shows the time lapsed between completion of hearings and issuance of administrative law judges' orders.

While other factors are likely involved (e. g., conflicting demands on the judge's time), some administrative assistance could help reduce the amount of time taken for each case. PEER also notes that the median amount of time from hearing to completion of the order prior to 2007 was 88 days; consequently, this is not necessarily a problem that has arisen in recent years.

According to the commission, it has assigned two externs to the administrative law judges to provide them with services and support comparable to those of a law clerk. The externs are law students who work ten hours per week during the academic year and thirty-five hours per week during the summer. Additionally, a secretary to one of the commissioners is responsible for providing support to the eight administrative law judges. Docket room staff also provide some support, but this is associated with collecting pleadings and other documents necessary to the hearing of claims or motions and is not related to research or the preparation of orders for hearings on the merits.

Exhibit 4: Length of Time for Administrative Law Judges to Produce Opinions after the Close of Hearings, 1997-2011, Based on PEER's Sample

	Pre-January 1, 2007[1]	Post-January 1, 2007[1]
Number of cases in sample	200	173
Number of cases that reported dates necessary to compute length of time between hearing and issuance of opinion	147	94
Percent of cases that reported dates necessary to compute length of time between hearing and issuance of opinion	74%	54%
Mean[2] number of days between hearing and issuance of opinion	104.2	143.1
Median[3] number of days between hearing and issuance of opinion	88	91.5
Mode[4] number of days between hearing and issuance of opinion	15	43

[1]January 1, 2007, was the point at which the current gubernatorial administration gained control of the majority of appointments to the Workers' Compensation Commission.

[2]*Mean*: the average of the values reported.

[3]*Median*: the middle value when all cases are ranked in ascending or descending order.

[4]*Mode*: the value that appears most often in the data set.

SOURCE: PEER analysis of Workers' Compensation Commission cases 1997-2011.

Policy Options and Recommendation

In view of the fact that there exist considerable differences in the rulings of the administrative law judges and the full commission and that the administrative law judges have received considerable support from the professional community (see page 6), PEER raises the question of whether there should be procedural modifications in the functions of the commission to ensure that cases are professionally adjudicated by persons knowledgeable in the workings of the workers' compensation system.

PEER sees two possibilities, or policy options, for revising the process by which workers' compensation claims are adjudicated.

Policy Options for Legislative Consideration

The Legislature may wish to eliminate the commission or to make procedural modifications in the commission's functions to ensure that cases are professionally adjudicated by persons knowledgeable in the workings of the workers' compensation system.

To address the problems set out in this report, PEER sees two policy options for the Legislature to consider:

- eliminate the Workers' Compensation Commission; or,
- revise the role and composition of the Workers' Compensation Commission.

Option One: Eliminate the Workers' Compensation Commission

The Legislature could abolish the Workers' Compensation Commission and subsequently create an office with an Executive Director appointed by the Governor, establish a procedure for appointing administrative law judges with set terms of office, and provide for appeals to the Mississippi Court of Appeals.

Several states, including Louisiana, Tennessee, and Florida, have no workers' compensation commission. In these states, agencies headed by executive directors, or division directors of larger umbrella agencies, are responsible for administering the state's workers' compensation program.

In these states, administrative law judges who work for the workers' compensation agency, or in some cases, a larger agency, are responsible for hearing controverted cases. Appeals are taken directly to the courts of each state. This effectively eliminates one level of administrative review.

In Louisiana, workers' compensation judges are appointed by the Director of the Office of Workers Compensation, Department of Labor. Such judges hold their positions for terms of five years. When a party is aggrieved by a decision of a workers' compensation judge, they file appeals with the circuit court of appeals serving the district wherein the case was heard (LSA: RS Section 23:1310.1).

Florida has a somewhat different system. Administrative judges working for the Florida Department of Management Services hear workers' compensation cases. The Governor appoints judges for terms of four years. Appeals are taken to the District Court of Appeals, First District (see Fla Stats 440.25 and Section 440.45).

This option is preferred because it places adjudication functions in the hands of the administrative law judges and eliminates an apparently unnecessary level of review. The Legislature could retain one commissioner to head the agency and direct its administrative functions as well as its rulemaking functions.

Should this approach be taken in Mississippi, the Legislature would have to amend several provisions of law to do the following:

- abolish the current commission and create an office or department of workers' compensation;
- provide for an executive director of the agency to be appointed by the Governor with advice and consent of the Senate;
- provide for administration and rulemaking authority vested in the director's position;
- establish a procedure for appointing administrative law judges (both Louisiana and Florida give their administrative law judges set terms of office during which they may only be removed with cause); and,
- provide for appeals to the Mississippi Court of Appeals.

Option Two: Revise the Role and Composition of the Workers' Compensation Commission

The Legislature could amend MISS. CODE ANN. Section 71-3-85 (1972) and revise the commission's membership to reflect the need for members who have extensive legal training. Also, the Legislature could amend MISS. CODE ANN. Section 71-3-47 (1972) to require the commission to review the appeals brought before it entirely on the record.

As noted previously, the commission is presently composed of three members, only one of whom must be a member of the bar. Should the Legislature wish to retain the Workers' Compensation Commission, it could amend MISS. CODE ANN. Section 71-3-85 (1972) and revise the commission's membership to reflect the need for members who have extensive legal training.

PEER notes that the lack of a requirement that members be licensed attorneys could have contributed to the issues set out in this report and that a commission with all members possessing a sound grounding in the law and experience in workers' compensation law in particular could address some of the problems set out in the report. Arkansas utilizes a commission similar to that of Mississippi, but Arkansas requires that all members of the commission be members of the bar, thereby assuring that the commission is composed of persons who understand the role and responsibility of appellate tribunals.

Additionally, the Legislature could amend MISS. CODE ANN. Section 71-3-47 (1972) to change the standard of review for the commission. Under the existing system, the state has essentially two levels of administrative review wherein issues of fact may be tried. This can add additional time to the adjudication process. Under a revised system, the commission could be required to review the appeals brought before it entirely on the record. No new testimony could be taken and administrative law judges' findings of fact could not be disturbed unless the court found them to be manifestly wrong and not supported by the evidence in the case. This would make the commission an appellate tribunal with the functions commonly associated with such tribunals.

Administrative Recommendation

Regardless of which entity the Legislature chooses to administer Mississippi's workers' compensation law, that entity should remedy problems associated with administration of the workers' compensation law and support to the administrative law judges.

Whether the Legislature eliminates the commission and creates a new office, revises the role and composition of

the commission, or retains the commission in its present form, the entity that administers Mississippi's workers' compensation law should:

- make internal adjustments in the duties of staff to provide the administrative law judges with necessary clerical and editing support for the preparation of orders; and,
- review the entity's rules for conformity with statutes. In cases wherein the rules do not comport with statutes, the entity should make appropriate amendments to the rules or recommend that the Legislature make substantive changes to enabling legislation to reflect appropriate policy.

Mississippi Workers' Compensation Commission

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December 12, 2011

RESPONSE BY THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION TO PEER REPORT: "THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION: A REVIEW OF ITS ADJUDICATIVE FUNCTIONS."

The Mississippi Workers' Compensation Commission (hereafter "MWCC") respectfully submit this Response to the PEER investigative report related to the adjudicative functions of the Commission. Our Response will attempt to follow the order of topics addressed in the Report.

INTRODUCTION (pp. 1-3): The MWCC does not have anything at this time to add to or address the content of the Introduction section of the PEER Report.

BACKGROUND: THE WORKERS' COMPENSATION COMMISSION (pp. 4-8): The MWCC in is general agreement with the background information provided by PEER. We do, however, note the following:

pp. 4-5 (STATUTORY AUTHORITY): We find PEER's analysis of the structure and statutory origin and authority of the Commission to be accurate.

p. 5 (FUNCTIONS): In the first paragraph in this section, PEER states that the Commission is not bound by the Rules of Evidence and the Rules of Civil Procedure, both of which are rules adopted by the Supreme Court to govern the conduct of civil actions in State trial courts (Circuit Court, Chancery Court, County Court). Peer also states that ***"[t]he commission sets its own rules of relaxed practice, which may be dispensed with from time to time."*** (Emphasis added).

