

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2013-WC-00409-COA**

**SARA PULLIAM**

**APPELLANT**

v.

**MISSISSIPPI STATE HUDSPETH REGIONAL  
CENTER AND MISSISSIPPI STATE AGENCIES  
WORKERS' COMPENSATION TRUST**

**APPELLEES**

DATE OF JUDGMENT:	02/22/2013
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEY FOR APPELLANT:	W. HOWARD GUNN
ATTORNEY FOR APPELLEES:	GINGER MOORE ROBEY
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIBUNAL DISPOSITION:	AFFIRMED THE ORDER OF THE ADMINISTRATIVE JUDGE DENYING APPELLANT'S REQUEST FOR PERMANENT DISABILITY BENEFITS
DISPOSITION:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED TO THE WORKERS' COMPENSATION COMMISSION FOR A DETERMINATION OF THE DATE CLAIMANT REACHED MAXIMUM MEDICAL IMPROVEMENT AND DISABILITY BENEFITS – 05/20/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**EN BANC.**

**IRVING, P.J., FOR THE COURT:**

¶1. On January 23, 2007, Sara Pulliam filed a petition to controvert with the Mississippi Workers' Compensation Commission (Commission), alleging that she had sustained

compensable injuries to her back, right shoulder, and body as a whole on March 26, 2006, while working as a direct care worker (DCW) for the Mississippi State Hudspeth Regional Center (Hudspeth). Hudspeth admitted that Pulliam had sustained compensable injuries to her back and right shoulder, but disputed the nature and severity of those injuries, including Pulliam's contention that her Chiari malformation and cervical-spine problems were causally related to her work injury.

¶2. A hearing was held before an administrative judge (AJ), who found that Pulliam had reached maximum medical improvement (MMI) on July 1, 2006; that Pulliam failed to prove that she suffered permanent disability as a result of her injuries; that Pulliam's average weekly wage at the time of the injury was \$296.01; that Pulliam's cervical spine and Chiari issues were not causally related to her work injuries; that Pulliam's other claims were barred by the statute of limitations; and that Hudspeth is responsible for medical expenses associated with Pulliam's injuries to her right shoulder and the lumbar area of her spine. Pulliam requested that the Commission review the AJ's decision. The Commission affirmed the AJ's decision and clarified that the AJ "found that [Pulliam's] lumbar [injury], thoracic [injury], and right[-]shoulder [injury were] compensable."

¶3. Feeling aggrieved, Pulliam appeals and argues that: (1) the Commission erred in upholding the AJ's erroneous decision to admit a medical report into evidence; (2) the Commission's findings were not supported by substantial evidence; (3) the Commission erred in finding that "Pulliam's claims other than [the] injury to her back and right shoulder are barred by the statute of limitations"; and (4) the Commission erred in finding that

Hudspeth was not responsible for certain medical expenses.

¶4. After a thorough review of the record, we affirm the Commission's finding that Pulliam's Chiari symptoms and cervical-spine issues were not causally related to her work-related injury. We also affirm the Commission's finding that Hudspeth shall only be responsible for the medical expenses associated with Pulliam's compensable injuries. However, we find that the AJ erroneously considered unauthenticated medical evidence. Because the AJ's findings regarding Pulliam's MMI date and her entitlement to permanent disability benefits, if any, rested largely on the erroneously considered evidence, we reverse the findings as to those issues and remand this case to the Commission for further proceedings consistent with this opinion.

#### FACTS

¶5. Pulliam began working for Hudspeth as a DCW in 2004. Prior to working for Hudspeth, Pulliam worked as a factory worker and a teacher's aide. On March 26, 2006, Pulliam assisted two coworkers with a patient to prevent the patient from falling. After helping her coworkers with the patient, Pulliam began to feel pain in her lower back and right shoulder. She reported the incident to her supervisor, Ruby Glover, and completed an accident report. On the following day, Pulliam presented to Dr. Charles Ozborn, a family practitioner, and told him about the incident at work. Dr. Ozborn diagnosed Pulliam with lumbar strain. Pulliam re-injured her back and shoulder in April 2006 while assisting a patient during the sounding of the fire alarm.

¶6. During the hearing in front of the AJ, Pulliam testified that her job responsibilities

included assisting Hudspeth patients through the rehabilitative process. According to Pulliam, approximately forty percent of her job as a DCW involved lifting, prolonged periods of walking, and frequent squatting and bending. Pulliam insists that she was able to perform all of her job duties without assistance prior to her injury.

¶7. Pulliam stated that she missed a few days of work as a result of her injury, and she received workers' compensation benefits for approximately one month afterwards. When she returned to work at Hudspeth, Hudspeth transferred Pulliam to an earlier shift. Working the earlier shift required Pulliam to perform more lifting and more walking, with little opportunity to rest or take breaks. Because of her injury and the pain that she experienced while trying to perform her new job duties, she was ultimately unable to continue to work. Hudspeth eventually terminated Pulliam after she exhausted her leave time.

