IN THE
COURT OF CIVIL APPEALS OF ALABAMA
Case Number CV-01-784

KOHLER COMPANY,

Appellant,

v.

TYRONE BLEDSOE,

Appellee.

On Appeal from the
Circuit Court of Madison County, Alabama

BRIEF OF THE APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

While the appellee, Tyrone Bledsoe, stands ready, willing and able to provide oral argument in this case, the appellee respectfully contends that oral argument would not materially aid the resolution of this case. The legal issues on appeal are simple and straightforward.

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STATEMENT OF JURISDICTION

The undersigned agrees that this Court has jurisdiction over this appeal of a trial court decision awarding workers' compensation benefits following an *ore tenus* trial.

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STATEMENT OF THE CASE

This is a workers' compensation case. Tyrone Bledsoe (Bledsoe) filed the present action against his employer, Kohler Company (Kohler) on April 17, 2001, in the Circuit Court of Madison County, Alabama. (C.5). Bledsoe sought workers' compensation benefits, including benefits for permanent disability. (C.5).

Tyrone Bledsoe's claim proceeded to an *ore tenus* trial before the Honorable James P. Smith on December 17, 2002. (R.2). On December 23, 2002, following the *ore tenus* trial, the trial court entered a judgment awarding Bledsoe permanent and total disability benefits. (C.98-106).

On January 21, 2003, Kohler filed a Motion to Alter, Amend or Vacate the trial court's decision. (107-112). The trial court heard oral argument on Kohler's motion. (R.115). The trial court denied Kohler's motion on February 25, 2003. Kohler then filed a notice of appeal on April 7, 2003.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT WAS CORRECT IN AWARDING TYRONE BLEDSOE PERMANENT AND TOTAL DISABILITY BENEFITS BASED ON THE SUBSTANTIAL EVIDENCE THAT HE WAS COMPLETELY VOCATIONALLY DISABLED.

II. WHETHER THE TRIAL COURT WAS CORRECT IN CONSIDERING ALL OF THE EVIDENCE CONCERNING TYRONE BLEDSOE'S DISABILITY BEFORE REACHING ITS DECISION.

III. WHETHER THE TRIAL COURT WAS CORRECT IN GRANTING BLEDSOE'S CLAIM FOR BENEFITS BASED ON THE SUBSTANTIAL EVIDENCE HE COULD FULLY PERFORM HIS JOB AT KOHLER UNTIL A DEVASTATING INJURY ON NOVEMBER 28, 2000, RENDERED HIM PERMANENTLY AND TOTALLY DISABLED.

STATEMENT OF THE FACTS

I. Background

Tyrone Bledsoe was 33 years old at the time of trial. (R.14). Bledsoe attended East Limestone High School in Limestone County, Alabama. (R.15). He was a special education student. (R.15). Although he remained in school through the 12th grade, he was unable to graduate. (R.15). He did, however, receive a certificate recognizing his attendance. (R.15). He possesses no further education. (R.15).

According to recent academic testing, Bledsoe can read only on a 3rd grade level, spell only on a 2nd grade level, and perform arithmetic only on a 2nd grade level. (Pls. Ex. 5, McKinney Report). He performs in the 1st percentile, or less, in each academic category. *Id.* Mr. Bledsoe is functionally illiterate. *Id.* Because he cannot read well, Mr. Bledsoe even had to ask friends to fill out his employment applications for him, including the application at Kohler. (R.144). In fact, Bledsoe was unable to read many of the documents presented to him on cross-examination during the trial. (R.82).

When Bledsoe began his employment with Kohler, he was able to perform all of his job duties with no physical problems, including no problems with his back. (R.96;102-103;120-121;124;196). In its brief, Kohler recounts Bledsoe's entire medical history *before* the injury at Kohler to imply that Bledsoe suffered from problems prior to the subject injury.[1] However, as discussed below, the direct testimony from Bledsoe and Kohler's human resources manager is clear that he suffered no physical problems that affected his ability to work at the time he suffered the devastating injury made the basis of this claim. (R.196).

Bledsoe's pre-Kohler activity is important, however, in analyzing what employment skills he possesses. The majority of Bledsoe's pre-Kohler employment consisted solely of very strenuous, physical work. After being disabled, while in the employment of Kohler, Bledsoe possesses no skills that he could transfer to other possible employment. (Pls. Ex 5, McKinney Report).

[1] Tyrone Bledsoe does not dispute that he suffered injuries prior to November, 2000. As discussed, *infra*, most of the prior injuries occurred at Kohler, involved his neck and shoulders, or involved simple muscular injuries resulting from automobile collisions. Contrary to Kohler's representations, these prior injuries had fully resolved before Bledsoe suffered a disabling back injury on November 28, 2000.

In his first job, Bledsoe began working as a farm laborer. He was only 9 years old. (R.16). He picked cotton and pulled weeds after school and during summer breaks. (R.16). He continued this work for a short period of time after leaving high school. (R.16).

Bledsoe next worked for Hardee's Restaurants. (R.16). In this job, he cooked hamburgers, unloaded trucks, and cleaned the restaurant. (R.16). He could not count well enough to run the cash register. (R.16). At Hardees, Mr. Bledsoe applied for the management-training program as an intern. (R.16,81). However, he was not accepted. (R.81).

Bledsoe left Hardee's to accept a position at ConAgra, a chicken plant in Athens, Alabama, (R.17). At ConAgra, he began as a floor person hauling barrels, hanging chickens, removing chickens from a belt, and packing them in coolers with ice. (R.17). This position required strenuous, heavy lifting. (R.17).

While at ConAgra, Tyrone Bledsoe attempted to assist in conducting inventory counts. (R.17). However, he could not count well. (R.17). As a result, ConAgra moved him from this position. (R.17).

After ConAgra, Bledsoe worked at Decatur Aluminum. Bledsoe started as a helper and press operator. (R.17-18). Bledsoe lacked the education or skills to be a management employee at Decatur Aluminum. (R.18). Yet, the personnel manager believed he was a very good worker and offered him the title of supervisor. (R.18). Although given the title, Bledsoe continued to perform manual labor at the plant. (R.18). He worked under another supervisor and never alone supervised any other employees (R.18). Likewise, Bledsoe never completed any paperwork without assistance from his supervisors. (R.18).

In its brief, Kohler boldly proclaims that Bledsoe " advanced to supervisory positions in 3 out of the 4 jobs he had prior to his job at Kohler, having management skills in those positions." (Kohler brief, p. 20). Kohler's contention, however, is clearly contrary to the testimony at trial. Upon being specifically questioned by counsel for Kohler as to whether he was in the " management-training program" at Hardees, Bledsoe testified that he had applied for the program but had been *rejected*. (R.81).

Additionally, when asked to explain the nature of his duties at ConAgra, Bledsoe replied that he was " sort of like a lead person." (R.82). Kohler now attempts to misconstrue this testimony to mean that Bledsoe was, in fact, a lead person and supervised a portion of the plant. This is contrary to the evidence presented at trial.

Finally, when questioned by Kohler regarding his duties at Decatur Aluminum, the substance of his testimony clearly indicates that Bledsoe's " supervisor" job title did not include actual supervisory functions. Instead, he simply received a title in name only, for being a hard, though unskilled, worker. Clearly, however, he held no meaningful responsibilities.

The evidence clearly shows that Tyrone Bledsoe had not advanced to any supervisory positions or obtained management skills at any of his jobs prior to his job at Kohler. In fact, the evidence reveals quite the opposite of Kohler's current contentions.

When Decatur Aluminum experienced financial difficulties, it laid-off several employees, including Bledsoe. (R.18). Bledsoe then received unemployment

benefits for only three weeks before locating other employment at SCL Warehouse in Madison, Alabama. (R.18-19).

At SCL, Bledsoe worked from 7:00 a.m. to 4:00 p.m. each day. (R.19). In this position, Bledsoe lifted computer boards and boxes, stacked boxes on trucks by hand, drove a forklift, cleaned the warehouse, and washed trucks. (R.19). This position required heavy lifting and standing throughout the day. (R.19-20).

While working for SCL Warehouse, Bledsoe also began working a second job at Lee's Chicken. (R.20). Each day after completing a full shift at SCL Warehouse he would then work from 5:00 p.m. to midnight for Lee's Chicken. (R.20). At Lee's, Bledsoe cooked food, prepared salads, and cleaned the restaurant. (R.20). He did not, however, run the cash registers due to his inability to count well. (R.20).

Bledsoe could fully perform all of the strenuous, physical requirements of each position he held prior to Kohler. (R.20). He performed heavy, physical labor at each position.

II. Tyrone Bledsoe's Employment at Kohler

In March, 1997, Bledsoe left his employment with SCL Warehouse and Lee's Chicken to accept a position at Kohler.[2] (R.20-21). At Kohler, employees worked 12 hour shifts. (R.22). Employees regularly worked for three consecutive days and then were off for three consecutive days. (R.53). Optional overtime was available. *Id.*

Bledsoe first worked as an operator attendant at Kohler. (R.21). In this fast-paced position, Bledsoe packed bathtubs constantly throughout a 12 hour shift. (R.21). Bledsoe could fully perform this strenuous work prior to his November, 2000, work-related injury. (R.21).

After working as an operator attendant for a period of time, Bledsoe became a molding operator. (R.21). As a molding operator, he loaded parts on a press that formed bathtubs. (R.22). He also deflashed and drilled the necessary holes in the formed bathtubs. (R.22). The position required standing throughout a 12 hour shift as well as constant, heavy lifting. (R.22). Again, Bledsoe

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[2] Both parties referred throughout the trial to the defendant simply as Kohler. However, in March 1997, the defendant was known as Sterling Plumbing. Prior to the November, 2000, work-related accident and disabling injury suffered by Bledsoe, Kohler purchased the facility. Kohler manufactures bathtubs.

could fully perform this strenuous work prior to his November, 2000, accident and injury. (R.22-23).