It is true that the Commission has adopted its own rules of practice and procedure because, by law, the Commission is required to do so. A reading of these rules, however, particularly the Procedural Rules which largely govern practice and procedure before the Judges and the Commission in litigated claims, shows these rules are not as "relaxed" as PEER states. It is a mis-statement by PEER to say the Commission **"sets its own rules of relaxed practice."** In Robinson Property Group, Ltd. Partnership v. Newton, 975 So.2d 256, 260 (Miss.Ct.App. 2007), the Court clearly

explained what is meant by this concept of "relaxed" practice, and also how there are still fundamental limits to the Commission's ability to relax proceedings before it:

> The Mississippi Workers' Compensation Commission has the procedural authority to promulgate and enforce its own rules for the administration of compensation claims, Mississippi Code Annotated section 71-3-61 (Rev.2000), and has the "discretion to enlarge the scope of the record and relax rules of discovery applicable to hearings." Bermond v. Casino Magic, 874 So.2d 480, 484(¶ 11) (Miss.Ct.App.2004); see also Mid-Delta Home Health, Inc. v. Robertson, 749 So.2d 379, 387(¶ 29) (Miss.Ct.App.1999) (*quoting* Delta Drilling Co. v. Cannette, 489 So.2d 1378, 1380-81 (Miss.1986). However, while the Commission is to be given deference in applying and interpreting its own rules, the concern of ensuring due process still remains. Bermond, 874 So.2d at 485(¶ 11). Due process dictates that the Commission is to follow its own procedural due process principles in conducting its duties of administering workers' compensation claims. *Id.* (Emphasis added).

Section 71-3-61 of the Workers' Compensation Law makes very clear that anything the Commission does in the way of rule making or other actions to enforce and administer the Law must be "conformable to law." As the Court above stated, due process is an imposing safeguard which prevents the Commission from excessively relaxing rules of practice and procedure. See also Workers' Compensation Guide §5.93 (West 2011) ("Although workers' compensation proceedings are generally conducted in an informal manner, such proceedings are required to be consistent with the requirements of due process of law. This means that hearings must be conducted in a fair and impartial manner and evidence may be admitted only if it is relevant to the issues being decided.").

The current Procedural Rules of the Commission, in fact, specifically incorporated Rules 26 - 37 of the MS Rules of Civil Procedure to govern the conduct of discovery in litigated claims. In many other instances, our Rules mimic rules which also apply in State Court actions. See MWCC Procedural Rules 2, 4, 5, 6, 7, 9, 10, 11, 15, 18, 20, 21, 22, 23, 24.[1]

PEER also notes that our Rules ***"may be dispensed with from time to time."*** To those who ultimately read this Report, we feel this implies the Commission operates a "relaxed practice" in the handling of litigated claims, and that our Rules are often merely "dispensed with." To this latter point, it should be further explained that the Commission or a Judge may permit a deviation from any of our rules only "for good cause shown" and only "insofar as compliance therewith may be found to be impossible or impracticable. . ." Furthermore, "the time limits for requesting review of an Administrative Judge's decision or for perfecting an appeal to circuit court from a decision of the

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[1] These rules correspond with, and are very similar in effect, to, the following rules which apply in courts of law: M.R.C.P. 3, 5, 6, 7, 8, 11, 16, 26-37, 42, 45, 57, 78; M.R.A.P. 3, 4, 27, 28, 32, 34, 46; Unif. Cir. And County Ct. Rules 1.05, 1.10; Unif. Chancery Ct. Rules 3.10, 3.11.

Commission[2] may not be waived [by a Judge or the Commission] unless otherwise provided by statue or case law."

So, while practice before the Commission, as with any administrative body, can be relaxed, and somewhat less rigid than the practice in actions at law before state or federal courts, we do have a structured set of rules governing this practice which may not be dispensed with at the whim or desire of a Judge or Commissioner. The informal and relaxed nature of practice before the Commission has more to do with informal manner in which hearings are conducted, and the ability of the Judges or Commission to consider certain evidence, such as hearsay evidence, which would otherwise be excluded in a civil court action. State trial court judges conducting trials without a jury have essentially the same discretion to consider certain evidence like hearsay which would otherwise be prohibited in the presence of a jury.

It also bears noting that the primary responsibility for enforcing these rules governing practice and procedure before the Commission in litigated claims falls on the shoulders of the Judges who initially hear and decide the claims, and who oversee the pre-trial preparation of the cases such as discovery. Rarely do these Rules of practice and procedure default to the Commission for enforcement. Instead, the Commission is most often asked to review a decision of a Judge as to the interpretation or application of a specific rule. Assuming the Judges regularly and consistently enforce the applicable rules adopted by the Commission, the result is far from a "relaxed practice."

In conclusion, we feel the first paragraph on page 5 under the heading of "Functions" is significantly misleading at best, and is in part incorrect. We respectfully request this paragraph be modified to note (1) that the MWCC has incorporated and adopted Rules 26-37 of the MS Rules of Civil Procedure to govern pre-trial practice before the Commission; (2) that it has adopted other rules which largely mimic similar rules of practice and procedure which apply in State and/or Federal court; (3) and that deviations from these rules, while permissible, are very limited; and in some instances unavailable.

We find the second paragraph under the heading of "Functions" on page 5 to be a correct statement of the Commission's role in the adjudication process.

pp. 5-8 (ROLE OF JUDGES, COMMISSIONERS AND COURTS): PEER's analysis of the role played by Judges, Commissioners and the appellate courts in the adjudication of claims is fairly and accurately presented, with one exception. The second paragraph at the top of page 8 concludes with the following statement: *"Commission rules do not allow for petitions for rehearing before the commission."* This statement is entirely accurate if considered in a vacuum. However, the Mississippi Supreme Court has effectively adopted such a rule for the Commission by endorsing post-review motions which are filed with the Commission or Judges within the time allowed for appeal of

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[2] Effective July 1, 2011, decisions of the Commission are to be appealed directly to the Supreme Court, but this does not change the fact that Rule 14 does not allow deviation from the time limits establish for seeking review or appeal.

an order. Ever since, and because of, the holding of the Court in prior cases, parties to claims pending before a Judge or the Commission routinely take advantage of the opportunity to seek reconsideration or rehearing of a Judge's or Commission's order. In Johnston v. Hattiesburg Clinc, P.A., 423 So.2d 114, 115 (Miss. 1982), the Court stated:

> The order of the Work[ers'] Compensation Commission was entered on September 19, 1980. On October 3, 1980, appellants filed a motion requesting a review of the evidence by the commission. On November 6, 1980, the commission entered its order overruling the motion for review. Appellants' notice of appeal to the circuit court was filed on November 13, 1980. Appellees contended successfully before the circuit court that the October 3 motion to review did not serve to toll the thirty-day appeal requirement from the commission to the circuit court. [MCA 71-3-51 (1972)].
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> The question appears to be of first impression before this Court. We first note the provisions of MCA § 71-3-53, which provide that:
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> > Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or *because of a mistake in a determination of fact,* the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.... (Emphasis added).
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> In looking at the appeal statute and the above quoted section on "continuing jurisdiction of the commission," it appears that the motion of appellants, when filed within the thirty-day appeal period, would toll the thirty-day requirement until an order disposing of the motion is entered by the commission. Going further, there are several other considerations. We have held that a rule of statutory construction is that "where the language of a statute is doubtful and the necessity for construction arises, the court may consider whether the legislature could have intended a construction that would be highly injurious, rather than one beneficial and harmless." *See McCaffrey Food Market, Inc. v. Miss. Milk Commission*, 227 So.2d 459 (Miss.1969).
>
> Another appeal requirement in work[ers'] compensation cases is that the losing party before an administrative judge is required to file his notice of review before the full commission within twenty days from the date of the order of the administrative judge. [MCA § 71-3-47 (1972)]. In the case of *Day Detectives, Inc. v. Savell*, 291 So.2d 716 (Miss.1974), the losing party before the administrative judge filed a similar motion as was filed here within the twenty-day statutory period. We held that the filing of that motion tolled the twenty-day statutory appeal time from the administrative judge's order to the full commission
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> It further appears that the motion filed herein after a final judgment by the commission is similar to the filing of a motion for a new trial in a court of record. We have held many times that the filing of such a motion tolled the time for appeal. Garrett v. Miss.