¶8. Pulliam testified that after Hudspeth terminated her, she conducted a job search, including contacting at least forty potential employers, but she was unable to find a job. She revealed during cross-examination that she completed only five out of forty job applications because some of the employers told her that they were not accepting applications. Pulliam stated that she continues to experience pain in her shoulder and back. She cannot sit for more than sixty minutes and cannot stand for more than twenty minutes. She takes medicine, but it does not help with the pain.

¶9. Glover testified that she was Pulliam's supervisor at Hudspeth while Pulliam worked the night shift. Glover affirmed Pulliam's contention that Pulliam did not have any problems performing her job duties prior to her injury. According to Glover, approximately seventy

percent of the job as a DCW involves standing and approximately sixty percent of the job involves stooping and bending. DCWs that work the morning shift stand for approximately ninety percent of their shifts because the patients are involved in numerous activities during the morning shift, and the DCWs must accompany the patients to those activities.

¶10. Although Dr. Ozborn did not testify at the hearing before the AJ, the medical records completed by him were admitted into evidence, and he testified by deposition regarding the contents of the medical records. During his deposition, Dr. Ozborn noted that he had served as Pulliam's primary physician for at least twenty years. Pulliam visited his office on March 27, 2006, the day after her on-the-job injury, complaining of pain located primarily in her lower and mid-back. Dr. Ozborn diagnosed Pulliam with lumbosacral strain and released Pulliam to return to work on March 28, 2006.

¶11. Pulliam returned to Dr. Ozborn's office on April 17, 2006, with complaints of increased pain in her back. Pulliam informed Dr. Ozborn that her "lifting a patient at the Kilmichael [n]ursing facility" led to an increase in the pain in her back. After conducting a physical examination, Dr. Ozborn assessed Pulliam's condition as a thoracic strain and a lumbosacral strain, which he classified as "an exacerbation or renewed strain compatible with the same type of injuries [that] she had initially[.]"

¶12. Dr. Ozborn examined Pulliam again on November 13, 2006. At this time, Pulliam complained of radicular pain, which radiated down her left leg. Prior to this time, Pulliam had started physical therapy, but was continuing to have difficulty with back pain. She visited Dr. Ozborn several more times. On January 3, 2007, Dr. Ozborn ordered an MRI

based on the “persistence of her pain and the fact that she’d had th[e] new development of radicular pain.” The MRI revealed a disc protrusion that “could be symptomatic.” Dr. Ozborn opined that “in view of [Pulliam’s] history, and in view of the fact that she had pain that was compatible with this,” the disc protrusion could be the cause of the pain in Pulliam’s leg. The MRI also revealed a Chiari malformation. Dr. Ozborn explained that an irritation of the spine could pull the Chiari “further down and [make the Chiari] become symptomatic.” He placed Pulliam at MMI on September 18, 2007. Dr. Ozborn opined, to a reasonable degree of medical certainty, that Pulliam was “totally disabled to do any kind of work activity.”

¶13. Pulliam presented to Dr. John Davis, at Hudspeth’s request, for an employer medical examination on April 2, 2008. Dr. Davis analyzed Pulliam’s medical records and conducted a physical examination of her. After conducting the physical examination and studying medical records from Dr. Ozborn and Dr. Hunt Bobo,<sup>1</sup> Dr. Davis opined, to a reasonable degree of medical certainty, that Pulliam’s Chiari malformation and the issues with her cervical spine were “completely unrelated in any way to any work injury[.]” He additionally opined that Pulliam’s ongoing pain in “her thoracic region and down into [the] lumbar region” as well as her “left leg discomfort . . . . [were] causally related to [her] work injury[.]” He also noted that he “would defer all questions about work[-]status restrictions, impairment[,], and MMI to a *treating* physical[-]medicine and rehab[-]medicine physician.”

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<sup>1</sup> Dr. Bobo is a neurosurgeon who evaluated and treated Pulliam’s Chiari malformation.

(Emphasis added).

¶14. Over Pulliam’s objections, the AJ also considered a report from Dr. David Collipp, who performed a second independent medical examination of Pulliam on November 21, 2008. Dr. Collipp opined that Pulliam suffered “a lumbar strain injury with some thoracic involvement.” According to Dr. Collipp, Pulliam’s back injury

did not lead to an aggravation of the pre-existing T6-7 disc protrusion, or the pre-existing Chiari I malformation. With consideration of the available medical records, this injury appears to have reached MMI within about three months, by July 1, 2006, although she never had complete resolution of her pain.

Dr. Collipp also assigned Pulliam a permanent-partial impairment rating of two percent for her consistent pain complaints. Further, Dr. Collipp found that while Pulliam had considerable restrictions due to other medical issues, Pulliam had not suffered any permanent restrictions as a result of the lumbar or thoracic strain. He opined that

based upon a reasonable degree of medical probability, and her present physical examination, . . . Pulliam is physically capable of performing light-medium work, with a maximum lift of about 35 pounds. This is not related to her physical complaints, or her report of prior surgery. This is not related to her work injury. This is related to her physical examination, and her overall habitus.