The evidence at trial was undisputed that Bledsoe could fully perform all the requirements of his employment prior to his November 28, 2000, work-related injury.[3] During his testimony, Tyrone Bledsoe admitted he could fully perform his employment prior to the accident and injury at issue. (R.33-34). Likewise, Kohler's corporate representative specifically admitted the following:

> Q: ..indicate to me whether prior to the injury which is the basis of this lawsuit that we are here about today, that being the injury which occurred on or about the 28th day of November...whether prior to that date he was ever returned to a permanent restricted duty basis?...And your answer was: Not to my knowledge. Did I read that correctly?
> A: **Yes**.
> Q: ...So, as of the time this injury occurred in November 2000, he was working at full duty with no physical restrictions or limitations, is that correct? Answer: As far as I know. Did I read your testimony correctly?
> A: **Yes**.
> Q: ...To the best of your knowledge, information and belief as well as the documentation that you have there with

[3] In addition to fully performing the physical demands of his job prior to November 28, 2000, Bledsoe also regularly sought additional overtime work. Indeed, Kohler's own time records detailing Bledsoe's work hours in the weeks and months leading up to the accident at work reveal that Bledsoe consistently worked not only his regular hours, but also large amounts of overtime prior to November 28, 2000. (Dfs. Ex. 73).

you today, he was not performing work under any special circumstances, he was performing his job or the jobs which he was assigned to at that time as if any other employee would in that same situation or same position? And, again, your answer is: To my knowledge, yes. Is that correct?
A. **Correct.**

(R.195-196)(emphasis added).

Indeed, Bledsoe constantly worked far beyond even the normal strenuous requirements of his employment. Based on the three days on/three days off scheduling method employed by Kohler, a normal full-time work week was either 36 or 48 hours. Yet, Bledsoe worked far in excess of the normal hours almost every single week. As Bledsoe revealed at trial, he practically " lived" at the plant. (R.53).

According to Kohler's own wage records, Bledsoe worked almost constantly prior to his November, 2000, work-related accident and injury made the basis of this case. Kohler's records reveal the following weekly work hours for Tyrone Bledsoe prior to his injury:

WEEK ENDING	HOURS WORKED
12/12/99	108.0
12/19/99	72.0
12/26/99	91.5
01/02/00	94.0

01/09/00	90.0
01/16/00	81.0
01/23/00	54.0
01/30/00	26.0
02/06/00	42.0
02/13/00	54.0
02/20/00	54.0
02/27/00	54.0
03/05/00	13.3
03/12/00	36.0
03/19/00	36.0
03/26/00	54.0
04/02/00	72.0
04/09/00	81.0
04/16/00	72.0
04/23/00	114.0
04/30/00	72.0
05/07/00	72.0
05/14/00	72.0
05/21/00	68.0
05/28/00	72.0
06/04/00	120.0
06/11/00	120.0
06/18/00	81.0
06/25/00	81.0
07/02/00	54.0
07/09/00	89.0
07/16/00	71.3
07/23/00	81.0
07/30/00	72.0
08/06/00	63.0
08/13/00	72.0
08/20/00	72.0
08/27/00	63.0
09/03/00	63.0
09/10/00	54.0
09/17/00	24.0
09/24/00	72.0
10/01/00	63.0
10/08/00	72.0
10/15/00	54.0
10/22/00	54.0

10/29/00	81.0
11/05/00	72.0
11/12/00	63.0
11/19/00	54.0
11/26/00	36.0

(Dfs. Ex. 73).

Based on Kohler's wage records, Bledsoe often worked up to 90 or 100 hours a week. (Dfs. Ex. 73). In October, the month before his disabling injury, Bledsoe worked 324 hours according to Kohler's time chart. Just weeks before his devastating injury, Bledsoe worked 225 hours. Clearly, Tyrone Bledsoe was able to perform the full duties of his position before the injury on November 28, 2000, rendered him permanently and totally disabled.

III. Tyrone Bledsoe's November 28, 2000, Work-related Injury at Kohler and Its Devastating Effect Upon His Capabilities.

On November 28, 2000, while performing his normal job duties, Tyrone Bledsoe suffered a work-related injury. Specifically, Bledsoe lifted and removed an approximately fifty (50) pound bathtub off of a jig[4] to set it on the floor. As he placed the bathtub on the floor, he felt a "pop" in his lower back. (R.40). Bledsoe immediately

[4] A flat raised work area where one places and secures the manufactured tub for deflashing and drilling the necessary holes.

reported the accident to his supervisor who instructed him to work lightly the remainder of the shift. (R.40).

Although in severe pain, Bledsoe remained at work until the end of his shift. (R.40). His shift ended early in the morning on November 29. (R.40). When he finished his shift that morning, he went home and tried to sleep. (R.41). However, he was hurting too badly to sleep. (R.41). He called back to Kohler later that same morning, spoke with his safety committee person, and specifically asked for medical attention. (R.41-42).

Mr. Bledsoe was in so much pain he could not do anything, including sitting or standing. (R.41-42). Bledsoe hurt so badly he could not perform simple activities and functions. When he attempted to use the bathroom that day, he severely increased the pain in his lower back. (R.41). He also saw blood. (R.41). As Kohler had not authorized Bledsoe to see a physician,[5] Bledsoe sought the advice of Henderson & Associates. Earlier in 2000, Henderson & Associates treated Bledsoe's neck and shoulder injury.

[5] Bledsoe's testimony reveals that he reported his injury to Kohler's safety committee person and related his immense pain. The safety person told Bledsoe he would get back to him. (R.41). After a simple function such as using the bathroom only increased Bledsoe's pain, he contacted Henderson & Associates, who had treated him earlier for a neck and shoulder injury, to see if using the bathroom could increase his pain. Henderson & Associates instructed Bledsoe to contact his physician for the back problem, as they were not treating him for that injury.

(R.121). On the November 29, 2000, telephone call, Bledsoe complained of severe back pain that was increased by the simple activity of using the bathroom. Henderson & Associates instructed him to contact a doctor. (R.41).

Later that day, Kohler sent Bledsoe to its company physician, Dr. Michael Lowery. (R.41-42). At that time, Bledsoe was suffering radiating pain to both legs and again related the accident that occurred while lifting the tub at work the preceding day. (R.43). Dr. Lowery took him off work for the next night and treated Bledsoe conservatively on a few occasions. (R.43). However, Bledsoe's pain did not improve.

Dr. Lowery sent Bledsoe back to work, but Bledsoe could not do anything due to his immense pain. (R.131). Due to Bledsoe's loss of feeling down his right leg and numbness in his foot, Dr. Lowery ordered a lumbar MRI that revealed a herniated disc with an extruded fragment at L4-5. (Pls. Ex. 16, Lowery records; R.44-45). Dr. Lowery then referred Bledsoe to Dr. Cyrus Ghavam, an orthopedic surgeon, for further treatment of his herniated lumbar disc. (Pls. Ex. 16, Lowery records; R.45).

Dr. Ghavam first attempted to continue a conservative approach with medication; however, medication failed to

help Bledsoe's pain. (R.45-46). Thus, Dr. Ghavam proceeded to perform lumbar disc surgery in January, 2001. (Pls. Ex. 13, Ghavam records, operative note on 1-11-01; R.45). Following the surgery, Dr. Ghavam observed that Bledsoe still suffered some parasthesia in his lower back which likely resulted from nerve root inflammation due to the herniated disc. (Pls. Ex. 13, Ghavam records, office note on 2-13-01).

In March, 2001, Dr. Ghavam allowed Bledsoe to return to work with Kohler. (Pls. Ex. 13, Ghavam records, office note on 3-15-01; R.46). Bledsoe resumed work the instant Dr. Ghavam would allow with restrictions of no lifting over 30 pounds. In actuality, Dr. Ghavam wanted to limit Bledsoe's lifting even further. However, Bledsoe asked the doctor to allow him to lift more so that he could return to some gainful work. (R.46). However, Bledsoe could not perform his work as he had been able to do before the November 28, 2000, accident and injury. (R.46-47).

Tyrone Bledsoe now suffered chronic pain and drastically decreased physical capabilities. Prior to his injury, he performed all the heavy requirements of his employment, even working significant overtime. Kohler's vocational expert even concluded that Bledsoe's earnings at

Kohler decreased by at least forty percent (40%), during his unsuccessful attempt to continue working after his injury, because of his inability to work significant hours or any overtime. (Dfs. Ex. 76).

Upon returning to work, Kohler even modified Bledsoe's job duties due to his seniority status. Kohler no longer required him to lift heavy tubs during his shift. (R.47). Now, he simply performed some light repair work and only worked the press for an occasional few minutes when a co-employee needed a short break. (R.47). Even then, he could barely function well enough to make it to work or through his entire twelve (12) hour shift. (R.47). After working his assigned twelve (12) hour shifts, Bledsoe would then hurt so badly that he often cried and remained bedridden during his off days. (R.47).

Beyond doubt, the plaintiff suffered chronic pain, some parasthesias in his lower back, numbness in his lower extremities, and greatly reduced physical abilities after his surgery. (Depo. Dr. Lary, p. 27). Despite these limitations, he attempted to return to work with modifications and greatly reduced earnings. However, he could barely function. (R.131). Furthermore, even this

limited work aggravated and worsened his chronic pain. (R.131).