State Highway Commission, 227 So.2d 856 (1969); Gulf, Mo. O.R. Co. v. Forbes, 228 Miss. 134, 87 So.2d 488 (1956); Davidson v. Hunsicker, 224 Miss. 203, 79 So.2d 839 (1955); Edwards v. Peresich, 221 Miss. 788, 74 So.2d 844 (1954); *and* Shaw v. Bula Cannon Shops, Inc., 205 Miss. 458, 38 So.2d 916 (1949). (Emphasis added).

We request, therefore, that the above referenced paragraph on page 8 be amended to state, in essence, that while Commission rules do not include a rule permitting parties to file a motion for rehearing or reconsideration, this practice is nonetheless permissible and widespread, courtesy of the cases just referenced.

THE CONCEPT OF WORKERS' COMPENSATION (pp. 9-12)

pp. 9-10 (TORT SYSTEM WEAKNESSES; CONSTITUTIONALITY OF THE WC SYSTEM): The historical and analytical information presented by PEER on pages 9-10 is fairly and accurately presented.

p. 11 (TYPES OF BENEFITS PAID . . .)

The first paragraph in this section on page 11 ends with the statement that an injured worker may receive two types of benefits: ***"(1) "disability benefits, under which the claimant receives compensation for lost wages; and, (2) medical benefits."***

As to disability benefits, payment therefor is not just limited to situations when a claimant has "lost wages", or more appropriately, a loss of wage earning capacity. Under section 7-3-17(c) (1)-(24), (26), a claimant may also receive benefits on the basis of a physical impairment alone, without regard to loss of earning capacity. See Ard v. Marshal Durbin Cos., 818 So.2d 1240 (Miss.Ct.App. 2002); Smith v. Jackson Const. Co., 607 So.2d 1119, 1125 (Miss. 1992).

The 3rd paragraph lists consequences for an employer's failure to maintain workers' compensation insurance, which PEER states is becoming subject to a civil action in tort without the benefit of any traditional affirmative defenses. However, section 71-3-83 of the MS Workers' Compensation Law also (1) makes the employer criminally liable, (2) makes certain employer representatives personally criminally liable, (3) makes certain employer representatives personally and jointly liable for payment of any award, and (4) makes the employer and its officers liable for a civil penalty up to Ten Thousand Dollars.

For the sake of accuracy, PEER may want to consider whether these paragraphs should be amended to include this additional information, although nothing critical turns on whether these changes are incorporated or not.

pp. 11-12 (APPLICATION OF THE STATUTE . . .)

This section contains a brief explanation of the two important principles which were fashioned by the Supreme Court in a long line of cases. The Act itself, in section 71-3-1, states the Commission

should act fairly and make its decisions according to the facts and evidence. The Supreme Court has nonetheless held repeatedly that the Act should be given a liberal construction in favor of compensation and that doubtful claims should be decided in favor of compensation. PEER concludes that the purpose of the WC Law is to create an "unlevel playing field" which favors compensation to the injured worker over any contrary argument of the employer.

One very important caveat is missing from PEER's analysis of how the Act is to be construed or applied. This Report fails to mention the following caveat to the principle of liberal construction:

> We recognize the rule that the work[ers'] compensation law should be broadly and liberally construed, that doubtful cases should be resolved in favor of compensation, and that the humane purposes the act seeks to serve leave no room for narrow and technical construction. But the rule of liberal construction may not be extended so as to eliminate the necessity of making proof prerequisite to recovery; and the humane spirit of the law does not warrant its extension beyond its legitimate scope. Ingalls Shipbuilding Corp. v. Howell, 221 Miss. 824, 832, 74 So.2d 863, 865 (1954).

In other words, no amount of liberal construction can be used to substitute for a lack of credible proof on the part of the claimant. Only if the claimant presents credible proof of his or her entitlement to benefits which rises to the required preponderance level is the Commission or a Judge suppose to give the claimant the benefit of the doubt in the face of equally credible proof from the employer. Our Supreme Court "remains firmly committed to the principle of liberal construction," but this principle "does not allow us to bridge gaps in the failure of the medical testimony or to find causal connections to the employment where none exists. Olen Burrage Trucking Co. v. Chandler, 475 So.2d 437 (Miss. 1985).

We feel the above is a very important caveat to the principles discussed by PEER on pp. 11-12. It is essential that this be included by PEER so that a complete statement of the applicable law is laid out, and a thorough understanding of the Law and how it should be applied in accurately conveyed to the reader. We feel PEER's current analysis leaves the unfair and inaccurate impression that the claimant has a significant advantage over the employer and should prevail most of the time.

CONCLUSIONS REGARDING ADJUDICATIVE FUNCTIONS OF THE MWCC (pp. 13-26)

The bulk of the Commission's disagreements arise from this section of the PEER Report. Not only does PEER blatantly contradict itself in this section of the Report, but it also casts the Commission, for the first time, as an "appellate" body functioning in an "appellate" capacity. We will demonstrate not only that this represents a gross mis-characterization of the Commission's statutory role under the Law, but that the only way PEER could remotely justify its criticism of the Commission in the context of adjudicating claims is to create a standard by which the Commission does not legally operate in order to test the outcome of its decisions. PEER's analysis regarding the Commission's adjudicative functions is quite clearly a pre-determined conclusion in search of a basis

to support it.

By law, the Commission is designated as the original and ultimate fact finder in its adjudication of workers' compensation claims. It is the Commission which is charged with making the ultimate decisions regarding the weight and credibility of the evidence. PEER itself "does not question the legality of the practices" by which claims are decided by the Commission, but instead questions the "wisdom and prudence" of continuing what it erroneously terms an "appellate system such as the one in place at the Commission." It cannot be emphasized too strongly that what PEER is doing here is completely and totally counter to the way the Commission has operated under the Law from its inception. In Bermond v. Casino Magic, 874 So.2d 480, 484 (Miss.Ct.App. 2004), the Mississippi Court of Appeals clearly stated what is already well understood:

> The findings and orders of the Mississippi Workers' Compensation Commission are binding on all appellate courts so long as the decisions are supported by substantial evidence. *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss.1988). This is a general deferential standard of review to the findings of the Commission. *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1245 (Miss.1991). As a matter of custom and practice, the administrative law judge is generally, within the Commission, the individual who conducts the hearing and hears the live testimony. However, it is the Commission itself that is the finder of the facts and that on judicial review, its findings and decisions are subject to the normal deferential standards, notwithstanding the opinion of the administrative law judge. *Walker Mfg. Co.*, 577 So.2d at 1245.
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> * * * * *
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> . . . the Commission as ultimate finder of fact was within its power to reject the administrative law judge's opinion, so long as substantial evidence supported the Commission's own judgment.[3]

PEER used a different standard by which it reviewed the decisions of the Commission. The basis it gives for doing so is that neither the plaintiff or defense bar have any problem with the way the Administrative Judges adjudicate claims. It supports this assertion with a "Resolution of Commendation" issued by the Workers' Compensation Section of the Mississippi Bar on April 24, 2009 which commended the Administrative Judges at that time for "conducting themselves in a forthright and honorable manner in fulfilling their Constitutional, Judicial and Ethical duty to the People of the State of Mississippi," and for "their exemplary service to the people of the State of Mississippi." We could not agree more with PEER's confidence in our Administrative Judges, but this confidence alone cannot change the facts or the law.

To judge the Commission as though it were an appellate body not only defies law, it makes any conclusions drawn by PEER conjectural. PEER cannot take decisions rendered by the

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[3] Although appeals are no longer filed first with the Circuit Court due an amendment to the Law effective July 1, 2011, before then that Court too was subject to the same review standards.: "[A] circuit court [sits] as an appellate court in reviewing the final order of the Workers' Compensation Commission." *Zurich Am. Ins. Co. v. Beasley Contr. Co.*, 779 So.2d 1132, 1134(8) (Miss.Ct.App.2000).