Pulliam objected to the admission of Dr. Collipp’s report because the report was not attached to an affidavit from Dr. Collipp or his medical-records custodian authenticating the report.

¶15. Additional facts, as necessary, will be related during our analysis and discussion of the issues.

## ANALYSIS AND DISCUSSION OF THE ISSUES

¶16. Our standard of review in workers' compensation cases is well settled. This Court's review "is limited to determining whether the [Commission's] decision was supported by substantial evidence, was arbitrary and capricious, was beyond the scope or power of the agency to make, or violated [the claimant's] constitutional or statutory rights." *Gregg v. Natchez Trace Elec. Power Ass'n*, 64 So. 3d 473, 475 (¶8) (Miss. 2011) (citing *Short v. Wilson Meat House LLC*, 36 So. 3d 1247, 1250 (¶17) (Miss. 2010)). We remain mindful that "the Commission is the ultimate fact-finder and judge of the credibility of . . . witnesses"; therefore, we "may not reweigh the evidence [that was] before the Commission." *Id.* (citing *Short*, 36 So. 3d at 1251 (¶23)).

*I. Admission of Dr. Collipp's Report*

¶17. Pulliam argues that the AJ committed reversible error by allowing into evidence Dr. Collipp's report without proper authentication as required by Procedural Rule 9 of the Rules of the Mississippi Workers' Compensation Commission. Hudspeth contends that the AJ properly admitted the report, as it was attached to Dr. Davis's report, which Hudspeth submitted with an affidavit from Dr. Davis's medical-records custodian.

¶18. Mississippi Code Annotated section 71-3-61 (Rev. 2011) grants the Commission the power to write and enforce its own rules "conformable to [the] law which may be necessary to enable [it] effectively to discharge the duties of [its] office." The Commission also has the "discretion to enlarge the scope of the record and relax [the] rules of discovery applicable to hearings." *Robinson Prop. Grp. v. Newton*, 975 So. 2d 256, 260 (¶8) (Miss. Ct. App. 2007) (quoting *Bermond v. Casino Magic*, 874 So. 2d 480, 484 (¶11) (Miss. Ct. App. 2004)). In

spite of the Commission’s discretion in applying and interpreting its own rules, “[d]ue process dictates that the Commission . . . follow its own procedural[-]due[-]process principles in conducting its duties of administering workers’ compensation claims.” *Id.* (citing *Bermond*, 874 So. 2d at 485 (¶11)).

¶19. Procedural Rule 9 provides, in pertinent part:

The medical records of examining or treating physicians, including narrative office notes, reports dictated by the physician in the ordinary course of his or her practice, and other records composed by the physician in his or her practice, may be introduced into evidence in lieu of direct testimony taken at the hearing or by deposition upon the following conditions[:]

1. The party wishing to introduce such medical records shall notify opposing parties and the Commission by written notice served at least thirty (30) days prior to the scheduled hearing. The prehearing statement may suffice as notification under this rule.
2. A copy of the medical records shall be attached to the written notice.
3. *There shall be submitted with the medical records a sworn statement of either the physician or the physician’s medical-records custodian stating that the attached medical records are a true and correct copy of the medical records of the physician as kept in the regular course of the physician’s medical practice.*
4. The contents of the medical reports shall be subject to the same objections as to relevancy and competency as the testimony of the reporting physician had he or she been personally present to testify at the hearing. *Any objection to the use of an affidavit must be made within fifteen (15) days after receipt by the objecting party of a notice of intent to use such affidavit.*

(Emphasis added).

¶20. Here, Hudspeth gave sufficient notice to Pulliam that it intended to introduce Dr. Collipp's report into evidence. However, according to the transcript provided on appeal, neither an affidavit nor Dr. Collipp's report was attached to the notice. The notice that was given was a sentence incorporated in Hudspeth's prehearing statement that Hudspeth intended to introduce Dr. Collipp's report. At the hearing, Hudspeth presented an exhibit that contained both Dr. Davis's and Collipp's reports. An affidavit from Dr. Davis's medical-records custodian, dated October 6, 2008, was attached to this exhibit. There was no affidavit attached to the exhibit from Dr. Collipp or his medical-records custodian, or a statement that Dr. Davis's and Dr. Collipp's medical-records custodian were one and the same person. The affidavit that was attached reads, in part, as follows:

PERSONALLY APPEARED BEFORE ME, . . . [custodian's name], medical[-]records custodian for John D. Davis IV, M.D., who, upon his/her oath, stated that the attached records are a true and correct copy of the medical records relating to the examination, evaluation, and/or treatment of the above-named claimant as generated in the regular course of medical practice of John D. Davis IV, M.D.

¶21. The record does not inform us as to how Dr. Collipp's medical report became attached to Dr. Davis's report. However, it is clear that it was not attached by Dr. Davis or his medical-records custodian. It is also clear that Dr. Davis did not refer Pulliam to Dr. Collipp. He did, however, suggest that the discomfort that Pulliam was experiencing in her lower back, thoracic region, and left leg "would best be treated by a board[-]certified or board[-]eligible physical or rehab[-]medicine doctor[,], as well as at least a trial of epidural[-]steroid injections by an interventional[-]pain[-]management physician." Pulliam saw Dr. Collipp

after the Commission granted Hudspeth's motion to compel her to do so. After Dr. Collipp completed his report, he sent a copy to Hudspeth's attorney, who apparently compiled and presented the exhibit that contained both Dr. Davis's and Dr. Collipp's reports.