Beginning shortly after his surgery, Dr. Ghavam observed that Bledsoe's attempts to work worsened his condition. (Pls. Ex. 13, Ghavam records). In a desperate effort to obtain relief for his severe pain, Bledsoe began seeking additional medical treatment. In March, 2001, Kohler authorized Dr. Clayton Davie, a neurosurgeon in Birmingham, to begin treating Bledsoe. (R.48-49). Dr. Davie, Kohler's physician, was initially skeptical of Bledsoe. (Pls. Ex. 14, Davie records, office note on 5-15-01). Dr. Davie ordered testing including an additional lumbar MRI and an EMG study after his first visit with Bledsoe. *Id.* However, these tests revealed surgically related changes at L4-5, a bulging disc at L4-5, slowed posterior tibial motor nerve conduction, denervation in multiple L5 muscles, and an L5 radiculopathy on the right. (Pls. Ex. 14, Davie records, correspondence on 5-29-01). Dr. Davie then concluded that Bledsoe was not capable of heavy or strenuous physical activity and that Bledsoe suffered a permanent impairment rating of twelve percent (12%) to the body as a whole from his work-related injury at Kohler. *Id.*

Although Bledsoe attempted to continue working, he suffered chronic pain and severely decreased physical capabilities. Bledsoe continued to seek medical treatment without relief. (R.51). Furthermore, his condition continued to progressively worsen. (R.51). Bledsoe pleaded with Kohler to find someone who could relieve his pain; however, Kohler provided no help. (R.51). Thus, Bledsoe sought medical attention on his own. (R.51).[6]

On July 11, 2001, Bledsoe saw Dr. Boston at University Orthopedic Clinic in Tuscaloosa. (R.51). Bledsoe sought treatment from Dr. Boston independently, due to his unrelenting pain. (R.51). Upon examination, Dr. Boston concluded that Bledsoe suffered post-laminectomy mechanical low back pain that was work-related. (Pls. Ex. 20, Boston records).

On October 4, 2001, Dr. Sovic, a Board-certified pain specialist with HealthSouth in Birmingham, admitted Tyrone Bledsoe to the hospital for post-surgical lumbar epidurals. (Pls. Ex. 15, HealthSouth records in Birmingham).

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[6] Kohler refused to help Bledsoe find treatment to alleviate his severe, chronic pain. Then, when he independently sought medical treatment, Kohler incredibly claimed that he was "doctor shopping."

At that time, Dr. Sovic noted that Bledsoe's condition had progressively worsened since returning to work. *Id.* Dr. Sovic also reached the diagnosis that Bledsoe suffered lower back pain syndrome. *Id.*

On January 30, 2002, Bledsoe saw Dr. Talbert. Dr. Talbert further concluded that Bledsoe's work environment at Kohler was "bothersome" and suggested that Bledsoe try working only partial shifts of six (6) hours instead of the assigned twelve (12) hours. (Pls. Ex. 19, Talbert records, office note on 1-30-02).

Contrary to Kohler's contentions, the medical evidence clearly reveals that Tyrone Bledsoe's condition progressively worsened over time. (Depo. Dr. Lary, p. 40). Each physician agreed that Bledsoe suffered a serious work-related injury and that his continued work at Kohler after the injury was an aggravating factor. When viewing his post-injury medical treatment, it is readily apparent that his condition progressively worsened over time.

Although he attempted to work after his injury, Tyrone Bledsoe was unable to continue in his employment even with modified job duties. He ceased working at Kohler in July, 2002, and has been unable to work since that time. (R.54). For a man who has worked hard since age 9, his inability to

work at all due to his severe pain has been a frustrating and depressing reality. (R.73).

Mr. Bledsoe, in tears, sought relief from his family physician, Dr. Ernest Hendrix. (R.54). On July 18, 2002, Dr. Hendrix, in writing, noted that Bledsoe had continued to suffer chronic pain since his November, 2000, injury, despite surgery and therapy. (Pls. Ex. 9, Hendrix records, office note on 7-18-02). Dr. Hendrix also completed a medical report in which he concluded that Bledsoe suffered a severe limitation of functional capacity and was incapable of even minimum (sedentary) activity. *Id.* On August 6, 2002, Dr. Hendrix concluded that "[i]t is my opinion that he is disabled and unable to return to work." (Pls. Ex. 9, correspondence on 8-6-02). Dr. Hendrix currently prescribes pain medication and muscle relaxers to help control Bledsoe's severe pain. Bledsoe takes each type of pill at least twice a day, every day. (R.52).[7]

Dr. Piotr Zieba, a psychiatrist, also examined Bledsoe and concluded that he is totally disabled. Dr. Zieba first evaluated Mr. Bledsoe on March 6, 2001. (Pls. Ex. 10, Zieba records). At that time, Bledsoe presented to the doctor

[7] At trial, Bledsoe required frequent breaks, as sitting for any length of time was extremely difficult.

with chronic pain and resulting depression due to his November, 2000, injury. *Id.* After a thorough evaluation, Dr. Zieba concluded that Bledsoe suffers major depression as well as mood disorder due to chronic pain. *Id.* On August 16, 2001, Dr. Zieba noted that Bledsoe "struggles on a daily basis." *Id.* On July 25, 2002, Dr. Zieba again noted that Bledsoe was depressed due to chronic pain as well as insomnia. *Id.* Dr. Zieba also noted on this visit that Bledsoe was frustrated because his problems prevented him from working. (Pls. Ex. 10, Zieba records; R.58-59). In this same visit, Dr. Zieba also concluded, "Pt. is disabled due to his condition." (Pls. Ex. 10, Zieba records, office note on 7-25-02, last sentence).

On August 9, 2002, Dr. John Lary evaluated Bledsoe. Dr. Lary is a medical doctor in Huntsville, Alabama, who has been retained by The Social Security Administration for over twenty (20) years to evaluate disability claimants. (Depo. Dr. Lary, pp. 6-7).[8] Dr. Lary evaluates several individuals daily who are claiming some type of impairment for social security reasons. (Depo. Dr. Lary, p. 8).

[8] Tyrone Bledsoe now receives Social Security disability benefits. (Pls. Ex. 7; R.55-56).

Dr. Lary reviewed the medical records concerning Mr. Bledsoe's condition. (Depo. Dr. Lary, pp. 9-10). Dr. Lary also conducted a thorough examination of Bledsoe. (Depo. Dr. Lary, p. 9). After thoroughly examining Bledsoe, Dr. Lary concluded that he suffered from lumbar disc disease due to a microdiscectomy for a right radiculopathy caused by a herniated lumbar disc, post-surgical scarring involving the lumbosacral nerve roots, chronic back pain, and functional limitations. (Depo. Dr. Lary, p. 27).

Dr. Lary also reached the following medical opinions concerning the extent of Tyrone Bledsoe's impairments:

> Q. Based on the history, as well as your training and experience and examination, did you reach any conclusion concerning Mr. Bledsoe's impairments?
> A. Yes.
> Q. And can you relate those to the court?
> Mr. Austill: Objection, form and predicate, qualification of witness to formulate such opinions?
> Q. You may answer.
> A. **I think he's permanently and totally disabled.**

(Depo. Dr. Lary, p. 28) (emphasis added).

According to Dr. Lary, the November, 2000, work-related accident and injury at Kohler caused Tyrone Bledsoe's disability (Depo. Dr. Lary, p. 30). In fact, Dr. Lary believes that Bledsoe's pain and limitations from the November, 2000, injury will only worsen over time. *Id.*

Tyrone Bledsoe also endured several functional capacity evaluations (FCE). In April, 2001, Bledsoe withstood an FCE conducted at HealthSouth at Kohler's request. During the HealthSouth FCE, the therapist even observed that Bledsoe's heart was racing, and he was sweating profusely. (R.59-61). Yet, the examiners instructed him to continue. *Id.* In addition, Bledsoe suffered pain, cramps and muscle spasms during the short test. His right leg began "jiggling." (R. 59-61). Despite these clear and objective signs of pain and exertional distress, the therapist projected that Bledsoe could perform the same activities 8 to 12 hours a day, everyday.

After the FCE concluded, Mrs. Bledsoe took her husband home. Bledsoe laid down after the examination, complaining that his groin hurt badly. *Id.* He even had to contact Dr. Ghavam, who prescribed additional pain medication. (Pls. Ex. 13, Ghavam records).[9] Mr. Bledsoe remained in bed, in pain the rest of the day. Upon returning to work the next day, Bledsoe could not even function due to the immense

[9] At the time of this FCE, Drs. Ghavam and Davie were the company physicians treating Bledsoe. The restrictions Dr. Ghavam placed upon Bledsoe were much more restrictive. That is, Dr. Ghavam restricted Bledsoe to no lifting over 30 pounds. Kohler specifically asked Dr. Davie, in writing, to place these FCE results on Bledsoe as restrictions. (Pls. Ex. 14, Davie records, correspondence on 6-15-01). Dr. Davie declined to do so, instead prescribing that Bledsoe should do no strenuous or laborious activities. (Pls. Ex. 14, Davie records, office note on 6-19-01).

pain. *Id.* Although requested by Kohler, Dr. Davie wisely refused to endorse the HealthSouth FCE as presenting appropriate restrictions for Mr. Bledsoe. (Pls. Ex. 14, Davie records, correspondence on 6-15-01).

Because Kohler would not mediate this case without a second FCE, Bledsoe endured another examination that took place in Birmingham with an outfit named Bledsoe McKie Rehabilitation. (R.62).[10] Kohler paid for this examination as well. (Depo. Dave Bledsoe, p. 66). This FCE was completed by an occupational therapist named Dave Bledsoe. The Bledsoe McKie report states certain recommendations of Dave Bledsoe. However, Dave Bledsoe did not even complete most of the FCE. In fact, at least eighty percent (80%) of the FCE was completed by "exercise technicians"[11] often outside of his presence. (Depo. Dave Bledsoe, p. 68-81). Dave Bledsoe did not perform the patient interview. (Depo. Dave Bledsoe, p. 68). He did not perform the standing/walking test and did not even know how much walking was performed on an actual slope. (Depo. Dave

[10] Bledsoe's prior attorney consented to Kohler's request for a second FCE. The second FCE was videotaped. However, the therapist who performed the FCE for Kohler mysteriously misplaced the videotape. It was never located despite requests from Bledsoe's current counsel.
[11] "Exercise technicians" do not hold a license and have no formal education as physical or occupational therapists.