Commission based on laws which require the Commission to adjudicate claims as the original fact finder, and arrive at anything other than speculative conclusions as to the adequacy of the Commission's work if it is being assumed that the Commission is a true appellate body. If the Commission were in fact a true "appellate body" whose role is to review the decisions of Judges using the same standards applicable to appellate courts, then quite likely the outcome of PEER's review would be different. Using the same "appellate" standard as PEER, it is relatively easy to conclude the Commission failed to give enough deference to the rulings of the Administrative Judges. In exactly the same way, a teacher could ensure that her students fail a chapter test by having them study chapter 1 and then giving them a test on chapter 10. This is no different, except that we will demonstrate that the rate at which the Commission reverses and/or modifies Judges' orders is only 6.89% higher since 2007 than it was for the 10 years prior to 2007. We will also demonstrate, by applying the true test of the legality and legitimacy of the Commission's decision-making, that the Commission overwhelmingly adjudicates claims within the bounds of the very law it is charged with administering.

pp. 14-15 (CRITERIA FOR REVIEWING ADJUDICATE FUNCTIONS OF THE COMMISSION; STANDARD OF REVIEW)

PEER devotes these two pages trying to convince its readers that (1) the Commission should render decisions and write opinions on each and every claim it reviews by setting out in detail the reasons for its decisions, in accordance with what PEER believes us a "fundamental principle of appellate adjudications," and (2) the Commission should exercise its power of review over the decisions of Administrative Judges in the same way that appellate courts in this State do, i.e., consider, as PEER does, the Administrative Judges to be "the trial judges" and apply a "highly deferential" standard of review to their decisions.

This is certainly a novel concept, but one which simply cannot withstand the overwhelming weight of law to the contrary. First and foremost, the very "appellate" standards which PEER would have us adopt with regard to writing and publication of decisions do not require that the appellate courts in this State render a detailed, transparent written opinion on every case decided by the Court. We direct PEER's attention to Rules 35-A and 35-B of the Mississippi Rules of Appellate Procedure which provide that the Supreme Court and Court of Appeals "may" write opinions on all cases heard by it, but they also have the discretion to affirm the decision of the lower court without rendering a formal opinion. Likewise, the Commission is not required to always issue detailed written opinions on every case it reviews, and the failure to do so is in no way fatal to validity of the order. Rivers Construction Co. v. Dubose 241 Miss. 527, 537, 130 So.2d 865, 869 (1961).

Secondly, the law does not consider the Administrative Judges to be the equivalent of elected, state trial court judges. Instead, as explained by our highest Court in the case of Day-Brite Lighting Division, Emerson Elec. Co. v. Cummins, 419 So.2d 211, 212-213 (Miss. 1982):

> We have previously set forth the role of the attorney-referee (now administrative judge) as a "facility of the Commission." *Railway Express Agency v. Hollingsworth,* 221 Miss. 688, 74 So.2d 754 (1954). This role of "facility of the Commission" follows directly

from the fact that the commission itself, and not the administrative judge, is the fact finder in all work[ers'] compensation cases. Dunn, *Mississippi Work[ers'] Compensation,* § 284 (1967).

As the fact finder in all work[ers'] compensation cases, the commission has the authority not to accept any or all fact findings of its "facility", the AJ. In *United Funeral Homes, Inc. v. Culliver,* 240 Miss. 878, 128 So.2d 579 (1961), we made it clear that as long as the commission's decisions were based upon substantial evidence, that decision would be upheld upon appeal in spite of the fact that the administrative judge's decision was also supported by substantial evidence. This role of the commission as *the* trier of fact was further emphasized in *Moon v. Erwin Mills, Inc.,* 244 Miss. 573, 145 So.2d 465 (1962).

The respective roles of the commission and the AJ derive from the fact that jurisdiction in work[ers'] compensation cases is vested statutorily in the commission itself. *Everitt v. Lovitt,* 192 So.2d 422 (Miss.1966).

The Commission is not at liberty to disregard or act in derogation of the law by simply transforming itself into a bona-fide appellate body. As noted above, the role of the Commission as the original and ultimate fact finder derives "from the fact that jurisdiction in work[er's] compensation cases is vested statutorily in the Commission itself." Id.; see also Dependents of J. E. Moon v. Mills, 244 Miss. 573, 578, 145 So.2d 465, 466 (1962) ("We are unable to agree that the finding of the attorney-referee is analogous to the finding of a master in chancery, under the former decisions of this Court as to the weight to be given a finding of the Work[ers'] Compensation Commission. We think that the case here is not whether the finding of the attorney-referee is supported by substantial evidence but whether or not the finding of the Commission is supported by substantial evidence.")

pp. 16-19 (LEGAL GROUNDS FOR MWCC'S REVERSALS & MODIFICATIONS)

PEER selectively reviewed a few cases from the Court of Appeals and Supreme Court in an attempt to try and demonstrate that the Commission "often" reverses and/or modifies the decisions of Administrative Judges without a clear basis for doing so, and is less deferential to its Administrative Judges than a true appellate court. According to PEER, the Commission's actions in these selected cases do not comport with "commonly accepted standards of review and the need for expeditious delivery of benefits to claimants." We presume PEER is referring to its own standards of review which do not apply to the Commission and have no basis anywhere in the body of the Workers' Compensation Law. Our assessment of these decisions follows.[4]

[4] Here, we look at the specific cases cited by PEER. In our response to pp. 20-22 of the PEER Report, we address PEER's contentions that the Commission, in general, reverses and/or modifies the decisions of the Judges too frequently, and does so often without legitimate, "transparent" reasons for doing so.

Cox v. National Bedding Company, MWCC No. 07-07134-J-9193-A:

The PEER report is incorrect in its assertion that the Commission provided no clear basis for its decision. The Commission based its findings regarding the Claimant's post-injury wage-earning capacity on an accommodated position from which the Claimant resigned that was within the restrictions assigned by her physicians. Although the PEER report mentions the Claimant's testimony that she could not perform that job, the Claimant herself stated the following regarding the Commission's decision: "The Commission correctly applied the law in looking at the uncontradicted testimony and the evidence presented, both medical and lay, when making their Decision as it relates to this case." (Claimant's Response to the Employer/Carrier's Motion to Reconsider, filed by the Claimant on December 7, 2009). This pleading from the Claimant went on to state that the Commission was "correct in its holding."

Cole v. Ellisville State School, MWCC No. 051289-J-5489:

The Commission addresses *Cole* below with a more lengthy legal analysis of this case and a related case which shortly followed, *City of Laurel v. Gavin Guy*, 58 So. 3d 1223 (Miss. Ct. App. 2011).

Anissa Holcombe v. George County Hospital, MWCC No: 07-03540-J-8959

This matter is still pending before the Commission on post-hearing motions for which no ruling has been issued. The Mississippi Code of Judicial Conduct Canon 3(B)(9) states that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make a nonpublic comment that might substantially interfere with a fair trial or hearing." The Commission finds that based on this Canon it would be improper to comment on this matter.

Edmondson v. Blood Systems, Inc., MWCC No. 04-10498-J-2111

In support of its decision, the Commission cited the availability of post-injury employment from the Employer within the Claimant's restrictions and the Claimant's failure to present herself for re-employment after reaching maximum medical improvement. This Commission decision was affirmed by the Circuit Court of Lee County, Mississippi. The Court found that "the decision of the Full Commission of the Mississippi Workers' Compensation Commission was supported by substantial evidence, was not arbitrary, and contains no errors of law and that the same should be AFFIRMED."

Sandifer v. City of Jackson, MWCC No. 07-12242-J-8990

This matter is still pending in a higher court. The Mississippi Code of Judicial Conduct Canon 3(B)(9) states that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or

make a nonpublic comment that might substantially interfere with a fair trial or hearing." The Commission finds that based on this Canon it would be improper to comment on this matter.

Hopper v. Joe's Garage, MWCC No. 05-03528-J-2248 and 05-03529-J-2249:

The Commission's decision was affirmed by the Mississippi Court of Appeals. The Court noted that the Commission's findings were supported by the medical testimony and the inconsistencies between the Claimant's testimony and the medical records. The Court rightly noted that "[t]he Commission serves as the ultimate fact finder in addressing conflicts in medical testimony and opinion." The Court found that the Commission's findings were supported by substantial evidence and were not arbitrary or capricious. The Commission would also note that in this case the Claimant's attorney filed no brief in the appeal before the Full Commission.

Ladner v. Zachry Construction, MWCC No. 09-07782-K -3592:

This matter is still pending in a higher court. The Mississippi Code of Judicial Conduct Canon 3(B)(9) states that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make a nonpublic comment that might substantially interfere with a fair trial or hearing." The Commission finds that based on this Canon it would be improper to comment on this matter. The Commission would also note that in this case the Claimant's attorney filed no brief in the appeal before the Full Commission.