¶22. When Pulliam objected to the use of Dr. Davis's medical-records custodian's affidavit to authenticate Dr. Collipp's report, Hudspeth noted that Dr. Davis and Dr. Collipp practice in the same clinic. Alternatively, Hudspeth argued that Pulliam waived her challenge to the admission of Dr. Collipp's report because she did not object to the use of the above-referenced affidavit within fifteen days of receiving notice that Hudspeth intended to use the affidavit. However, both of Hudspeth's arguments fail.

¶23. First, it is clear that the affidavit from the medical-records custodian authenticates only Dr. Davis's report, and not, as Hudspeth contends, Dr. Collipp's report as well. Also, the record contains no evidence that Dr. Collipp sent a copy of his report to Dr. Davis. Therefore, it could not have been included by Dr. Davis or unintentionally commingled by him. While it is true that Dr. Davis and Dr. Collipp practice at the same medical clinic, it cannot be denied that they do not specialize in the same area of medicine. Furthermore, Hudspeth failed to present any evidence that the medical-records custodian who provided the affidavit attached to Dr. Davis's report also serves as the medical-records custodian for Dr. Collipp. The fact that the doctors work in the same building does not eliminate Hudspeth's responsibility to obtain authentication of the reports of both doctors through affidavits either from the doctors themselves or from their medical-records custodians.

¶24. Second, in spite of Hudspeth's argument that Pulliam has waived her challenge to the

admission of Dr. Collipp's report, we find that Pulliam did not waive her objection to the use of the affidavit from Dr. Davis's medical-records custodian to authenticate Dr. Collipp's report. Procedural Rule 9 requires that any objection to the use of an affidavit to authenticate medical records or reports be made within fifteen days of the notice of intent to use the affidavit. It is clear from the record that Pulliam was not aware that Hudspeth intended to use the affidavit from Dr. Davis's medical-records custodian to authenticate Dr. Collipp's report until the day of the hearing before the AJ. Therefore, the fifteen days that the rule grants to Pulliam to object to the use of the affidavit had not expired prior to the day of the hearing before the AJ, and her objection to Hudspeth's use of the affidavit to authenticate Dr. Collipp's report was timely. As stated, when Pulliam first received notice that Hudspeth was intending to use Dr. Collipp's medical report, neither an affidavit nor the report was attached.

¶25. As such, we find that the AJ erred in admitting Dr. Collipp's report into evidence without proper authentication of the report from either Dr. Collipp or his medical-records custodian.<sup>2</sup> With all due respect, we must say that the dissent's suggestion—that Pulliam waived objection to the admission of Dr. Collipp's medical report at the hearing because she did not timely object after being notified of Hudspeth's intent to use the report—is just not supported by the record. Because the AJ relied heavily on Dr. Collipp's report in determining whether Pulliam was entitled to disability benefits and in assessing impairment

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<sup>2</sup> We also note that, according to the hearing transcript, the AJ never ruled on Pulliam's objection. In fact, she admitted the exhibit containing Dr. Davis's and Dr. Collipp's reports for identification purposes only. However, it is clear that the AJ and the Commission relied upon Dr. Collipp's report to reach their decisions in this case.

ratings, the Commission's decision affirming the AJ's findings is reversed, and this case is remanded to the Commission for it to determine Pulliam's disability benefits, if any, using properly admitted evidence.

## *II. Disability Benefits*

¶26. Pulliam contends that the AJ erred in finding that she had failed to prove that she was permanently disabled, that she had not reached MMI, and that her injuries, except the lumbar strain, thoracic strain, and the right[-]shoulder injury, were causally related to her work-related injuries.

¶27. This Court has reiterated that

in workers' compensation claims, a claimant does not have to prove with absolute medical certainty that his work-related injuries were the cause of his disability. All that is necessary is that the medical findings support a causal connection. A causal connection may be established so long as there is medical testimony that supports a finding of disability.

*Wayne Farms LLC v. Weems*, 105 So. 3d 1178, 1181 (¶8) (Miss. Ct. App. 2012) (internal citations and quotation marks omitted) (quoting *Frito-Lay Inc. v. Leatherwood*, 908 So. 2d 175, 180 (¶24) (Miss. Ct. App. 2005)).

¶28. In spite of the erroneous admission of Dr. Collipp's report, we cannot say that the AJ erred in finding that Pulliam's Chiari symptoms and cervical-spine issues were unrelated to her work-related injury, as Pulliam failed to present medical evidence that these issues were associated with or aggravated by her work-related injuries. Regarding the Chiari, Dr. Ozborn never opined that the Chiari was caused or aggravated by Pulliam's work-related injury. He only stated that trauma to the spine *could* have made the Chiari symptomatic. Dr. Davis, on

the other hand, opined, to a reasonable degree of medical certainty, that Pulliam's Chiari and the issues with her cervical spine were not related to her work-related injury. Pulliam failed to present any medical evidence to rebut Dr. Davis's opinions that her Chiari and cervical-spine problems were not connected to her work-related injuries. Therefore, we find that the Commission had substantial evidence to determine that Pulliam's Chiari and cervical-spine issues were not causally related to her work-related injuries.