Bledsoe, p. 71; 74). Likewise, he did not administer the circuit tests. (Depo. Dave Bledsoe, pp. 83-84).

During the examination, Bledsoe McKie filmed Tyrone Bledsoe. (Depo. Dave Bledsoe, pp. 81-83). This film and any photographs would clearly show Bledsoe's physical difficulties. However, although Dave Bledsoe testified that photographs are usually taken of the patient during the examination, he claimed in his deposition that he could not locate the specific photographs of Tyrone Bledsoe. (Depo. Dave Bledsoe, pp. 81-83).

Had Dave Bledsoe remained for the FCE he would have realized that when Tyrone Bledsoe was instructed to walk, he could only limp badly, almost falling down. (R.62). Tyrone Bledsoe again began sweating and hurting very badly during the lifting portion of the examination. Only this time, the "exercise technicians" did not even bother to monitor his heart rate. (Depo. Dave Bledsoe, p. 89; R. 63-64). Tyrone Bledsoe experienced muscle spasms and cramps throughout his lower back during the examination. (R.63-64). He was in extreme pain. *Id.*

Once the test had concluded, Bledsoe hurt so badly that he was unable to return to his home at Tanner, in Limestone County. He and his wife had to rent a hotel room close to

the examination site. (Pls. Ex. 38; R.64-65). Mr. Bledsoe, unable to even leave his hotel room to eat, went straight to bed to rest his back. His wife left and purchased food for him. (R.66). He could not do anything after the examination. (R.66-67). On the drive home from Birmingham to Tanner (just across the Tennessee River) the next day, Mrs. Bledsoe had to pull over *four* times to allow Tyrone to rest his back as he was in so much pain. (R.67-68). When he returned to work a couple of days later, he was still in pain and could not do anything, even with the aid of pain medication. (R.67-68).

A third functional capacity evaluation was performed by Mitchell Hamric in Madison. During the examination, Hamric stopped the test a few times recognizing Bledsoe's severe pain, and instructed Bledsoe to lie down. (R.68). During the lifting portion of the test, Bledsoe's heart rate increased significantly. (Depo. Hamric, p. 24; R.69). When he attempted to lift something, it hurt him. (Depo. Hamric, p. 22). He also sweated profusely during the entire examination. (R. 69). After the examination, Bledsoe went home, took a pain pill, and went straight to bed. He was in extreme pain and could not do anything the rest of the

day. (R.69). The next day, when Bledsoe returned to work, he was in so much pain he could not do his job. (R.69-70).

Kohler's contention that Bledsoe could perform his job based on the results of each of the above-referenced FCEs is wholly contrary to the evidence presented at trial. Kohler fails to provide this Court with the full picture. It is undisputed that the functional capacity evaluations lasted only a few hours and Bledsoe was unable to perform the requested activities without severe pain. Each examination rendered him virtually incapacitated afterwards. The evidence also clearly shows that Bledsoe cannot perform these activities on a day-to-day basis. (Depo. Dr. Lary, pp. 40-41). Indeed, he could not even perform the tasks for more than a couple of hours. (R.69-70). Bledsoe has even experienced a 30 pound weight gain due to his inability to engage in any significant physical activity and severe pain. (R.73).

Mr. Bledsoe, once a strong, active man who was no stranger to hard work, is now reduced to frequent tears and depression from his November 28, 2000, disabling injury. (R.73-77). He struggles with all aspects of his daily activities. (R.76). He suffers constant pain in his groin and even has trouble urinating due to the pain. (R.74).

This once capable man cannot even put on his shoes, clip his toenails or wash his back without assistance from his wife. (R.172-173).

Tyrone Bledsoe now spends his days simply searching for a comfortable position. (R.74). He can only sit for less than 20 minutes without dramatically worsening his chronic back pain. (R.77). He played sports and fished before the injury, but those activities are forever lost due to his back injury. (R.76-77). He previously cared for his lawn, but now has to ask his brother to help with those simple chores.[12] (R.75).

Instead of being able personally to perform home repairs at little or no expense, Bledsoe must now hire individuals to do that job. (R.75). He drives only when his wife cannot take him somewhere, usually to a doctor's appointment.[13] (R.76).

Mr. Bledsoe's little children have also suffered due to his severe pain. Tragically, he cannot pick up either of his small children or even wrestle with them on the floor as he did before his disabling injury. (R.74). His wife

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[12] Prior to trial, Kohler videotaped Tyrone Bledsoe's brother performing certain activities. At trial, Kohler attempted to claim, despite the obvious differences in appearance, that the tape contained footage of Tyrone Bledsoe. 29

[13] Mr. Bledsoe has been issued a handicap tag for his vehicle. (R.76).

must care for the small children without any assistance from her husband, a frustration that has taken a toll on the Bledsoe's marriage. (R.170-173).

John McKinney, a vocational counselor, interviewed Bledsoe on two occasions following his work-related injury.[14] McKinney's evaluation indicated that Bledsoe was not able to perform the type of work he performed prior to his injuries at Kohler. (Pls. Ex. 5, McKinney Report). McKinney also indicated that Bledsoe possesses no transferable skills to sedentary jobs. *Id.* Bledsoe is not a candidate for vocational rehabilitation. *Id.* Thus, McKinney concluded that Bledsoe was one hundred percent (100%) vocationally disabled and there is no reasonable expectation that he could return to the labor market and find any employment.[15] *Id.*

The trial court heard the evidence *ore tenus* before reaching its decision that Bledsoe suffered a work-related injury at Kohler that rendered him permanently, totally disabled. The trial court's decision in this case is well-supported by substantial evidence.

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[14] Kohler stipulated to Mr. McKinney's expert qualifications and the admission of his report at trial.

[15] Counsel would note that that conclusion of total disability was also reached by Dr. Lary, Dr. Hendrix, and Dr. Zieba.

STATEMENT OF STANDARD OF REVIEW

This appeal comes from a decree rendered in favor of the employee after an *one tenus* trial in a workers' compensation case. The trial court, hearing the case *ore tenus*, is uniquely able to judge the credibility and demeanor of the witnesses and render a fair and just decision. As such, under the appropriate standard of review, the facts must be reviewed in the light most favorable to the finding of the trial court.

The " Statement of Facts" contained in the appellants brief, however, ignores the appropriate standard of review. Instead, appellant carefully picked and chose from the evidence to present a one-sided, distorted view of the facts. As a result, appellee therefore respectfully presented an additional statement of facts in the preceding section of this brief.

SUMMARY OF THE ARGUMENT

The trial court's decision awarding Tyrone Bledsoe permanent and total disability benefits is well-supported by the evidence. In reaching its decision, the trial court correctly considered all the evidence, including Bledsoe's own testimony, the trial court's observations of Bledsoe, and three separate physician opinions rendering Bledsoe totally disabled. The overwhelming evidence of total disability also correctly included the fact that Bledsoe was receiving benefits from Social Security for a total disability.

The overwhelming evidence further revealed that Bledsoe could fully perform his normal job at Kohler when he suffered a devastating injury on November 28, 2000. This evidence includes Bledsoe's testimony that he could fully perform his job duties, as well as a Kohler wage chart which revealed Bledsoe worked almost every hour of every day prior to his November, 2000, injury. Thus, this Court should affirm the trial court's award of permanent and total disability to Tyrone Bledsoe.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN AWARDING TYRONE BLEDSOE PERMANENT AND TOTAL DISABILITY BENEFITS BASED ON THE SUBSTANTIAL EVIDENCE THAT HE WAS COMPLETELY VOCATIONALLY DISABLED.

Alabama law is clear that "permanent total disability" is not necessarily total physical disablement. Rather, it is the inability to return to one's trade or the inability to find other gainful employment. *Mead Paper Co. v. Brizendine*, 575 So. 2d 571, 573 (Ala.Civ.App. 1990). In the case at bar, the evidence of Tyrone Bledsoe's permanent and total disability is overwhelming. Prior to suffering a severe work-related back injury on November 28, 2000, Tyrone Bledsoe fully performed all of the required duties of his job at Kohler. Indeed, he practically lived at Kohler's facility, working huge amounts of overtime in addition to his regular hours. His position required heavy physical exertion, which he fully performed far beyond even the average employee.

On November 28, 2000, while performing his normal job duties, Tyrone Bledsoe suffered a work-related accident and injury. When Bledsoe lifted and removed an approximately 50 pound bathtub off of a jig and set it on the floor, he

felt a "pop" in his lower back. (R.40). Bledsoe suffered a herniated disc at L4-5 in this accident. (R.44-45). As a result, Dr. Cyrus Ghavam, an orthopedic surgeon, performed surgery on Bledsoe, a lumbar discectomy. (Pls. Ex. 13, Ghavam records, operative report on 1-11-01).

After a period of recuperation, Bledsoe returned to work in March, 2001. Dr. Ghavam initially restricted Bledsoe to lifting no more than 25 pounds. However, Bledsoe asked the doctor to allow him to lift more so that he could return to some gainful work. (R.46). In response, Dr. Ghavam increased Bledsoe's work restrictions to 30 pounds. Yet, Bledsoe was unable to perform his work as he had before the November 28, 2000, accident and injury. (R.46-47).

