

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**NESHOPA COUNTY GENERAL)
HOSPITAL AND MISSISSIPPI)
HOSPITAL ASSOCIATION PUBLIC)
WORKERS' COMPENSATION GROUP))
(HEALTHCARE PROVIDERS))**

**EMPLOYER AND CARRIER/)
APPELLANTS)**

v.)

NO. 2007-TS-01131

SALLY HOWELL)

CLAIMANT/APPELLEE)

**ON APPEAL FROM THE
CIRCUIT COURT OF NESHOPA COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The Employer and Carrier have requested that the Court grant oral argument to the parties in this matter. This appeal involves multiple issues, requiring the Court to examine whether errors of law were committed and whether substantial evidence supports the Commission's determination that Claimant rebutted the presumption of no loss of wage earning capacity, which arose as a result of her actual post injury earnings and, in the alternative, whether the Commission apportioned Claimant's injury and calculated her benefit amount in accordance with the provisions of Mississippi Workers' Compensation Law. Moreover, the facts underlying this appeal are complex, involving both the injury at issue and an injury with a prior employer. Because of these multiple issues and factual complexities, the Employer and Carrier believe that oral argument will help the Court in its understanding and assessment of the issues presented.

REPLY BRIEF OF APPELLANT

In their principle brief, Employer and Carrier presented arguments and authorities to show that the Commission decision in this matter is not supported by substantial evidence and is contrary to provisions of the Workers' Compensation Law. In her Response Brief, Claimant did not present arguments or authorities to establish otherwise. In reply to Claimant's Brief, Employer and Carrier submit the following counter arguments:

I. AT THE TIME CLAIMANT RESIGNED FROM HER EMPLOYMENT WITH NESHOPA, SHE WAS ADMITTEDLY UNDER NO RESTRICTIONS RELATED TO THE JULY 2003 INJURY AT ISSUE

Claimant contends that Employer and Carrier made "factually incorrect" statements in their brief regarding the termination of Claimant's employment. Employer and Carrier stated Claimant resigned from her employment with Neshoba because her job required work beyond the restrictions imposed by Dr. Staggs as the result of a prior injury at Hilltop Nursing Center. In

making that contention, Claimant overlooks her own testimony at the hearing in this matter:

- Q. Okay. Mrs. Howell, just so I have this straight, you were working at Station Three?
- A. Yes.
- Q. Which was the Personal Care Area, correct?
- A. Yes, sir.
- Q. And that's where the patients are able to care for themselves better and there is not as much patient handling?
- A. Yes, sir.
- Q. And that's what you were doing when you were first hired at Neshoba County General Hospital?
- A. Yes, sir.
- Q. And then you worked in that area and were working there when you hurt you neck on September 29th 2003?
- A. July.
- Q. I'm sorry, July 29th 2003; is that correct?
- A. Yes, sir.
- Q. Okay. And then you kept working there until you were changed to Station Two?
- A. Yes, sir.
- Q. Is that correct?
- A. Yes, sir.
- Q. And Station Two required more physical work, is that what you're testifying too [sic] - -
- A. Yes.
- Q. - - more physical activities. And that required more of the duties that would typically be required of an LPN, correct?
- A. Yes, sir.
- Q. *And at that time the only work restrictions that you were under was the work restriction of Dr. Staggs, which was no lifting more than 25 to 30 pounds; is that correct?*
- A. *Yes, sir.*
- Q. *And it was because of what you were doing at that point, you were not able to work within that restriction placed upon you by Dr. Staggs that you stopped working there; is that correct?*
- A. *Yes, sir.*

(Tr. at 43-44) (emphasis added) At the hearing, Claimant also acknowledged that no doctor had instructed her to stop working at Neshoba and that she had instead decided on her own to end her employment. (Tr. at 40) As this testimony shows, Claimant undeniably admitted that she was

under no work restrictions as a result of the July 2003 injury at issue and that she ended her employment with Neshoba because she was unable to work within the restrictions imposed by Dr. Staggs after her injury with a previous employer. Claimant's own testimony, therefore, confirms the accuracy of Employer and Carrier's recitation of the facts.

II. CLAIMANT'S INCREASED MEDICAL DISABILITIES ALONE ARE INSUFFICIENT TO REBUT THE PRESUMPTION OF NO LOSS OF WAGE EARNING CAPACITY

As evidence to rebut the presumption of no loss of wage earning capacity arising from Claimant's actual post injury wages, Claimant argues only that "even though she may be earning *approximately* more wages at this time, she is doing so with increased medical and occupational disabilities."¹ (Appellee's Brief at 7) (emphasis added) As Employer and Carrier discussed in their principal brief, evidence of a physical impairment is not sufficient to rebut the presumption of no loss of wage earning capacity. *See Cox v. Int'l Harvester Co.*, 221 So. 2d 924, 924-25, (Miss. 1969). *See also* Appellant's Brief at 7-8. The record contains insufficient evidence to show that Claimant's actual post injury earnings are for some reason an unreliable indicator of her post injury wage earning capacity. The Court has required proof of such unreliability to rebut the presumption at issue. *See Cooper Tire and Rubber Co. v. Harris*, 837 So. 2d 789, 793, (Miss. 2003); *Gen. Elec. Co. v. McKinnon*, 507 So. 2d 363, 365, (Miss. 1987). *See also* Appellee's Brief at 7-9. Because substantial evidence does not support the Commission's finding on this issue, the Court should reverse the Commission's decision.