Fair v. Beau Rivage Resort, MWCC No. 04-03980-J-1433

The Commission's decision was affirmed by the Mississippi Court of Appeals. The Court agreed with the Commission that substantial evidence showed the Claimant's need for right-shoulder surgery was not related to her work accident but was attributable to pre-existing right-shoulder problems dating back more than seven years prior.

White v. Beau Rivage Resort, MWCC No. 08-10002-K-1328

Although the PEER report states that "no clear basis was discernable" for the Commission's finding that the Claimant was not permanently and totally disabled, the Full Commission Order cited extensive evidence in support of its decision, including, but not limited to the following: 1) medical evidence showing that the Claimant remained capable of a medium level of work; 2) vocational rehabilitation expert testimony which identified post-injury employment opportunities for the Claimant; and 3) evidence offered by the Employer which contradicted the Claimant's assertions regarding the extent and reasonableness of his post-injury employment search.

Whittle v. Tango Transport, MWCC No. 09-11407-K-4490

This matter is still pending in a higher court. The Mississippi Code of Judicial Conduct Canon 3(B)(9) states that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make a nonpublic comment that might substantially interfere with a fair trial or hearing." The Commission finds that based on this Canon it would be improper to comment on this matter.

Shirley Cole v. Ellisville State School, 2010 WL 4069367 (Miss. Ct. App. 2010)

Shirley Cole injured her left knee while performing duties as a caretaker at Ellisville State School. She underwent a total knee replacement and was released at maximum medical improvement with restrictions and a 25% impairment to her left leg. Her restrictions included no prolonged standing or walking, no climbing, and no lifting greater than twenty-five pounds. Her treating physician found that she would be employable. Ms. Cole's employment history began in 1992 when she was employed for four months as a secretary. The remainder of her employment was in food service or as a caretaker. The Claimant's restrictions were such that she could no longer perform her food service or caretaker duties. Ms. Cole had completed two years of junior college with an emphasis in word processing and secretarial skills.

The Administrative Judge awarded the Claimant permanent disability benefits based on a 100% loss of use of the lower extremity. The Commission reduced the award to 50%. The Circuit Court affirmed, and the Court of Appeals reversed and reinstated the Administrative Judge's decision.

In this case, the Court found that Claimant was entitled to 100% because she had established a presumption of that loss based on her inability to perform the substantial acts of her usual employment. The Court found that the Commission's consideration of Claimant's previous employment as a secretary was erroneous because "working as a part-time secretary for approximately four months in 1992 can hardly be considered part of her usual employment."

The following language appears in the well-known Mississippi Supreme Court case of *Meridian Professional Baseball Club v. Jensen*, 828 So. 2d 740, 747 (Miss. 2002), as well as the case to be discussed next:

> "Usual employment in this context means the ***jobs in which the claimant has past experience, jobs requiring similar skills, or jobs for which the worker is otherwise suited by his age, education, experience, and any other relevant factual criteria***."

Although the *Cole* opinion from the Mississippi Court of Appeals cites *Jensen* repeatedly, it fails to cite the above language or how the Commission's application of it would have been erroneous. Ultimately, the Commission followed this language of the Mississippi Supreme Court in *Jensen*, noting that the Claimant had an advanced degree with an emphasis in secretarial skills and previous experience in that position. Thus, the Commission found that a secretarial position was one in which the claimant had past experience, and one "for which the worker is otherwise suited by [her]

age, education, experience, and any other relevant factual criteria." The Court of Appeals did not agree.

City of Laurel v. Gavin Guy, 58 So. 3d 1223 (Miss. Ct. App. 2011)

*This decision was issued by the Court on March 29, 2011, less than six months after the *Cole* decision. Both decisions are now final.

While working as a patrolman for the Laurel Police Department, Mr. Guy injured his left knee apprehending a suspect fleeing from a nightclub brawl. He underwent numerous surgeries and was ultimately assigned a 25% permanent impairment rating to the lower extremity. Although he initially returned to work with the Employer, he voluntarily left to take a job with the Petal Police Department as a warrant officer. He was promoted to the Investigations Unit, to a position that paid $10,000 a year more than his former position with Laurel. He was accommodated by Petal to the extent that he was allowed to perform his physical testing on a stationary bike in lieu of the running requirement.

The Administrative Judge awarded 100% loss of industrial use based primarily on the Claimant's inability to continue as a patrol officer and his need for special accommodation to pass the physical testing requirements of his new job. The Commission and the Circuit Court affirmed.

The Court of Appeals found that Mr. Guy had in fact established the presumption of 100% loss of industrial use in this case due to his inability to perform the substantial acts of his usual employment, specifically his inability to run, which, according to the Court, is required of all law enforcement officers. However, the Court found that in this case the presumption had been rebutted by the Employer based primarily on Claimant's post-injury earnings. Specifically, the Court held that, "while a worker who is earning post-injury wages may nonetheless be entitled to an industrial loss greater than his medical loss, he cannot be compensated for a total loss." The Court noted that "Rebuttal is shown by *all the evidence concerning wage-earning capacity...*" The Court found that in cases where industrial loss is to be found greater than the medical impairment, "the claimant's industrial or occupational disability or loss of wage-earning capacity controls his degree of disability." The Court reversed and remanded to the Commission for a determination of whether Mr. Guy experienced an industrial loss less than 100% but greater than his 25% medical impairment.

Unlike the *Cole* case we previously discussed, in *Guy* the Court does not stop simply after finding that the Claimant established his presumption. The *Guy* Court went on to find that the presumption was rebutted by evidence regarding Claimant's post-injury wage-earning capacity, similar to the evidence regarding the claimant's secretarial skills considered by the Commission in *Cole*. There are some who argue that the *Cole* case establishes some different burden of proof for "loss of industrial use" as opposed to "loss of wage-earning capacity," yet the Court in *Guy* clearly treats the terms as synonymous. Thus, based on *Guy*, an interpretation of the *Cole* case which suggests that the substantial acts presumption cannot be rebutted by evidence regarding a claimant's post-injury wage-earning capacity would be erroneous.

pp. 20-22 (EFFECTS OF THE COMMISSION'S REVERSALS & MODIFICATIONS)

PEER contends here that "the broad scope of the Commission's review authority has an impact on the stability and timeliness of determination of worker's compensation benefits." PEER also contends that the Commission's reversal and/or modification of Administrative Judge decisions violates "the time-honored principles of liberal construction of the workers' compensation statutes in favor in injured claimant."

Timeliness. As to PEER's claim that the review process statutorily assigned to the Commission delays the ultimate adjudication of claims, they sample 24 cases from 2010 and 2011 and somehow arrived at the conclusion that this review process added an average of 77 days to the adjudication process. Several problems inhere in this analysis.

First, the review process whereby the Commission is available to review orders of Administrative Judges is prescribed by the Workers' Compensation Law itself. While parties are not obligated to seek Commission review of AJ decisions, the option is there nonetheless. The Commission cannot simply refuse to review decisions when requested, so it could just as easily be argued that it is the choice of one or more parties to these claims to seek review in the first place that extends the adjudication process. If all parties to litigated claims operated on the same assumption of PEER, which is that the Administrative Judges are presumptively correct all the time, then perhaps they would think twice about seeking Commission review and saving everyone an average of 77 days added to the adjudication process. For better or worse, however, actual litigants do not always share PEER's confidence in the outcomes reached at the Administrative Judge level.

Second, one has to question why, of the 376 cases since January 1, 2007 that PEER analyzed, it chose to sample only 24 from 2010-2011 to support it's contention that the Commission review process adds an average of 77 days to the adjudication process. Furthermore, PEER analyzed 1,058 cases going back 10 years prior to January 1, 2007, but yet chose not to sample any of these in order to compare the delay associated with Commission reviews prior to 2007.