Upon returning to work, Kohler modified Bledsoe's job duties and no longer required him to lift heavy tubs during his shift. (R.47). Now, he simply performed some light repair work and only worked the press for an occasional few minutes when a co-employee needed a short break. *Id.* Yet, even with the modified duties, Bledsoe barely functioned well enough to make it to work or through his entire twelve (12) hour shift. *Id.* After attending his assigned (12)

hour shifts, Beldsoe would hurt so badly that he often cried and remained bedridden on his off days. (R.47).

As a result of his debilitating back injury, Bledsoe suffered chronic pain, parasthesias in his lower back, numbness in his lower extremities, and greatly reduced physical abilities (as evidenced by a 30 pound weight gain) after his surgery. Despite these limitations, he attempted to return to work with modifications and greatly reduced earnings. Bledsoe's efforts to continue working despite chronic pain, numbness, physical inability, and parathesis should be applauded. Despite his efforts, his condition continued to worsen. Eventually, he could no longer even present himself in the workplace, a fact readily supported by the three separate doctors who concluded he was totally disabled.

In a misguided effort to attack the trial court's decision that Bledsoe is totally disabled based on substantial evidence, Kohler cites *Ellenburg v. Jim Walter Resources, Inc.*, 680 So. 2d 282 (Ala.Civ.App. 1996). However, Kohler's reliance on *Ellenburg* is misplaced.

Indeed, Kohler wholly disregards the guiding principle of law repeated by this Court in *Ellenburg*. In *Ellenburg*,

this Court explicitly noted the well-settled principle that:

> [I]n workers' compensation cases the trial court will consider all the evidence, including its own observations, and interpret it to its own best judgment. The trial court is in the best position to observe the demeanor of witnesses and to assess their credibility. Further, the trial court, and not the reviewing court, determines the weight to be given to the testimony.

Id. at 286 *quoting Yellow Freight Systems, Inc. v. Green*, 612 So. 2d 1209 (Ala.Civ.App. 1992).

Certainly, in the present case, the trial court could easily reach the decision that Tyrone Bledsoe is totally disabled based on substantial evidence. At trial, Bledsoe testified he was unable to continue any gainful employment. During his presence in the courtroom he was in severe pain, an observation readily apparent to the trial court. The only physician who testified, Dr. Lary, explicitly concluded that he was totally disabled. Two other doctors, Dr. Hendrix and Dr. Zieba, concluded in their records that Bledsoe was totally disabled. Finally, the opinions of a vocational expert who concluded that Bledsoe was 100% vocationally disabled, were admitted at trial without objection from Kohler. Certainly, this constitutes

sufficient evidence upon which the trial court could base its decision.

In *Ellenburg*, the trial court determined, after an *ore tenus* trial, that the injured worker was entitled to recover benefits for a permanent partial, but not total, disability of 68% to the body as a whole. *Id.* at 284. On appeal, the employee argued that the trial court erred in finding that he could obtain reasonably gainful employment. *Id.*

Upon affirming the trial court's judgment, this Court related several factors which determine whether an employee is able to return to reasonably gainful employment. *Id.* at 285-286. In addition to wage considerations and medical testimony, this Court held that age, education and aptitude are important factors the trial court should consider when determining total disability. *Id.* Ellenburg was a high school graduate, in his late 30s, tested at a high school grade level in all subjects, and possessed intelligence close to the "gifted" level. *Id.* Furthermore, Ellenburg's past work experience showed that he could perform light mechanical work, and even work in a supervisory capacity. *Id.* In addition, he was skilled at bookkeeping. *Id.* As

such, the trial court's decision finding him less than totally disabled could be supported by the evidence.

Unlike the gifted employee in *Ellenburg*, Tyrone Bledsoe was a special education student, unable to even graduate from high school. (R.15). Likewise, he performs academically between a 1st and 3rd grade level. (Pls. Ex. 5, McKinney Report). Hardees, a prior employer, rejected his application for management training. (R.16). Furthermore, his past employers have refused to allow him to operate a simple cash register, conduct a simple inventory count, or even complete basic paperwork without assistance, because of his difficulties counting and reading. (R.16). Unlike Ellenburg, Bledsoe is functionally illiterate and performs in the 1st percentile, or less, in each academic category. It is remarkable that Kohler attempts to compare the two individuals.

Additionally, unlike Ellenburg who was skilled at bookkeeping, a certified electrician and engaged in supervisory duties, Bledsoe possesses only manual labor skills. He possesses no high school degree and no further training. Although he attempted to take on more responsibilities at his prior jobs, he was consistently unable to do so.

Unlike Ellenburg, whose superior intelligence easily propelled him to management positions, Bledsoe's hard work and determination only netted him fictitious "supervisory" labels. In its brief, Kohler contends that "Bledsoe advanced to supervisory positions in 3 out of the 4 jobs he had prior to his job at Kohler, having management skills in those positions." (Kohler brief, p. 20). The testimony at trial, however, is clearly contrary to Kohler's assertion.

On a factual basis, Ellenburg is not comparable to the present case. In the case at bar, the evidence overwhelmingly supports the trial court's conclusion that Tyrone Bledsoe is totally disabled.

At trial, and again in its appellate brief, Kohler ignores the complete picture of Tyrone Bledsoe's total disability easily established when the evidence is viewed in its entirety. Instead, Kohler presents snapshots of medical evidence out of context chronologically and qualitatively, regarding Bledsoe's severe and debilitating injury. The trial court possessed all the medical evidence when it considered the issues and rendered its decision finding Bledsoe permanently and totally disabled.

Yet, Kohler consistently ignores the evidence. At trial, Kohler attempted to submit only small fragments of

medical records, taken out of context, to support its position that Bledsoe was not permanently and totally disabled. (R.87-92). However, the trial court wisely decided instead to review all the medical evidence before rendering a decision. (R.91-92). Kohler now attempts, for a second time, to submit its incomplete picture of Bledsoe's medical condition to this Court.

The complete medical records clearly show that Tyrone Bledsoe continued to experience debilitating pain and limitations after his surgery in 2001. Desperate for some relief, Bledsoe asked Kohler for further medical care. Kohler sent Bledsoe to its new company neurosurgeon, Dr. Clayton Davie. Dr. Davie was initially skeptical of Bledsoe and his injury; however, this skepticism quickly faded. After his first visit with Bledsoe, Dr. Davie promptly ordered several additional tests, including a lumbar MRI and EMG studies. All of these tests revealed objective proof of severe, permanent damage from the November, 2000, work-related accident and injury. Dr. Davie then reached the conclusion that Tyrone Bledsoe suffered post-operative radiculopathy secondary to surgical scar tissue. Contrary to Kohler's contentions, Dr. Davie also reached the conclusion that Bledsoe was *not* capable of

heavy or strenuous physical activity, and that Bledsoe had a permanent impairment rating of twelve percent (12%) to the body as a whole from his work-related injury at Kohler.

Kohler now claims that Bledsoe could perform according to certain FCEs. However, the facts bear a different conclusion. According to correspondence contained in Dr. Davie's records, the workers' compensation carrier forwarded him a copy of the April, 2001, HealthSouth Functional Capacity Evaluation (FCE). (Pls. Ex. 14, Davie records, correspondence on 6-15-01).[16] Dr. Davie did *not* express agreement with the HealthSouth FCE. Instead, Dr. Davie expressly concluded that "[he did not] feel that [Bledsoe] is capable of doing heavy, laborious, strenuous, physical activity." (Pls. Ex. 14, Davie records, office note on 6-19-01). Dr. Davie did allow Bledsoe to return to work pursuant to communications with Kohler. However, his notes do not reveal specifically what Kohler represented it would require Bledsoe to perform on the job.

Additionally, and contrary to Kohler's assertions, the medical evidence reveals that Tyrone Bledsoe's condition has progressively worsened over time. Beginning shortly

[16] As discussed earlier, this FCE is an inaccurate representation of Bledsoe's day-to-day capabilities.

after his surgery, Dr. Ghavam observed that his attempts to work worsened his condition. (Pls. Ex. 13, Ghavam records). On July 11, 2001, Bledsoe saw Dr. Boston at University Orthopedic Clinic in Tuscaloosa. Bledsoe sought treatment from Dr. Boston independently, due to his unrelenting pain. Upon examination, Dr. Boston concluded that Bledsoe suffered post-laminectomy mechanical low back pain which was work-related. (Pls. Ex. 20, Boston records).

On October 4, 2001, Dr. Sovic, a Board-certified pain specialist with HealthSouth in Birmingham, admitted Bledsoe to the hospital for post-surgical lumbar epidurals. At that time, Dr. Sovic noted that Bledsoe's condition had progressively worsened since returning to work. Dr. Sovic also reached the diagnosis that Bledsoe suffered lower back pain syndrome. (Pls. Ex. 15, HealthSouth records in Birmingham).

On January 30, 2002, Bledsoe saw Dr. Talbert. Dr. Talbert further concluded that Bledsoe's work environment at Kohler was "bothersome" and suggested that Bledsoe try working only partial shifts. (Pls. Ex. 19, Talbert recods, office note on 1-30-02). Each physician agreed that Bledsoe suffered a serious work-related injury and that his continued work at Kohler after the injury was an

aggravating factor. When viewing his post-injury medical treatment, it is readily apparent that his condition progressively worsened over time.