¶29. Regarding whether and when Pulliam had reached MMI, the AJ relied on Dr. Collipp's report to find that Pulliam reached MMI on July 1, 2006. However, as previously discussed, Dr. Collipp's report was not properly authenticated and, consequently, should not have been considered by the AJ. Within the properly admitted medical evidence, both Dr. Davis and Dr. Ozborn offered opinions regarding whether and when Pulliam had reached MMI. Dr. Ozborn opined that Pulliam reached MMI on September 18, 2007. Dr. Davis stated in his report that he did "not believe that [Pulliam] ha[d] reached MMI yet," but that he would "defer all questions about work[-]status restrictions, impairment[,], and MMI to a treating physical[-]medicine and rehab[-]medicine physician." Because the AJ determined Pulliam's MMI date based on improperly admitted evidence, without any consideration of the medical evidence that was properly admitted, we reverse the AJ's finding that Pulliam reached MMI on July 1, 2006, and remand this case to the Commission for a determination of whether and when Pulliam reached MMI from her injuries.

¶30. The Mississippi Supreme Court has stated that a workers' compensation claimant is not entitled to permanent disability benefits until the claimant has reached MMI from her

compensable injuries. *Barber Seafood Inc. v. Smith*, 911 So. 2d 454, 460 (¶25) (Miss. 2005).

It follows, then, that without a proper determination regarding whether Pulliam has reached MMI, it cannot be said that she is not entitled to permanent disability benefits. As such, we reverse the Commission's finding that Pulliam is not entitled to permanent disability benefits and remand this case to the Commission for a proper determination of whether Pulliam is entitled to permanent disability benefits once an MMI date has been determined.

### *III. Statute of Limitations*

¶31. In her third assignment of error, Pulliam argues that the AJ erred in finding that her “thoracic[-]injury [claim] and other claims were barred by the statute of limitations.” However, a review of the AJ's order and the final order from the full Commission, reveals that the AJ determined that Pulliam's injury to the thoracic region of her spine was compensable. Additionally, it is not clear from the record what “other claims” were barred by the statute of limitations. Accordingly, this issue is without merit.

### *IV. Medical Expenses*

¶32. As her final issue on appeal, Pulliam asserts that the AJ erred in determining that Hudspeth is not responsible for the payment of medical expenses incurred “in connection with treatment of the Chiari I malformation, the disc herniation at T6-7, and the cervical spine.” This Court has stated that “[a]n employer is to pay for medical treatments that are reasonable and necessary and that result from the work-related injury.” *Wesson v. Fred's Inc.*, 811 So. 2d 464, 467 (¶9) (Miss. Ct. App. 2002). Here, as previously stated, Pulliam failed to present medical evidence that her Chiari issues, her disc herniation, and her cervical-

spine issues resulted from her work-related injuries. Therefore, the AJ did not err in finding that Hudspeth would not be responsible for the medical expenses associated with the treatment of these injuries.

**¶33. THE JUDGMENT OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS AFFIRMED IN PART AND REVERSED IN PART, AND THIS CASE IS REMANDED TO THE COMMISSION FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEES.**

**LEE, C.J., GRIFFIS, P.J., FAIR AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, ISHEE AND ROBERTS, JJ. MAXWELL, J., NOT PARTICIPATING.**

**CARLTON, J., DISSENTING:**

¶34. I respectfully dissent from the majority's opinion in this case. As provided by Mississippi Workers' Compensation Commission Procedural Rule 9(4), Pulliam possessed fifteen days to object to the affidavit at issue after receiving Hudspeth's notice of intent to use the affidavit to admit Dr. Collipp's medical report into evidence at the hearing before the AJ.<sup>3</sup> Pulliam failed, however, to timely object to the use of the affidavit to admit the attached medical reports<sup>4</sup> into evidence as required by Procedural Rule 9(4), and she thus failed to

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<sup>3</sup> Mississippi Workers' Compensation Commission Procedural Rule 8 provides that the rules of evidence are relaxed at evidentiary hearings. Procedural Rule 9(4) provides an objecting party with fifteen days to object after receipt of notice of an intent to use an affidavit to admit medical records. *See also* Miss. Code Ann. § 71-3-47 (Rev. 2011) (providing details for the adjudication of claims before the Commission); Miss. Code Ann. § 71-3-61 (Rev. 2011) (stating the Commission's authority to conduct proceedings).