Third, there are perfectly legal reasons which account for most of the additional time consumed in the Commission review process. Once an Administrative Judge issues a decision, either party has up to 20 days in which to file for Commission review. Once a petition for Commission review is filed, the Court Reporter must transcribe the hearing, and the appeals clerk must assemble and prepare the record of testimony and documentary evidence. This "record" will serve as the record for any appeal which may be later filed to the Supreme Court so it must meet certain standards. This step could easily consume an additional 20-30 days, bringing the required additional time so far up to 50-60 days. Next, the Commission must schedule with the parties a date for hearing if oral argument is being allowed. The additional time here is largely attributable to the schedules of the attorneys involved as the Commission generally can schedule hearings in as little as two to three weeks. Since both attorneys must agree on a suitable date, however, it could take anywhere from two weeks to two months before the oral argument can take place. If the Commission elects to review the case "on the record" without the benefit of oral argument, it must allow 60 days for the parties to file a written brief (30 for the party who sought review, and 30 more for the other party). Finally, once the Commission completes its review, the majority of cases are decided the same day and an

order is issued by the Commission. If a detailed written opinion is desired by the Commission, these are generally completed within 60 days after the hearing. All total, the minimum required time added to the adjudication process as the result of a party seeking Commission review is at least 75 days.

Incidentally, the Judges are also asked to issue their opinions within 60 days after the hearing, and by comparison, the Supreme Court and Court of Appeals follow a standard where "Cases are normally decided within 270 days following the completion of briefing."

Finally, we randomly sampled 26 cases decided by the Commission since January 1, 2007 which were then appealed to the Circuit Court and ultimately decided on the merits by the Circuit Court. On average, these appeals added over 11 months to adjudication process. This was one significant reason why the Legislature chose to amend the appeal statute and direct appeals to the Supreme Court from the Commission.

By comparison, the Commission demonstrates an amazing level of efficiency based on PEER's finding that the Commission review process lengthened the overall adjudication process by an average of 77 days. Curiously, PEER elected not to analyze and determine the average length of time it took Administrative Judges to decided claims from the time they were first filed.

Legitimacy of Commission Decisions. Like on p.14 and 16-19 of their Report, PEER questions whether the Commission too often reverses or modifies the decisions of its Administrative Judges, and in so doing, whether it violates the principle of liberal construction and whether it offers legitimate reasons for taking such action.

First, with regard to the frequency with which the Commission reverses and/or modifies the decisions of Administrative Judges, PEER contends that prior to January 1, 2007, the Commission affirmed AJ decisions without modification 70% of the time, compared to 58% of time since January 1, 2007. Reversals, it says, rose from 15% to 18% over this same period, and modifications increased 5% to 8%.

The Commission's own analysis of all cases from FY 1998 through FY 2010 reveals the following:

YEAR	Affirm	Reverse	Reverse/ Remand	Modified	Rate
FY 98	107	17	3	0	15.75%
FY 99	101	8	4	7	15.83%
FY 00	83	14	3	5	20.95%
FY 01	69	11	2	11	25.81%
FY 02	82	10	1	3	14.58%

FY 03	67	11	2	2	18.29%
FY 04	62	15	3	3	25.30%
FY 05	50	12	2	2	24.24%
FY 06	88	24	1	7	26.67%
FY 07	74	10	12	3	25.25%
FY 08	60	16	2	10	31.82%
FY 09	49	5	6	5	24.62%
FY 10	51	6	10	5	29.17%
Totals	**943**	**159**	**51**	**63**	**22.45%**

	Affirm	**Reverse, etc.**
AVG FY07-FY10	**72.29%**	**27.71%**
AVG FY98-FY06	**79.17%**	**20.83%**
DIFFERENCE	**-6.88%**	**-6.88%**

The above demonstrates an average rate of reversal and/or modification prior to FY2007 of 20.83% ,thus yielding an average affirm rate of 79.17%. Since FY2007, the average reverse/modify rate is 27.71%, yielding an average affirm rate of 72.29%. Based on the 1,216 cases included in the above study, the difference in rates of affirmance translates into the post-2007 Commission reversing and/or modifying only 83 more cases than the pre-2007 Commission. In the grand scheme, this number strikes us as bordering on the statistically insignificant, especially when you consider that in several of these instances of modification by the post-2007 Commission, more benefits were being to the Claimant than the Judge awarded.[5]

Much more significant, in our opinion, is that PEER's criticism of the Commission's decisions which reverse and/or modify AJ decisions as having little or no legal basis and lacking transparent explanations, must be compared to the outcome of these same decisions on appeal to the Circuit Court, Court of Appeals and Supreme Court. As we have previously attempted to explain, these bodies provide a true check on the exercise of arbitrary or unjustified behavior. It is these courts who ultimately determine whether the Commission is performing it's adjudicative functions in accordance with the Law. There are always going to be parties on one side or the other who may not agree with the way we make decisions, but at the end of the day, it is the appellate courts who decide the legitimacy of the Commission's decisions.

In Smith v. Johnston Tombigbee Furniture, 43 So.3d 1159, 1164 (Miss.Ct.App. 2010), the Court very adequately explained their role in the review process, and how this acts as a check against the Commission:

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[5] This study is done on an FY basis, meaning that the figures for FY2007 include six months of work attributed to the Commission which existed prior to January 1, 2007, but the total numbers for FY 2007 were assigned to the current Commission.

> Our standard of review in actions arising under Workers' Compensation Law is limited to determining whether the Commission erred as a matter of law or made findings of fact contrary to the overwhelming weight of the evidence. *Clements v. Welling Truck Serv., Inc.*, 739 So.2d 476, 478 (¶ 7) (Miss.Ct.App.1999) (citing *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss.1988)). "Reversal is proper only when a Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law." *Weatherspoon v. Croft Metals, Inc.*, 853 So.2d 776, 778 (¶ 6) (Miss.2003). Our supreme court has also stated the Commission will only be reversed "for an error of law or an unsupportable finding of fact." *Ga. Pac. Corp. v. Taplin*, 586 So.2d 823, 826 (Miss.1991) (internal citations omitted). When the Commission's decision is supported by substantial evidence, then it must be upheld. *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss.1994). This remains true even though we might have reached a different conclusion were we the trier of fact. *Id.*

The Commission analyzed a total of 105 cases which were decided by the Commission since January 1, 2007, and were then appealed to Circuit Court. Of these 105 cases, the Circuit Court affirmed the Commission in 98 cases, reversed the Commission in 5 cases, and affirmed in part and reversed in part in 2 of the cases. The current, post 2007 Commission, has been held by the Circuit Court to have reached perfectly legitimate, supportable decisions over 93% of the time.

We also analyzed the cases decided by the Commission since January 1, 2007 which were appealed to the Supreme Court and decided there by the Supreme Court or Court of Appeals. At this level of appeal, the Commission's decisions have been affirmed 84.34% of the time (70 of 83 cases affirmed). This equates to a finding by the highest appeals courts in our State that the Commission's adjudicative work is lawful, is not arbitrary or capricious, does not violate any statutory or constitutional rights of the parties, and is supported by the evidence 84.34% of the time. It also bears noting that in 6 of the 13 decisions where the Commission was reversed, the Commission had ruled in favor of the claimant.

Either way you choose to look at it, there can be no question but that the Commission is performing its adjudicative functions efficiently, legitimately, and in a perfectly legal manner.

pp. 22-24 (COMMISSION'S RULES AND OPERATIONS)

In this section PEER asks the question "***has the commission adopted rules and practices to ensure statutory compliant and efficient operations.***" Following this broad question, PEER then focuses solely on whether a portion of the Commission's General Rule 9 regarding immediate hearings to address medical treatment issues complies with section 71-3-17(b) of the Law which deals with the right of a claimant to have an immediate hearing on an entirely different issue. PEER concludes that our General Rule 9 and section 71-3-17(b) do not conform to one another.

PEER also contends that the portion of Procedural Rule 10 giving the Commission discretion to entertain oral argument, or consider cases on review without the benefit of argument, "***could work to the detriment of a party***" because of the fact that the Commission may consider additional evidence on review which a party could then not rebut absent oral argument.

- the "Five Day" hearing dilemma

The PEER report erroneously identifies the provision of Miss. Code Ann. Section 71-3-17(b) as a provision regarding medical benefits. In fact, as indicated by the title of that subsection, that provision concerns instances where a claimant's "temporary total disability" benefits have been terminated by the carrier. Thus, the PEER report is erroneous in its assertion that the Commission's General Rule 9, a rule concerning medical benefits, should "comport with the statute" regarding temporary total disability benefits.