Although, as Kohler points out, Bledsoe attempted to return to work after his injury, he was unable to continue in his employment even with modified job duties. On July 17, 2002, Dr. Talbert recommended that Bledsoe see Dr. Revard for an evaluation for disability. (Pls. Ex. 19, Talbert records, office note on 7-17-02). On July 19, 2002, Dr. Hendrix, in writing, stated that he advised Bledsoe to discontinue his work. In that same correspondence, Dr. Hendrix noted that Bledsoe had continued to suffer chronic pain since his November, 2000, injury, despite surgery and therapy. (Pls. Ex. 9, Hendrix records, office note on 7-18-02). On July 25, 2002, Dr. Piotr Zieba, Bledsoe's psychiatrist, also concluded that Tyrone Bledsoe is now totally disabled. (Pls. Ex. 10, Zieba records). On August 6, 2002, Dr. Hendrix, Bledsoe's family physician, concluded that Bledsoe was disabled and unable to return to work. (Pls. Ex. 19, Hendrix records, correspondence on 8-6-02).

A third medical doctor, Dr. Lary, evaluated Bledsoe and concluded that Bledsoe suffered from lumbar disc disease

due to a microdiscectomy for a right radiculopathy caused by a herniated lumbar disc, post-surgical scarring involving the lumbosacral nerve roots, chronic back pain, and functional limitations. (Depo. Dr. Lary, p. 27). Dr. Lary reached the medical opinion that Bledsoe is permanently and totally disabled. (Depo. Dr. Lary, p. 28). Dr. Lary further testified that the November 28, 2000, work-related accident and injury at Kohler caused Bledsoe's disability. Certainly, substantial evidence of total disability exists where the claimant and three (3) separate treating doctors all conclude that Tyrone Bledsoe is totally disabled. This evidence overwhelmingly supports the trial court's decision.

Kohler ignores the opinions of three separate physicians that Tyrone Bledsoe is totally disabled. Instead, Kohler claims that Bledsoe could perform on a daily basis as outlined in certain FCEs. However, the evidence does not support Kohler's assertion. These FCEs do not accurately project Bledsoe's capabilities on a daily basis. This is precisely why no physician has adopted them as appropriate restrictions for Bledsoe.

The first in the series of FCEs was completed at Kohler's request by HealthSouth in April, 2001. During

this FCE, the therapist even observed that Bledsoe's heart was racing, and he was sweating profusely. In addition, Bledsoe suffered pain, cramps and muscle spasms during the short test. Despite these clear and objective signs of pain and exertional distress, the therapist projected that Bledsoe could perform the same activities 8 to 12 hours a day, everyday. After this and the other FCEs taken later, Bledsoe was in such severe pain that he had to seek bedrest immediately. Most telling about this FCE is that no doctor agreed with it and placed its recommendations as appropriate restrictions upon Bledsoe.

At the time of this FCE, Drs. Ghavam and Davie were the company physicians treating Bledsoe. The restrictions Dr. Ghavam placed upon Bledsoe were much more restrictive. That is, Dr. Ghavam restricted Bledsoe to no lifting over 30 pounds (initially 25 pounds, but increased at Bledsoe's request). Kohler specially asked Dr. Davie, in writing, to place these FCE results on Bledsoe as restrictions. He declined to do so, instead prescribing that Bledsoe should not perform any strenuous or laborious activities.

In 2002, Kohler asked Bledsoe to attend a second FCE with an outfit named Bledsoe McKie Rehabilitation in Birmingham. Kohler paid for this examination as well.

According to the FCE, it was completed by an occupational therapist named Dave Bledsoe. Yet, upon cross-examination the therapist's assertion that he conducted the FCE was proven false. In truth, the therapist, Dave Bledsoe did not complete or even attend most of the FCE. In fact, at least eighty percent (80%) of the FCE was completed by exercise technicians[17] *often outside his presence*. (Depo. Dave Bledsoe, pp. 67-84).[18]

During the examination, Bledsoe McKie filmed Tyrone Bledsoe. This film and any photographs would clearly show Bledsoe's physical difficulties. Yet, this video mysteriously disappeared.

The Bledsoe McKie FCE lacks any *indicia* of credibility. The report was completed not by the therapist who signed it, but instead, by unlicensed "exercise technicians." When asked about his FCE procedures, Dave Bledsoe even admitted "I am the only person who would do it the way I do it." (Depo. Dave Bledsoe, p. 86). He readily admitted that his procedures have not been discussed in any published reports, have not been subject to peer review,

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[17] "Exercise technicians" do not hold a license and have no formal education as physical or occupational therapists.

[18] Dave Bledsoe did not perform the patient interview. He did not perform the standing/walking test and did not even know how much walking was performed on an actual slope. Likewise, he did not perform the circuit tests.

have not been studied, and are not used by any other clinic. (Depo. Dave Bledsoe, pp. 85-88).

After this FCE, Bledsoe could not even return home due to his pain. Instead, he had to seek immediate bedrest. Yet, Kohler argues that it presents appropriate restrictions.

Contrary to Kohler's contention, Tyrone Bledsoe suffers chronic, debilitating pain. No physician has endorsed the numbers contained in the three FCEs.[19] In fact, Dr. Lary, the one physician who specifically reviewed all three FCEs rejected their application to Bledsoe. (Depo. Dr. Lary, pp.92-93). Bledsoe is completely unable to perform at a level indicated by any two-hour visit with a therapist, on a day-to-day basis. This is clearly evidenced by the fact that after each FCE, he hurt so badly that he immediately sought bedrest, virtually incapacitated.

As discussed previously, the trial court's decision is supported by the claimant's testimony, its observations of the claimant, and three separate physician opinions. In addition, a vocational expert, John McKinney, concluded that Bledsoe is 100% vocationally disabled. Although

[19] The physicians who examined Bledsoe have placed much greater restrictions upon him.

Kohler now attacks Mr. McKinney's opinions, it failed to object to their admission at trial.

Kohler clearly has waived any right to question John McKinney's qualifications and the admission into evidence of his report. It is well-settled that where vocational experts are stipulated to without objection, the employer waives the right on appeal to claim as error their introduction into evidence and consideration by the trial court. *See, Yellow Freight Systems, Inc. v. Green*, 612 So. 2d 1209, 1211 (Ala.Civ.App. 1992); *see also*, C. Gamble, McElroy's Alabama Evidence, § 426.01(1) (4th Ed. 1991). Thus, Kohler may not now object to the introduction of McKinney's vocational report as it stipulated, without objection, to said qualifications and report at trial.

In the case at bar, three (3) separate physicians and a vocational expert have all concluded that Tyrone Bledsoe is totally disabled. Such overwhelming evidence clearly leads to the conclusion reached by the trial court. Yet, the evidence of total disability goes even beyond these multiple expert opinions.

Alabama law is well-settled that, "[a]n injured employee's own subjective complaints of pain are legal evidence which may support a finding of disability."

Eubanks v. International Paper Co., 717 So. 2d 391, 395 (Ala.Civ.App. 1998) *quoting Jim Walter Resources, Inc. v. Budnick*, 619 So. 2d 926, 927 (Ala.Civ.App. 1993). At trial, Tyrone Bledsoe related the excruciating pain he suffers which prevents him from even performing simple activities of daily living. He related how he desired to work, but could not due to pain and limitations. He related how he hurt so badly he could barely function. Even more telling, he was in excruciating pain during trial, a fact readily apparent upon observation by the trial court.

The trial court heard voluminous testimony from both sides regarding the functional capacity evaluations at issue. Kohler's own vocational expert provided information regarding said FCEs, all of which the trial court considered. As Kohler stressed in its brief, judging the weight and credibility of the evidence before it is solely within the province of the trial court. In arriving at its judgment, the trial court may consider all the evidence before it, as well as its own observations of the witnesses. The trial court may then interpret what it has heard and observed, according to its best judgment. *Tackett v. Elastic Corporation of America*, 557 So. 2d 1281

(Ala.Civ.App. 1990). In the present case, the trial court considered all the medical evidence, both reports from the vocational experts, and Bledsoe's own testimony. Considering all the evidence, the trial court correctly concluded that Bledsoe suffered a permanent and total disability. Thus, this Court should affirm the trial court's award of permanent and total disability benefits to Tyrone Bledsoe.

II. THE TRIAL COURT WAS CORRECT IN CONSIDERING ALL OF THE EVIDENCE CONCERNING TYRONE BLEDSOE'S DISABILITY BEFORE REACHING ITS DECISION.

Alabama law is well-settled that a trial court should consider all the evidence pertaining to the claimant's disability in reaching its decision. Despite this clear legal principle, Kohler now attacks virtually all the evidence indicating that Tyrone Bledsoe is totally disabled.

In its arguments to this Court, Kohler implies that the trial court and this Court should ignore the medical findings of Dr. Lary. (Kohler brief, pp. 29-30). In making this implication, Kohler even proclaims that Dr. Lary reached his conclusions, in part, based on prior injuries. (Kohler brief, p. 30). However, although not mentioned by

Kohler, Dr. Lary explicitly testified that Bledsoe's November 28, 2000, injury resulted in his total disability.

Likewise, Kohler now asks this Court to ignore the evidence of Bledsoe's vocational disability presented by the expert, John McKinney. The undersigned would note that McKinney's opinions were admitted at trial, without any objection from Kohler. In reaching its decision, the trial court wisely considered McKinney's opinions, as well as the opinions of Kohler's vocational expert, Lori Hodge.

Throughout its brief, Kohler ignores and completely disregards the testimony of Bledsoe himself that he suffers chronic pain, severe functional problems, and cannot work. Again, it is Kohler that seemingly asks the Court to not consider evidence on the issue of disability.

Kohler also boldly asserts that the trial court should have blindly followed certain FCE recommendations. Kohler again asks the Court to simply ignore the relevant evidence from Bledsoe that he was incapacitated after these examinations and cannot maintain such a level of activity for any length of time. Furthermore, Kohler asks the Court to ignore the simple and relevant facts that the physicians did not endorse these FCE findings. In fact, the one

physician who actually reviewed the results and testified clearly rejected the application of the FCE results.