¹Claimant's statement clouds the facts related to her post-injury earnings. Claimant was not merely "earning approximately more wages" at her post injury job with Choctaw Health Center; Claimant was instead *definitively* earning more than her preinjury wages. Claimant's average weekly wage as an LPN with Neshoba was \$462.18. Her average weekly wage as an LPN with Choctaw Health Center was \$514.00. As these numbers demonstrate, Claimant cannot reasonably characterize her post-injury earnings as only "approximately" higher than her preinjury earnings.

III. IN COMPUTING THE BENEFIT AMOUNT, BOTH THE CLAIMANT AND THE COMMISSION INCORRECTLY EQUATED LOSS OF WAGE EARNING CAPACITY TO PREINJURY AVERAGE WEEKLY WAGE

In proffering an explanation for how the Administrative Judge and Commission computed the weekly benefit awarded in this matter, Claimant incorrectly uses her preinjury average weekly wage as the measure of her post injury loss of wage earning capacity. The clear, unambiguous language of the Mississippi Workers' Compensation Law establishes that "loss of wage earning capacity" is not the same as preinjury average weekly wage. Mississippi Code Annotated § 71-3-17(c)(25) provides as follows:

In all other cases in this class of disability [permanent partial disability] the compensation shall be sixty-six and two-thirds percent of the difference between [the Claimant's] average weekly wages, subject to the maximum limitations as to weekly benefits as set up in this chapter, and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest.

To determine the loss of wage earning capacity, this statutory provision instructs the Commission to subtract a claimant's post injury wage earning capacity from his or her preinjury average weekly wage. The statute then instructs the Commission to calculate the disability amount by computing sixty-six and two-thirds percent of the loss of wage earning capacity. As Claimant's Brief explains, the Administrative Judge and Commission did not follow these statutory instructions in computing the benefit amount awarded in this case.

The Commission affirmed the Administrative Judge's finding that Claimant incurred a seventy percent loss of wage earning capacity, thirty percent of which was apportioned to Claimant's injury at Hilltop. The Commission thus agreed with the Administrative Judge's finding that Claimant incurred a forty percent loss of wage earning capacity as a result of the July 2003 injury at issue. Claimant explains the \$123.25 weekly benefit awarded by the

Administrative Judge as follows: "When you take forty percent of the Claimant's average weekly wage at the time of her injury, \$462.18, you receive \$184.87. When you reduce that amount by sixty-six and two-thirds percent under the Commission law, you get \$123.25. This is the exact finding of the Administrative Judge, Full Commission and Circuit Court Judge." (Appellee's Brief at 9) As this explanation shows, the \$123.25 benefit amount can only be reconciled to the forty percent loss of wage earning capacity by equating Claimant's preinjury average weekly wage with her loss of wage earning capacity. Such equation is, however, contrary to the formula provided in Mississippi Code Annotated § 71-3-17(c)(25).

Using the statutory formula, Claimant's loss of wage earning capacity could equal \$462.18 (her preinjury average weekly wage) only if her post injury wage earning capacity equaled zero dollars. As explained in Employer and Carrier's principle brief, even discounting Claimant's actual post-injury earnings, the uncontradicted evidence showed that Claimant had a post injury wage earning capacity of at least \$313.20. Mississippi Code Annotated § 71-3-17(c)(25) requires compensation for permanent partial disability to be computed by taking sixty-six and two-thirds percent of the difference between a claimant's preinjury average weekly wages (in this case \$462.18) and a claimant's wage earning capacity thereafter (in this case no less than \$313.20). Under no mathematical formula can this computation equal \$123.25 as determined by the Commission and as argued by Claimant. Instead, Claimant's entire, unapportioned compensation benefit for her seventy percent loss of wage earning capacity can equal no more than \$99.32. Reducing that amount by thirty percent results in a maximum possible compensation benefit to Claimant of \$69.52 per week. Any other computation is contrary to the law and the substantial evidence presented in this matter. Therefore, this Court should reverse the Commission's award.

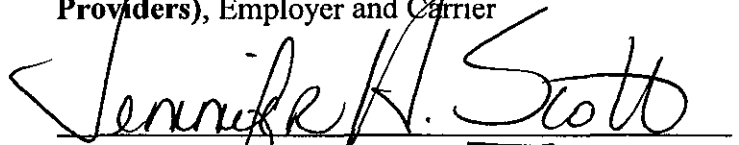
CONCLUSION

For the reasons urged in this Reply Brief as well as those presented in Employer and Carrier's initial brief, this Court should reverse the Commission's findings because Claimant failed to demonstrate a loss of wage earning capacity as a result of her injury with Neshoba County General Hospital. In the alternative, this Court should reverse the Commission's Order affirming a benefit amount of \$123.25 because such amount is not supported by the substantial evidence or by the relevant statutory provisions.

Dated this the 22nd day of April, 2008.

Respectfully submitted,

**Neshoba County General Hospital and
Mississippi Hospital Association Public
Workers' Compensation Group (Healthcare
Providers), Employer and Carrier**

A handwritten signature in black ink, appearing to read "Jennifer H. Scott", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this day caused to be served via hand-delivery, a true and correct copy of the above and foregoing to the following:

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and via **United States Mail**, postage prepaid, to the following:

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Honorable Marcus D. Gordon
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Dated this the 22nd day of April, 2008.


ANDREW D. SWEAT
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