Furthermore, previous Commissions, including those prior to 2007, have held that neither the Mississippi Workers' Compensation Act nor the General or Procedural Rules of the Commission create a mandatory, automatic right to a hearing upon 5 days notice. *See Willie James Brown v. United Technologies Automotive*, 1998 WL 309225, MWCC No. 98-01499-G-2039 (Miss. Work. Comp. Com. May 26, 1998)("The Judge entertaining such a request has wide discretion to determine whether such a hearing is appropriate or necessary. There is no automatic "right" as Brown contends to an evidentiary hearing under either provision simply for the asking.") Although the PEER report characterizes the 5 day hearing provision of 71-3-17(b) as "unambiguous" and "mandatory," this characterization ignores the statute's use of the word "may," which has been interpreted by previous Commissions to mean that such a hearing is permissive, not "mandatory." *Id.*

pp. 24-25 (COMMISSION DISCRETION REGARDING ORAL ARGUMENT)

PEER's assumption that the Commission's discretionary use of oral argument "could work to the detriment of a party if such party is not allowed to argue against new evidence" shows a lack of understanding how the Commission exercises its adjudicative functions. As a side note, the very appellate courts in this State to which PEER says we should aspire also exercise discretion with regard to oral argument and do not allow it in every case. Miss.R.App.Proc. 34(a).

More importantly, PEER seems to question the Commission's commitment to due process. In any given case, whether the Commission feels oral argument will be beneficial and efficient or not, a party is never going to be denied the right to argue against or in someway rebut the introduction of new evidence by another party to the case.

pp. 25-26 (ASSIGNMENT OF STAFF TO ADMINISTRATIVE JUDGES)

PEER makes the assertion that delays "may" occur in the Administrative Judges ("AJ") being able to issue orders following hearings because "the commission does not assign the administrative law judges any support staff to assist them in producing orders, opinions, and other documents necessary for the completion of their work." First, PEER's use of the word "may" along with their concessions that any delay between an AJ hearing and the issuance of an AJ Order is "likely" due to other factors, admits of the speculative nature of their conclusion that "some administrative assistance could help reduce the amount of time taken for each case." Ultimately, PEER even admits the delay between AJ hearings and AJ orders is not meaningfully different prior to or after 2007; "consequently,

this is not necessarily a problem that has arisen in recent years."[6]

Second, PEER's claim that ***"the commission does not assign the administrative law judges any support staff to assist them in producing orders, opinions, and other documents necessary for the completion of their work" is totally inaccurate.*** PEER bases this claim on its review of "the organizational chart in the commission's FY 2012 budget request. . ." PEER also interviewed some of the current Administrative Judges as part of its investigation, but apparently did not question them about support mechanisms in place, or else received inaccurate information. Below, we outline the true structure of the Commission prior to and after January 1, 2007.[7]

When the current Commissioners began serving (Williams 2005, Junkin 2007, and Gibbs 2010), the staffing related to the Administrative Judges and their work, including docket room staff (legal assistants and administrative personnel), court reporters, and secretarial staff for typing orders, was as follows:

8 Administrative Law Judges;
8 Court Reporters;
4 Legal Assistants;
2 Administrative Personnel in Docket Room;
2 Secretaries available to type orders, along with other duties.

For several years prior to what is referred to as the "post 2007 Commission," Judges routinely dictated orders and sufficed with the typing assistance of two dedicated secretaries and docket room staff who maintained files for them. Beginning in about 1992-1993, the Commission provided advanced word processing software to all Judges and staff, and has consistently upgraded this software as well as the computing equipment used by the Judges and staff. As a result, many Judges have come to regularly compose and finalize their own orders without the need for any secretarial

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[6] PEER announced the Scope of this investigation is to determine whether the Commission is performing its adjudicative functions satisfactorily, and whether the Commission's rules and practices ensure statutorily compliant and efficient operations. We are not sure how this speculative analysis regarding delays related to Judges issuing orders after hearings fits within the announced scope of this inquiry, but we are more than comfortable nonetheless that staffing issues vis-a-vis' the Judges is not at all a cause of delay in issuing orders.

[7] Following a meeting with PEER staff on December 8, 2011, the Commission was advised that PEER would be supplementing its final report on page 26, before the exhibit, with the following information: "*The Commission notes that it has assigned two externs to the administrative law judges to provide them with services and support comparable to those of a law clerk. The externs are law students who work 10 hours per week during the academic year, and 35 hrs per week during the summer. Additionally, the Commission has told PEER that one secretary to one of the commissioners has been given the responsibility of providing support to the 8 Administrative Law Judges. Docket room staff also provide some support but this is associated with collecting pleadings and other documents necessary to the hearing of claims or motions, and it not related to research or the preparation of orders for hearings on the merits.*" While we are appreciative of this addition to the Report, we feel it necessary nonetheless to offer our full explanation, notwithstanding the fact some of these points will be reiterated.

assistance. Free training in the use of this software and other new software based on the Windows platform was made available to all Commission staff through an arrangement with the Personnel Board. This automation process significantly lessened the need for secretarial staff dedicated solely to typing AJ orders.

As the result of initiatives taken by the current Commission, and based in part on the continuing upgrade of computer equipment and software which has allowed those Judges willing to try a more efficient system for generating orders, the following additional changes have been implemented:

1. We reduced the Court Reporter staff from 8 full time reporters to 4 full time reporters. We have standing contracts with some independent reporters in case they are needed to relieve pressure on the current 4, but these contract reporters are rarely used because the current 4 reporters easily handle the work load.

2. We purchased new voice activated software called "Dragon Naturally Speaking" for every Judge and our staff attorneys which enables the user to dictate directly into their computers and the software generates the text for the order. The AJ then edits, arranges and issues the final order. Not all of the AJ's have elected to make use this software, but it is available and we have experienced personnel to assist with training.

3. Judges are allowed and have been encouraged to require that attorneys for one or all of parties to initially prepare proposed orders consistent with the Judge's instructions, and to submit these electronically in an editable and compatible format so the Judge can provide any necessary final editing. AJ's may have one or both attorneys prepare a draft order for them to review, which they in turn edit and issue the final order. The submission of a proposed order for the Judge is in fact required anytime a motion for any type of relief is requested. Miss. Workers' Comp. Comm Procedural Rule 22(a).

4. Currently, we have one secretary always available to type orders, along with her other duties, and we have one additional secretary available if needed.

5. Working with our Judges and the two Law Schools in the State, we have added two externs who are assigned to work exclusively with the Judges. These are 2nd or 3rd year law students from MC or Ole Miss School of Law who are able to assist the Judges with legal research, file review, order drafting, etc. During the Fall and Spring school semesters, these student externs are allowed to work up to about 10 hours per week. In the summer they can work full time. With Miss. College in particular, their extern program will pay the wages of the extern up to 35 hours per week during the summer period..

6. All Judges are thoroughly equipped with modern lap top computers containing advanced word processing software, email, WestLaw legal research access, advanced networking and other conveniences which allow them to type their own orders from any location. WestLaw access in particular is available from any computer or location where an

internet connection is available. This service comes with unlimited monthly usage, and WestLaw is the leading provider of electronic legal research. Results found from WestLaw research online can be viewed, printed, emailed, or downloaded to the user's computer for permanent storage.

7. We have standardized and automated many of the most common orders that are entered on a frequent and routine basis by Judges so that no effort at all is required of the Judges to enter these orders other than affixing their signature. Examples of these are attorney withdrawal orders, claim dismissal orders, and case consolidation orders. These orders, and pre-addressed envelopes, are printed automatically by the Commission computer system. Legal assistants to the Judges are primarily responsible for printing these orders, having the Judge review and sign them, and forwarding them to the Office of Commission Secretary where they are attested and mailed to the parties.

We feel PEER should also take note of the fact that we have experienced a significant reduction in overall staff for the Commission. This has been possible due to increasing use of and reliance on technological advancements, a significantly reduced work load, and is in keeping with the Governor's and the Legislature's request that all Agencies reduce staff where possible. We have done this without compromising the quality of work. See the figures below for details.