<sup>4</sup> The medical reports by Dr. Davis and Dr. Collipp were attached to the affidavit.

preserve the issue for appellate review.<sup>5</sup> Therefore, our standard of appellate review is limited to whether the Commission’s decision is supported by the evidence or whether the Commission’s decision erroneously applied the law. *See Ga. Pac. Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991); *see also Raytheon Aerospace Support Servs. v. Miller*, 861 So. 2d 330, 335 (¶9) (Miss. 2003) (finding that the Court of Appeals exceeded its permissible scope of review and that “the courts may interfere only where the agency action is arbitrary and capricious”).

¶35. The AJ’s opinion in this case reflected that Pulliam failed to object within fifteen days of receipt of notice and in advance of the hearing as required by Procedural Rule 9(4), and instead, she waited until the hearing to object. The AJ ruled on the objection raised by Pulliam at the hearing, and the AJ set forth in her written opinion that the report was properly offered and admitted into evidence. As acknowledged by *Mississippi Workers’ Compensation Law* § 6.33:

In workers' compensation matters, there is no hard and fast hearsay rule. There are no jurors' ears to protect from untrustworthy testimony, and the Commission and administrative judges have the experience and expertise to evaluate the reliability and probative value of the various kinds of evidence that arise in workers' compensation matters.

John R. Bradley & Linda A. Thompson, *Mississippi Workers’ Compensation Law* § 6.33 (2013). The Commission is not bound by the formal rules of evidence that govern

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<sup>5</sup> *See Binswanger Mirror v. Wright*, 947 So. 2d 346, 351 (¶14) (Miss. Ct. App. 2006); *see also Sonford Prods. Corp. v. Freels*, 495 So. 2d 468, 473 (Miss. 1986) (overruled on other grounds) (finding no merit in an argument regarding the reliability of an expert opinion where the argument on appeal was not presented to the AJ).

proceedings in courts of law. *Id.*<sup>6</sup> In the case before us, the AJ clearly possessed the discretion and flexibility to determine whether the records at issue were properly offered and admitted at the hearing. This is particularly true in light of Pulliam’s failure to timely object in advance of the hearing in accordance with Procedural Rule 9(4). We must therefore review the record to determine whether the decision of the Commission is supported by the evidence or whether the Commission erroneously applied the law. *See Ga. Pac. Corp.*, 586 So. 2d at 826; *see also Walker Mfg. Co. v. Butler*, 740 So. 2d 315, 323 (¶¶37-39) (Miss. Ct. App. 1998) (finding that the admission of an unsworn doctor’s note was not error and caused no substantial prejudice and citing the proposition that “[e]rrors along technical lines in the conduct of the hearing before the [C]ommission are not sufficient on review to cause a reversal unless substantial prejudice can be shown”) (citation omitted).

¶36. In applying our limited scope of review to this case, I acknowledge that the Commission, as an executive administrative agency, promulgates general rules as well as procedural rules. In the present case, Pulliam claims error resulting from a procedural rule of the Commission and not a general rule. In determining whether the Commission

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<sup>6</sup> *Cf. Riddle v. Miss. State Bd. of Pharmacy*, 592 So. 2d 37, 42-43 (Miss. 1991) (holding that the admission of prescribing physicians’ affidavits was not error where the defendant pharmacist had been informed of his procedural-due-process rights); *see also Greenwood Utilities v. Williams*, 801 So. 2d 783, 790 (¶23) (Miss. Ct. App. 2001) (acknowledging the broad discretion and procedural flexibility that an AJ possesses); Miss. Code Ann. § 71-3-47 (“The [C]ommission shall have full power and authority to determine all questions relating to the payment of claims for compensation[.]”); Miss. Code Ann. § 71-3-55(1) (Rev. 2011) (“In making an investigation or inquiry or conducting a hearing, the [C]ommission shall not be bound by common law or statutory rules of evidence or by technical or formal rules or procedure, except as provided by this chapter[.]”).

erroneously applied the law in this case, we must recognize that, with respect to the Commission's procedural rules, the Commission possesses broad discretionary authority to relax, import flexibility to, and deviate from its own procedural rules "where in its judgment such is necessary to implement and effect its charge under the Mississippi Workers' Compensation Act." *Delta Drilling Co. v. Cannette*, 489 So. 2d 1378, 1380 (Miss. 1986).<sup>7</sup> As the Mississippi Supreme Court stated in *Delta Drilling Co.*, "It is a rare day when we will reverse the Commission for an action taken in the implementation and enforcement of its own procedural rules." *Delta Drilling Co.*, 489 So. 2d at 1380-81. I respectfully submit that the record in the present case reflects no basis for such a rare occasion.<sup>8</sup>

¶37. I will now turn to the facts of the case that are relevant to this analysis and that support the decision by the AJ and the Commission. The record reflects that Pulliam received sufficient advance prehearing notice of the affidavit at issue and of Hudspeth's intent to use the affidavit to admit the attached medical records, which included Dr. Collipp's report, at the hearing before the AJ.<sup>9</sup> In accordance with the goals and principles underlying

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<sup>7</sup> See also Miss. Workers' Comp. Comm'n P.R. 8; Miss. Workers' Comp. Comm'n P.R. 14 (providing that the Commission or the AJ may allow deviation from the procedural rules).