Finally, Kohler asserts that the trial court should have ignored and not considered at all the fact that Bledsoe was receiving Social Security benefits for a total disability. The trial court properly considered all the evidence, including the fact that Bledsoe receives Social Security disability benefits. However, assuming *arguendo* and contrary to well-settled law that such a fact was *per se* inadmissible, it would still not warrant a reversal of the trial court's judgment. In a non-jury trial, an error in the admission of evidence does not authorize a reversal if other legal evidence supports the judgment. *See, Cleveland v. Monroe*, 474 So. 2d 80 (Ala. 1985). In the present case, overwhelming evidence supports the trial court's judgment.

Dr. Lary, the only physician who testified, explicitly stated that Tyrone Bledsoe is totally disabled from the November 28, 2000, accident and injury. John McKinney, a vocational expert, concurred. Likewise, both Dr. Hendrix and Dr. Zieba expressly noted in their records that Bledsoe is totally disabled. Finally, Bledsoe himself testified he was unable to work. Such evidence paints a clear and

overwhelming picture of disability. Thus, the trial court's judgment is beyond question.

However, Alabama law does not support Kohler's assertion that the finding of disability by the Social Security Administration cannot be considered by the trial court. Rather, this evidence can constitute relevant evidence before the trial court. *See, Fuqua v. City of Fairhope*, 628 So. 2d 758 (Ala.Civ.App. 1993); *Wright v. Goodyear Tire & Rubber Company*, 591 So. 2d 518 (Ala.Civ.App. 1991).

In *Fuqua, supra*, a trial court found the injured worker to be permanently, partially disabled. The worker appealed contending that, based on the evidence, the trial court should have found him totally disabled. *Id.* This Court carefully reviewed the evidence upon the issue of the worker's disability. This Court then recited the significant relevant evidence in the record of the worker's total disability, including the evidence that "[h]e has been determined to be totally disabled for Social Security and retirement purposes." *Id.* at 760-761. In *Werner Company v. Williams*, 2003 WL 1900763 (April 18, 2003) (Not yet released for publication), this Court again noted that

a trial court may properly consider the receipt of disability benefits.

In *Wright, supra*, this Court reversed a trial court's finding that the employee was entitled to recover benefits for permanent partial disability of 68% to the body as a whole. Instead, this Court reasoned that a reasonable view of the evidence supported a finding of total disability. *Id.* at 520. The record reflected that Wright was unable to obtain any type of gainful employment due to his disability. *Id.* A vocational consultant testified that due to Wright's limited education, low average I.Q., work experience, medical history, and physical capabilities after the injury, he suffered a 100% impairment to his earning ability. *Id.* In addition, the evidence revealed that Wright "was receiving disability benefits from Social Security." *Id.*

Kohler disregards the significant precedent allowing a trial court to consider the award or receipt of Social Security disability benefits. Instead, Kohler cites *ConAgra v. Calhoun*, 666 So. 2d 19 (Ala.Civ.App. 1995), for the proposition that the admission of such an award was error. However, *ConAgra* clearly does not stand for the proposition offered by Kohler. In *ConAgra*, this Court made

no determination that the introduction of any evidence, including the receipt of disability benefits, constituted error. *Id.* In fact, in *ConAgra*, this Court affirmed a trial court's finding of permanent, total disability. Id.

Kohler also mistakenly relies on *Odell v. Myers*, 295 So. 2d 413 (Ala. 1974). *Odell* did not even involve the receipt of social security disability benefits by the claimant. *Id.* That case involved very different evidentiary issues, including questions presented to the claimant while testifying at trial which solicited hearsay from medical professionals, a practice engaged in by Kohler's counsel throughout the trial of this case. Furthermore, *Odell* was decided under the prior Workers' Compensation Act, not the 1992 amendment of the Act. Since the appropriate standard on the admission of evidence was addressed earlier in this argument, counsel will not belabor the issue further.

In the case at bar, the trial court heard all the relevant evidence concerning the extent of Bledsoe's disability. The trial court then wisely and appropriately considered all the evidence. The evidence overwhelmingly supports the trial court's decision.

III. THE TRIAL COURT WAS CORRECT IN GRANTING BLEDSOE'S CLAIM FOR BENEFITS BASED ON THE SUBSTANTIAL EVIDENCE HE COULD PERFORM HIS JOB AT KOHLER UNTIL AN INJURY OCCURRING ON NOVEMBER 28, 2000, RENDERED HIM PERMANENTLY AND TOTALLY DISABLED.

In its argument, Kohler completely ignores well-settled Alabama law concerning the compensability of work-related accidents when a defendant claims the injured employee suffered a pre-existing infirmity. "The Workmen's Compensation Act is to be liberally construed. It is not limited to those in perfect health." *Godbold v. Saulsberry*, 671 So. 2d 80, 81 (Ala.Civ.App. 1994).

In evaluating such an affirmative defense, the appropriate analysis is whether the injured worker could perform the normal duties of his employment before the work-related injury at issue. *See, Cagle v. Brock and Blevins, Inc.*, 723 So. 2d 65, 68 (Ala.Civ.App. 1998). In short, could Tyrone Bledsoe fully perform his job at Kohler prior to the November 28, 2000, injury? If so, he does not have a pre-existing condition for the beneficent purposes of our workers' compensation laws.

Unfortunately, Kohler would have this Court limit the Worker's Compensation Act to only that rare individual in perfect health throughout his entire life. Under Kohler's construction of the statute, the ability of the employee to

perform gainful work at the time of his injury, would be irrelevant. Such a construction destroys the beneficent purpose contained in the Act of promoting gainful employment.

Kohler's contention that Bledsoe suffered a pre-existing condition barring compensation for the debilitating injuries he suffered while in its employ is without merit under Alabama law. Alabama law is well-settled that "[i]f the employee was able to perform his duties prior to the injury, no pre-existing condition is present for the beneficent purpose of the Act." *Cagle v. Brock and Blevins, Inc.*, 723 So. 2d 65, 68 (Ala.Civ.App. 1998).

In *Cagle, supra*, the employee claimant went to work for Brock and Blevins, Inc., on January 23, 1993, and claimed he was injured a few hours later when a 300 pound object fell on his waist and groin. *Id.* The trial court, following oral proceedings, entered judgment finding that Cagle sustained bilateral inguinal hernias and strained his back, right hip, and right knee, as a result of the accident. *Id.* at 66. However, the trial court denied disability benefits on the ground that Cagle had a pre-existing condition, not aggravated by the accident. *Id.*

On cross-examination, Cagle admitted that he had experienced pain in his back and had hurt his knee before the January 1993 on-the-job injury. *Id.* at 67. The evidence was also undisputed that Cagle had spondyloarthritis before his January 1993 injury. *Id.* at 68. However, Cagle performed his job for five (5) hours before the accident and the record was devoid of any evidence that he was unable to work. *Id.* Cagle admitted he suffered from back pain, but testified that it did not prevent him from working. *Id.* His doctors testified that the accident aggravated his condition. *Id.* Based upon the evidence, this Court held that the trial court's finding of a pre-existing condition for the purposes of the Workers' Compensation Act, was not supported by the evidence. *Id.*

In the present case, the evidence clearly showed that Tyrone Bledsoe could perform his duties at Kohler without any accommodation prior to November 28, 2000. Becky McCutcheon, Kohler's human resources manager, clearly and explicitly testified in deposition that Bledsoe was fully performing his job duties at Kohler without any special circumstances before he was severely injured in November, 2000. (R.195-196). During his testimony, Tyrone Bledsoe

admitted he could fully perform his employment prior to the accident and injury at issue. (R.33-34).

Indeed, Kohler's own time records paint a vivid picture of an employee who not only worked his normal hours, but worked almost every hour of every day of every week prior to his injuries. According to the time chart introduced into evidence by Kohler at trial, Bledsoe worked substantial amounts of overtime, without any complaint, before his November 28, 2000, back injury. (Dfs. Ex. 73).

Kohler's contention that Bledsoe suffered preexisting injuries which prevented him from doing his job prior to November 28, 2000, is entirely contrary to its own time records. As the time chart clearly reveals, Bledsoe constantly worked up to 90 or 100 hours a week prior to his November, 2000, injury. In October, the month before his disabling injury, Bledsoe worked 324 hours. In the first few weeks of November, 2000, Bledsoe worked 225 hours. In fact, less than five (5) months before the subject injury, Bledsoe worked a commendable 340 hours in two weeks. Thus, the record is devoid of any evidence that Bledsoe was unable to do his job before his disabling injury on November 28, 2000. Certainly, this documentary evidence is

entirely consistent with the testimony from both Bledsoe and Kohler that he could fully perform his job, without limitation, prior to his November, 2000, injury.

The case of *Oberkor v. Central Alabama Home Health Care Services, Inc.*, 716 So. 2d 1267 (Ala.Civ.App. 1998), also involves the issue of whether an employee suffered a pre-existing condition barring compensation. Oberkor suffered a non-work-related automobile accident in August 1992. *Id.* at 1268. As a result of that accident, she received treatment for injuries to her neck and back. *Id.* Her physician performed an MRI and found disc herniations at C3-4 and C4-5 in her neck. Oberkor was out of work for several days recovering from the accident before returning to her job at Central Alabama Home Health Care Services, Inc. ("Home Health"). *Id.*

On September 18, 1993, Oberkor was involved in an automobile accident while working in the scope of her employment. *Id.* She again sought treatment for her neck and back. *Id.* An MRI was performed which revealed the same disc herniations as the MRI following the earlier non-work-related accident, with no changes since 1992. *Id.* at 1269.

Oberkor subsequently filed a complaint seeking workers' compensation benefits for the 1993 injury. *Id.* at 1267. The trial court denied benefits.