YEAR	TOTAL STAFF	JUDGES &RELATED STAFF	ALL OTHER
2005	71	22[8]	49
2010	54	18[9]	36
Change	(23.9%)	(18.2%)	(26.5%)

One important reason why we have been able to reduce overall staff is because the number of new claims being reported to the Commission each year has been steadily declining. Not only new claims, but overall productivity by the Administrative Judges has steadily declined from 2005 to 2010, as shown below.

YEAR	CLAIMS
1994	20,557
2005	12,536
2006	12,598
2007	12,369
2008	11,720

[8] Does not include part time staff or contract personnel.

[9] Does not include part time staff or contract personnel.

2009	11,090
2010	11,290

PERIOD	Total Difference	% Difference
2005-2010	-1,246	-9.94%
1994-2010	-9,267	-45.08%

PRODUCTIVITY BY ADMIN. JUDGE				
JUDGE	YEAR	HEARINGS	ORDERS	TOTAL ACTIVE CASES
BEST	2005	19	13	703
	2006	16	14	656
	2007	8	14	777
	2008	19	9	605
	2009	18	5	467
	2010	13	11	476
%CHANGE				
2005-2010		-31.58%	-15.38%	-32.29%
DIXON	2005	34	27	659
	2006	24	27	560
	2007	13	11	443
	2008	17	15	482
	2009	18	15	578
	2010	23	18	556
% CHANGE				
2005/2010		-32.35%	-33.33%	-15.63%
HARTHCOCK	2005	53	48	675
	2006	34	34	548
	2007	47	30	535
	2008	20	30	496
	2009	19	21	574
	2010	22	19	574

% CHANGE				
2005/2010		-58.49%	-60.42%	-14.96%
HENRY/ARNOLD	2005	26	27	579
	2006	20	20	556
	2007	25	20	516
	2008	15	22	432
	2009	21	17	487
	2010	10	16	432
%CHANGE				
2005/2010		-61.54%	-40.74%	-25.39%
LOTT	2005	19	27	578
	2006	22	21	569
	2007	17	20	513
	2008	18	15	538
	2009	17	19	475
	2010	15	19	445
% CHANGE				
2005/2010		-21.05%	-29.63%	-23.01%
MOUNGER	2005	32	39	524
	2006	27	29	497
	2007	14	21	544
	2008	14	6	537
	2009	20	20	490
	2010	21	15	447
% CHANGE				
2005/2010		-34.38%	-61.54%	-14.69%
THOMPSON	2005	22	21	518
	2006	19	15	473
	2007	12	9	547
	2008	12	4	531
	2009	9	9	499
	2010	11	4	443
% CHANGE				

2005/2010		-50.00%	-80.95%	-14.48%
WILSON	2005	23	40	547
	2006	19	25	528
	2007	28	17	580
	2008	25	25	566
	2009	33	26	478
	2010	19	23	465
%CHANGE				
20052010		-17.39%	-42.50%	-14.99%
GRAND TOTAL	Year	Hearings	Orders	Total Active Cases
ALL AJ'S	2005	228	242	4783
	2006	181	185	4387
	2007	164	142	4455
	2008	140	126	4187
	2009	155	132	4048
	2010	134	125	3838
% CHANGE				
2005/2010		-41.23%	-48.35%	-19.76%
2010 AVG. PER		Hearings	Orders	Total Active Cases
AJ PER YEAR		16.75	15.63	479.75

These declining claim numbers greatly belie the contention of PEER that Administrative Judges are not provided with adequate assistance to help them issue their decisions in a timely manner. As these numbers show, as of 2010, Judges on average were having 16.75 evidentiary hearings per year (just over one per month), and were issuing orders awarding or denying benefits at the average rate of 15.63 per year (just over 1 per month). While the active case dockets may look imposing at first, the vast majority of these cases do not require any extra effort by the Judge. A very significant amount of the day to day management of these claims is either automated or handled by the Legal Assistants. The most telling numbers regarding their work loads are the number of hearings actually held each month and year, and the number of orders awarding or denying benefits which are being issued on a monthly and annual basis. These numbers make it very difficult to justify additional expenditures on personnel solely for the purpose of providing assistance to the Judges themselves.

POLICY OPTIONS AND RECOMMENDATIONS (PP. 27-30)

pp. 27-28 (ABOLISH THE COMMISSION)

PEER believes its analysis support the elimination of the Commission and the creation of an office consisting of an Executive Director and appointed Judges with set terms who would decide cases. Appeals would go straight to the Supreme Court. PEER concedes that one Commission could be included to head agency administration and rule making functions, but ultimately it recommends an appointed Executive Director be put in charge of these functions.

It should be clear to anyone who reads the PEER Report as well as our Response that PEER's analysis and conclusions are not supported and are contrary to the circumstances which currently exists. As we noted previously, PEER's use of selective analytical tools to conduct this review have no basis in law or fact. The regularly declining case load of the Judges, the negligible difference in affirmance rates between current and past groups of Commissioners, the Commission's efficient dispositions of cases, and the overwhelming rate at which the appellate courts have supported the decisions of the Commission, all combine to render this particular recommendation highly questionable.

Moreover, PEER's recommendation to abolish the Commission simply ignores other responsibilities of the Commission for which PEER has made no provision. The Commission is, among other things, responsible to maintaining its Medical Fee Schedule, a very complicated but successful cost containment tool which saves millions of dollars per year in medical expenses while ensuring the injured worker is able to obtain necessary treatment and is not subjected to unnecessary procedures.

The Commission also is responsible for licensing and regulating all self insured employers in the State of Mississippi, which includes well over 100 individually self insured companies and approximately 14 group self insurance programs. This group includes several thousand employers and employees and represents approximately 50% of the premium collected and benefits paid in the State of Mississippi.

PEER's failure to recognize these and other responsibilities further discounts the legitimacy of this study by showing PEER's lack of familiarity not only with the Workers' Compensation Law, but with the different responsibilities and functions of the Commission.

p 29 (REVISE THE ROLE OF THE COMMISSION . . .)

Lastly, PEER recommends the Legislature consider a requirement that all three members of the Commission be licensed attorneys, and that the Commission's role in reviewing claims be modified to make the Commission more like a traditional appellate court.

The only comment here is that simply requiring Commission members to be licensed attorneys is no guarantee that the outcomes PEER desires would be any different than they are today. Repeatedly, the Supreme Court has stated how the Workers' Compensation Law should be applied

using common sense, taking into account the flesh and blood realities of the injured worker. Stuart's, Inc. v. Brown, 543 So.2d 649 (Miss. 1989). A law license is no guarantee that outcomes will be any more or less favorable to any particular group of people.

Thank you for the opportunity to present this Response.

Sincerely,

Liles Williams, Chairman

John R. Junkin, Commissioner

Debra H. Gibbs, Commissioner

PEER's Response to the Agency Response

Pages 32 through 57 of this report contain the response of the Workers' Compensation Commission to a draft copy of this report. The response defends the current practices of the commission and could be distilled into two broad principles--that the commission follows the law and that PEER's criticism is unfounded. While generally PEER does not make a practice of responding to an agency's response, the Committee finds it necessary to include a brief addendum to the report to make clear a few points.

At no point in the report did PEER criticize the Workers' Compensation Commission for not following the law. The report goes to great pains to point out that the commission follows the law in its adjudicative processes. What PEER points out is that the adjudicative process could be carried out more efficiently and with greater transparency. It appears that the additional time the commission expends on reviewing and often modifying decisions of the administrative law judges adds little to the ultimate fairness of the process, but does add time. PEER suggests in the report that the Legislature could remedy these problems by either eliminating the commission, thereby allowing decisions of administrative law judges to be appealed directly to the courts, or by limiting the commission's subject matter jurisdiction to matters generally within the scope of the appellate process.

During the process by which agencies respond to PEER's report, an exit conference is generally held. At the exit conference held for this project, PEER agreed to add language to the report at page 26 regarding administrative support provided to the administrative law judges. However, PEER would note that in preparing its response, the commission wrote at length about there being error in this finding, with only the barest acknowledgement of the addition of the information that PEER included. The acknowledgement is found in footnote 7 to the agency response. In view of the fact that the staff included all things the agency brought forward regarding administrative support, it would appear that further discussion of this matter would be a moot point.

In several places in the agency response, the commission asserts that the report contains errors. In these cases, the commission is trying to make differences of opinion or weight of the evidence to be factual errors. In these cases, the Committee will allow the report to speak for itself.

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