<sup>8</sup> See *Flowers v. Panola Mills Inc.*, 749 So. 2d 1104, 1105 (¶8) (Miss. Ct. App. 1999) ("This Court will reverse the decision of the Commission only if it is a product of manifest error, an abuse of discretion, and does not enjoy support in the substantial evidence.") (citation omitted).

<sup>9</sup> See Miss. Workers' Comp. Comm'n P.R. 9(1) ("The party wishing to introduce . . . medical records shall notify opposing parties and the Commission by written notice served at least thirty (30) days prior to the scheduled hearing. The prehearing statement may suffice

Procedural Rule 9, this prehearing notice by Hudspeth provided Pulliam with ample opportunity to object to the affidavit prior to the hearing. The prehearing notice reflected the use of the affidavit to admit Dr. Collipp's medical report and resulted in no substantial prejudice to Pulliam.<sup>10</sup> The sufficiency of the prehearing notice was reflected in Hudspeth's prehearing statements, the medical records and affidavit filed therewith, and the procedural history leading to the AJ's order for an employer's medical evaluation (EME) of Pulliam. Dr. Davis first performed the EME but then referred Pulliam to Dr. Collipp, a physical-medicine specialist in his practice, for complaints outside the scope of Dr. Davis's expertise. Dr. Collipp performed a one-time EME of Pulliam by order of the AJ after Hudspeth filed a motion on October 20, 2008, to compel the EME. Pulliam objected to the examination, but on November 3, 2008, the AJ ordered Pulliam to attend the EME with Dr. Collipp. On December 30, 2008, Hudspeth filed a motion for continuance of the hearing on the merits since Dr. Collipp's EME had not yet been received and was necessary to determine whether a vocational expert would be retained and a functional capacity evaluation (FCE) would be performed.<sup>11</sup> Over Pulliam's objection, the AJ granted Hudspeth's motion and delayed the

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as notification under this rule."); *see also* Jeffrey Jackson & Mary Miller, 9 *Encyclopedia of Mississippi Law* § 76:141 (2002) (providing a discussion of the introduction of medical records and affidavits into evidence at a Commission hearing).

<sup>10</sup> *See Walker Mfg. Co.*, 740 So. 2d at 323 (¶¶37-39).

<sup>11</sup> *See* Miss. Code Ann. § 71-3-15(1) (Rev. 2011) (stating the purpose of an EME); Jeffrey Jackson & Mary Miller, 9 *Encyclopedia of Mississippi Law* § 76:107 (2002) ("The employer has the right to have the worker examined by a physician for the purpose of evaluating the extent of disability or need for medical treatment.").

hearing.

¶38. The record reflects that Pulliam enjoyed far more than the thirty-day advance notice required by Mississippi Workers' Compensation Commission Procedural Rule 9(1) of Hudspeth's intent to use the affidavit to admit Dr. Collipp's medical report in lieu of his live testimony. The AJ held the hearing on the merits and received evidence on March 24, 2011. With respect to the sufficiency of prehearing notice, the record shows that Pulliam first received notice of Hudspeth's intent to admit Dr. Collipp's report several years earlier on March 6, 2009, from Hudspeth's amended prehearing statement that contained Dr. Collipp's report and opinions.<sup>12</sup> The amended prehearing statement cited the report and opinions of Dr. Collipp and attached a copy of his report as an exhibit. Hudspeth then filed a second amended prehearing statement on June 17, 2009, which cited the opinions of Dr. Collipp. Hudspeth also filed the medical-records affidavit for Dr. Davis's records, which contained Dr. Collipp's medical report reflecting the evaluation referred to him by Dr. Davis and ordered by the AJ.<sup>13</sup> Pulliam possessed ample opportunity to cross-examine or depose Dr.

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<sup>12</sup> See Miss. Code Ann. § 71-3-15(6) (Rev. 2011) ("All findings pertaining to a second opinion medical examination, at the instance of the employer[,] shall be reported as herein required within fourteen (14) days of the examination . . . . All findings pertaining to an independent medical examination by order of the [C]ommission shall be reported as provided in the order for such examination.").

<sup>13</sup> See Miss. Workers' Comp. Comm'n P.R. 5 (providing that prehearing statements are required before a matter can be set for a hearing on the merits and must be completed with all documents attached); Miss. Workers' Comp. Comm'n P.R. 7 (stating that all cases shall be completed at one hearing before the AJ, and all evidence shall be introduced at such hearing; the Commission possesses discretion to allow additional evidence to be thereafter presented to the full Commission).

Collipp regarding his medical opinions, but she chose not to do so.

¶39. As permitted by the Commission's procedural rules, Pulliam could have conducted a cross-examination deposition of Dr. Collipp, or she could have chosen to have him subpoenaed to testify at the hearing before the AJ.<sup>14</sup> Despite having prehearing notice for over a year of Hudspeth's intent to use the affidavit to admit Dr. Collipp's report with Dr. Davis's records, and despite having prehearing notice for almost two years of the contents of Dr. Collipp's EME report, Pulliam still failed to file her objection in advance of the hearing as required by Procedural Rule 9(4). As acknowledged, Pulliam failed to raise any objection to the affidavit until the day of the hearing. Logically, a timely objection filed pursuant to Procedural Rule 9(4) provides an opportunity for deficiencies in the affidavit to be cured. The record reflects that Pulliam received sufficient advance notice and that the AJ's decision to admit Dr. Collipp's report was consistent with the Commission's procedural rules and the procedural-due-process principles set forth therein.