Conflicting medical evidence was presented at trial as to whether Oberkor's condition pre-existed the 1993 work-related accident. However, Oberkor's supervisor testified that before the 1993 accident Oberkor rarely missed work, was a good employee, and regularly picked up and moved patients. *Id.* at 1269.

In examining whether Oberkor suffered a pre-existing condition at the time of her 1993 accident, this Court held that "if the previous injury has not demonstrated itself as disabling and has not prevented the employee from performing his job in a normal manner, then the previous injury will not disqualify the claim." *Id.* at 1270; *see also, Tarver v. Diamond Rubber Products Co.*, 664 So. 2d 207, 210 (Ala.Civ.App. 1994). Furthermore, "[p]re-existing injury is defined in terms of its effect on the employee's ability to earn. The existence of an infirmity that does not prevent an employee from performing his duties without modification, or from working 'as a normal man,' does not affect a compensation award." *Id.; see also, Gold Kist, Inc. v. Nix*, 519 So. 2d 556, 557 (Ala.Civ.App. 1987).

Tyrone Bledsoe does not dispute that he suffered prior injuries to his back and neck. In fact, most of these injuries have occurred during the course of his employment with Kohler. (R.24-25).

Over ten (10) years ago, Bledsoe was involved in an automobile collision that caused some temporary whiplash symptoms. These symptoms resolved and did not affect Bledsoe's ability to work at Kohler.

After starting his employment with Kohler, Bledsoe suffered two work-related injuries in 1997. (R.24-25). Both occurred at Kohler and were reported immediately. *Id.* The first injury was to his thumb. The second was to his upper back/neck while lifting a tub. Both improved. After each, Bledsoe resumed the full duties of his employment with Kohler. (R.24-25). Bledsoe has experienced some flare-ups in his neck from this prior upper body work-related injury when performing strenuous work at Kohler. However, neither injury has prevented Bledsoe from performing his regular job duties. (R.24-25). No injury limited Bledsoe from performing his duties in November, 2000, when the injury made the basis of this claim occurred. (R.24-25).

In February and December, 1998, Bledsoe was involved in two minor automobile collisions. (R.26). One occurred when his car was bumped at a stop sign while sitting still. The other occurred when his car slipped on some ice at a low speed and hit a guardrail. Both injuries affected mainly his neck and shoulder, although he did have some lower back complaints. (R.27-28). Dr. John Bacon treated Bledsoe for the February, 1998, accident. (R.27). Dr. Bacon ordered MRI's which were negative for any disc problems. (Pls. Ex. 21, Bacon records). In his correspondence, Dr. Bacon concluded that this injury was only muscular in nature. (Pls. Ex. 21, Bacon records, correspondence on 2-17-98). MRIs taken after the second accident again showed no disc problems. (Pls. Ex. 21, Bacon records).

Drs. Bacon and Miller treated Bledsoe for this second minor accident. Bledsoe also sought subsequent care from a chiropractor following this accident. According to the chiropractic records, he improved. (Pls. Ex. 30, Hardy records). His last visit occurred in June, 2000, many months before his final work injury at Kohler.[20] Neither of these injuries affected his ability to continue in his

[20] The undersigned would note that MRIs taken after these accidents did not reveal a disc herniation.

full employment at Kohler.[21] (Dfs. Ex. 73). Furthermore, as of June, 2000, Bledsoe was completely recovered from both of his automobile collisions. (R.28-29).

On July 28, 2000, while performing his regular job duties at Kohler, Bledsoe suffered a lower back injury. This injury occurred as he lifted a heavy charge. (R.32). He reported it immediately. Kohler sent Bledsoe for treatment with its company physician, Dr. Robert Johnson. According to Dr. Johnson, after only a couple of visits, Kohler contacted him stating that Bledsoe was fine and would need no further treatment. (Pls. Ex. 17, Johnson records, office note on 8-16-00). At trial, Bledsoe concurred with that assessment. (R.37). According to Bledsoe, he improved back to normal and could fully perform his job. (R.37). As such, Bledsoe, the physician, and Kohler, all concluded no further treatment was needed.

In the Fall of 2000, Bledsoe experienced a flare-up in his neck and shoulders due to working significant overtime at Kohler. He attended some therapy for this flare-up of his neck. However, this flare-up had no effect on his

[21] According to Kohler's own time records, Bledsoe worked substantial hours the month of June.

ability to work. He continued to perform all the requirements of his job at Kohler without limitation.[22]

Bledsoe does not dispute that he had suffered prior injuries. According to the evidence, these injuries were muscular in nature, did not prevent Bledsoe from performing his regular job duties, and resolved prior to the November, 28, 2000, accident and injury.[23] Kohler, in brief, asserts that Bledsoe was under restrictions and unable to perform his job at the time of the injury. (Kohler brief, pp. 41-42). This is simply untrue. Counsel invites this Court to review the record in its entirety on this issue. Kohler's counsel specifically asked Bledsoe at trial about his abilities at the time of the November, 2000, accident. Likewise, Kohler's representative admitted Bledsoe was under no restrictions when his injury occurred. (R.195-196). It is incredible that Kohler would now claim otherwise.

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[22] On cross-examination, Bledsoe again affirmed that he experienced no restrictions or limitations at the time of his injury. (R.94;96;99;100;102-103;104-105;120;123).

[23] Counsel would note that if any of the prior work-related accidents and injuries, at Kohler, resulted in any permanent limitations or problems, the award of permanent, total disability to Bledsoe would still be appropriate. Under *Ala. Code* § 25-5-57(a)(4)f (1992), successive injuries in the same employment can result in a fully compensable total disability. Indeed, the medical evidence prior to November 28, 2000, cited by Kohler in its brief primarily involves medical treatment as a result of injuries, at Kohler (or, at least, problems which the physicians clearly indicated in their records were aggravated by his work at Kohler). (Kohler brief, pp. 41-43). In its brief, Kohler takes the incredible position that Bledsoe possessed a pre-existing problem but that his prior work accidents had absolutely no effect upon him. (Kohler brief, pp. 41-43).

In *Oberkor, supra*, this Court held that it would be contrary to the purposes of the Workers' Compensation Act to hold that the employee was due no benefits because she had pre-existing problems, when those problems did not impair her work performance. *Id.* at 1270. Likewise, in the present case, Bledsoe experienced no pre-existing problems which impaired his ability to work at Kohler.

In support of its position, Kohler solely relies upon *General Motors v. Jackson*, 823 So. 2d 695 (Ala.Civ.App. 2001), *Knapp v. Mitternight Boiler Works, Inc.*, 693 So. 2d 506 (Ala.Civ.App. 1997), and *Eubanks v. International Paper Co.*, 717 So. 2d 391 (Ala.Civ.App. 1998). As set forth below, the case at bar is clearly distinguishable from each of these cases.

The facts in each of Kohler's cited cases clearly reveal that the injured worker was unable to perform his or her job duties at the time of the injury at issue. In *Jackson, supra*, the injured worker had suffered an earlier injury. *Id.* at 697. As a result of that injury she transferred to a light duty position, but was still unable to perform fully her duties. *Id.* In fact, she reported to her employer's medical unit "constantly, complaining of pain in her arms, hands, and shoulder" before the injury at

issue. *Id.* She even admitted that her earlier injury had not resolved. *Id.* Jackson, unlike Bledsoe, was unable due to a prior injury to perform her full job. Thus, Jackson is inapplicable to the present case.

Similarly, in *Knapp, supra*, the evidence overwhelmingly revealed that the injured worker was unable to perform his job duties on the two consecutive days prior to the date of his alleged back injury. Knapp was even wearing a TENS unit for his back pain shortly before his alleged injury. *Id.* at 510. Just two days prior to falling at work, Knapp indicated to his physician that he had constant back pain. *Id.* at 509. He further revealed he was unable to sleep, bathe, dress, engage in daily activities, household chores and family activities due to his constant back pain. *Id.* Bledsoe, on the other hand, was able to function fully on November, 28, 2000.

Finally, in *Eubanks, supra*, the record revealed little medical evidence to support Eubanks's claim of total disability after a fall at work. Eubanks's own treating physician did not even believe that his fall caused his continuing back problems. *Id.* at 394. Furthermore, a physician testified that Eubanks was capable of working with certain restrictions after his alleged injury. *Id.*

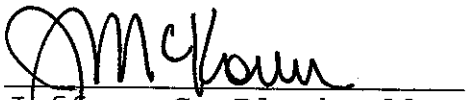
Unlike the injured workers in *Jackson*, *Knapp* and *Eubanks*, Tyrone Bledsoe could fully perform his job duties after each of his prior, mostly work-related, injuries. Kohler's own time records revealed that Bledsoe was able to fully perform his job prior to November 28, 2000, for entire 12 hour shifts, every week, even accumulating significant hours of overtime. Furthermore, three physicians indicated that Tyrone Bledsoe was totally disabled due to his devastating injury on November 28, 2000, at Kohler. Thus, the case at bar is clearly distinguishable from Kohler's cited cases.

The overwhelming evidence reveals an employee who could fully perform his normal job at Kohler when he suffered a devastating injury on November 28, 2000. This evidence includes Bledsoe's testimony that he could fully perform his job duties and a wage chart which revealed Bledsoe worked almost every hour of every day prior to his injury. As such, he clearly suffered no pre-existing disability under Alabama's Workers' Compensation Act. Thus, the trial court's award of benefits in this case should be affirmed.

CONCLUSION

Based on all the foregoing, this Court should fully affirm the jury's verdict in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

We hereby certify that we have this date served a copy of the foregoing brief by placing a copy of the same in the United States Mail, First Class, postage prepaid, and properly addressed to the Appellant as follows:

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