¶40. As stated, in my view, Pulliam failed to timely object to the use of the affidavit to admit Dr. Collipp's report. However, even if Pulliam's claim of error had been preserved, I submit that Pulliam's claim of reversible error would still lack merit under the Commission's relaxed procedural rules and in light of the facts of this case. Hudspeth's motion to compel Pulliam to undergo an EME with Dr. Collipp reflected that Dr. Davis previously recommended that Pulliam be medically evaluated by Dr. Collipp, a physical-

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<sup>14</sup> See Miss. Workers' Comp. Comm'n P.R. 9(5); Jackson & Miller, at § 76:141.

medicine specialist. The AJ also acknowledged that Dr. Davis first conducted an EME of Pulliam on April 2, 2008. The AJ's opinion further acknowledged Dr. Davis's opinion that some of Pulliam's complaints exceeded the scope of his medical practice and, as to those matters and any related opinions, that Dr. Davis would defer to a physical-medicine specialist. An EME as to those complaints was therefore conducted by Dr. Collipp, a physical-medicine specialist in Dr. Davis's own medical practice. Clearly, Dr. Davis's records reflected that Pulliam required referral to a physical-medicine specialist for those issues pertaining to her ongoing cervical-spine pain complaints. Dr. Davis's report concluded with a recommendation that Pulliam be evaluated by a physical-medicine doctor since her initial complaints of ongoing neck pain began a full eight months after her injury. Dr. Davis's report also reflected his belief that Pulliam's cervical-spine pain was not causally related to her work injury.

¶41. Upon the AJ's order and Dr. Davis's referral, Dr. Collipp evaluated Pulliam. Dr. Collipp opined that Pulliam's lower-back pain was not causally related to her work injury, and he answered the medical-diagnostic question raised by Dr. Davis in his evaluation. The first page of Dr. Collipp's medical report reflected that he was part of the same practice as Dr. Davis and that Pulliam was referred to him. The first page of Dr. Collipp's report also acknowledged that the EME in this case was ordered by the AJ. Dr. Collipp signed the last page of his report, which was filed with Hudspeth's amended prehearing statement in March

2009.<sup>15</sup> Hudspeth's second amended prehearing statement was filed on June 17, 2009. This filing included as a "proposed exhibit" the medical-records affidavit for Dr. Davis's medical records, which contained Dr. Collipp's report. The affidavit was signed by the medical-records custodian for Dr. Davis's medical records, and as reflected in the record, both Dr. Davis and Dr. Collipp were members of the same medical group and had the same medical-records custodian.

¶42. As previously acknowledged, the record also shows that Dr. Davis performed the initial EME and then recommended that Pulliam be further evaluated by his partner, Dr. Collipp, a physical-medicine and rehabilitation specialist. The referring doctor's report would logically contain the report or results of the referral recommended by him to complete the diagnostic process, particularly where both the referring physician and the physician receiving the referral practice with the same medical group.<sup>16</sup> The AJ possessed sufficiently broad discretion to determine that the records at issue in this case were properly offered and

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<sup>15</sup> Dr. Collipp's EME report was also referenced in Hudspeth's motion for a status conference and in the third and fourth prehearing statements. Hudspeth argues that the EME had been produced to Pulliam's attorney and filed with the Commission on multiple occasions, and such an argument is consistent with Mississippi Workers' Compensation Commission Procedural Rule 20, which requires copies of pleadings to be sent to each party once the case is controverted. After Hudspeth completed its prehearing statements, Pulliam requested additional continuances, and the AJ held a hearing on the merits on March 24, 2011. The record therefore reflects that Pulliam possessed approximately two years of prehearing notice of the affidavit and its intended use to admit Dr. Collipp's report.

<sup>16</sup> Cf. *Legacy Hall of Fame Inc. v. Transp. Trailer Serv. Inc.*, 2012-CA-01978-COA, 2014 WL 211718, at \*3 (¶16) (Miss. Ct. App. Jan. 21, 2014) (acknowledging that the treating physician's medical records, which were admitted into evidence, included a consultation report from another physician).

admitted. However, as acknowledged, the sufficiency of the affidavit is not properly before us on appeal since Pulliam failed to preserve her claim of error by advance objection in accordance with Procedural Rule 9(4) as to the admission of Dr. Collipp's report via the disputed affidavit. *Cf. Riddle*, 592 So. 2d at 42-43.

¶43. Because the record contains sufficient evidence to support the decision by the Commission and by the AJ, I would affirm. I therefore respectfully dissent from the majority's opinion.

**BARNES, ISHEE AND ROBERTS, JJ., JOIN THIS OPINION.**