IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NESHOBA 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	)	

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made so that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. The Honorable Marcus D. Gordan, Circuit Court Judge for Neshoba County, Mississippi

2. Neshoba County General Hospital, Employer/Appellant

3. Mississippi Hospital Association Public Workers' Compensation Group (Healthcare Providers), Carrier/Appellant

4. Mr. Andrew D. Sweat and Ms. Jennifer H. Scott of Wise Carter Child & Caraway, attorneys for Appellants

5. Ms. Sally Howell, Claimant/Appellee

6. Mr. Al Chadick , attorney for Claimant/Appellee

7. The Honorable Melba Dixon, Administrative Judge for Mississippi Workers' Compensation Commission

8. Liles Williams, Commissioner, Mississippi Workers' Compensation Commission

9. Lydia Quarles, former Commissioner, Mississippi Workers' Compensation Commission

10. Barney J. Schoby, former Commissioner, Mississippi Workers' Compensation Commission

This the 8th day of January, 2008.

BY: _____

ANDREW D. SWEAT (MSB #[redacted]
JENNIFER H. SCOTT (MSB#[redacted])
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STATEMENT OF THE ISSUES

1. Does substantial evidence support the Mississippi Workers' Compensation Commission's determination that Sally Howell suffered a loss of wage earning capacity as a result of a July 29, 2003 injury that occurred during her employment with Neshoba County General Hospital?

2. If this Court finds that such determination is supported by substantial evidence, are the Commission's calculation of benefits and its method of apportioning those benefits supported by substantial evidence and Mississippi Code Annotated Section 71-3-7?

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

On June 14, 2004, Claimant Sally Howell ("Claimant" or "Howell") filed a Petition to Controvert alleging she sustained a work-related injury to her neck and both arms on July 29, 2003 as she assisted a patient into bed. (R. 1) In answering the Petition, Employer Neshoba County General Hospital ("Neshoba" or "Employer") admitted compensability but denied that Howell had sustained a loss of wage earning capacity and that she was entitled to permanent disability benefits. (R. 3-4) Following discovery in this matter, Administrative Judge Melba Dixon conducted a hearing on January 31, 2006 as to the issues raised in the Petition to Controvert and the defenses asserted by Neshoba. (R. at 31) At the hearing the parties stipulated that (1) Howell's average weekly wage at the date of the injury was $462.18; (2) Howell reached maximum medical improvement ("MMI") on March 29, 2005, (3) all temporary total disability benefits and medical benefits had been paid to Howell; and (4) Howell has a ten percent permanent partial impairment rating to the body as a whole, per Dr. Winklemann. (R. 31-32) The issues placed before Judge Dixon were (1) the existence and extent of permanent disability and loss of wage earning capacity, if any, attributable to the injury and (2) whether apportionment was applicable. (R. 31-32)

On April 13, 2006, Judge Dixon issued an Order finding that apportionment of benefits was applicable. (R. 45) Judge Dixon found that Howell's preexisting condition was occupationally disabling since it had adversely affected her pre-injury wage earning capacity. (R. 45) The preexisting occupational disability was caused by an injury with a prior employer which resulted in a twenty to thirty pound lifting restriction assigned by Dr. Ken Staggs. (T. 34) Judge Dixon also found that Howell had a seventy percent loss of wage earning capacity as of the date of her Order. (R. 45) Because of Howell's preexisting disability, Judge Dixon held that thirty percent of the award

should be apportioned to the previous injury. (R. 45) Judge Dixon awarded Howell permanent partial disability benefits of $123.25 per week for a period of 450 weeks, subject to the statutory maximum, beginning on March 30, 2005. (R. 46)

Employer and Carrier filed a Petition for Review with the Full Commission on May 2, 2006. (R. 47-49) The Full Commission affirmed Judge Dixon's Order on September 12, 2006. (R. 76) On October 10, 2006 Employer and Carrier timely appealed that decision to the Circuit Court of Neshoba County. (R. 77-79) . The Honorable Marcus D. Gordan, Circuit Court Judge, affirmed the Full Commission Order on June 11, 2007. (R. 728-729). Employer and Carrier thereafter timely appealed to this Court on July 5, 2007. (R. 36-39)

B. Statement of Relevant Facts

Prior to her employment with Neshoba, Howell worked as an LPN at Hilltop Nursing Center ("Hilltop"). (T. 17) While employed at Hilltop, she incurred a neck injury and initially returned to work with no restrictions after being released by Dr. Lynn Stringer. (T. 15-16). A few months after Howell returned to Hilltop, she began experiencing problems, and Dr. Ken Staggs, who had begun treating her, took her off work for approximately one year. (T. 18)

Dr. Staggs released Howell with a twenty to thirty pound lifting restriction. (T. 18) Howell did not return to her job at Hilltop, but instead began working as an LPN in Neshoba's Personal Care Unit in May 2003. (T. 19) Howell testified that her job with Neshoba allowed her to work within her lifting restriction. (T. 39) Neshoba had in fact modified Howell's job duties so that they conformed to the restrictions imposed by Dr. Staggs. (T. 39)

On July 29, 2003, approximately two months after beginning work at Neshoba, Howell sustained the subject injury. (T. 20) This injury occurred as she was assisting a patient who was attempting to get into the hospital bed. (T. 20) The patient was seated on the side of the bed; when

Howell knelt down to help the patient place her legs into the bed, the patient rolled toward Howell. (T. 20) Howell testified that, in order to prevent the patient from falling to the floor, she held the patient and tried to get her to move back onto the bed; Howell injured her left arm and neck in this process. (T. 20)

Howell continued working at Neshoba after this incident. (T. 21) Around September 2003, Howell moved from Station 3 to Station 2 at the hospital. (T. 23) In contrast to the modified Station 3 LPN job Howell had been performing at Neshoba, the Station 2 position required full duty LPN nursing duties. (T. 23) After approximately three weeks, Howell decided that she was not able to perform the work tasks required at Station 2. (T. 24) Because this position required work beyond the restrictions placed upon her by Dr. Staggs as a result of her prior injury at Hilltop, Howell ended her employment with Neshoba in October 2003. (T. 23-24)

At no time did a physician instruct Howell to discontinue her employment with Neshoba. (T. 40) Instead, Howell made the decision on her own to leave Neshoba. (T. 40) Prior to notifying Neshoba of her voluntary resignation, Howell had sought and obtained other employment with Dr. A. P. Soriano. (T. 40) In her letter of resignation, Howell only cited the "offer from another agency" as the reason for leaving her employment with Neshoba. (Ex. 15) Howell did not mentioned any inability to perform her job duties as a reason for her voluntary resignation from Neshoba. (Ex. 15)

During her employment with Dr. Soriano, Howell began treating with Dr. Phillip Azordegan. (T. 25) In September 2004, Dr. Azordegan performed surgery on Howell related to her July 2003 injury. (T. 26) Dr. Azordegan eventually referred Howell to Dr. Winkelmann for further treatment. (T. 26) Dr. Winkelmann placed Howell at maximum medical improvement on March 29, 2005 and assigned a ten percent permanent partial impairment rating to the body as a whole. (Ex. 12 at 14)

Dr. Winkelmann testified that Howell was physically capable of working in a sedentary position for eight hours per day and that she could use her hand and arm for activities such as reaching and grasping. (Ex. 12 at 17)

Bruce Brawner, a vocational rehabilitation expert, testified on behalf of the Employer and Carrier by deposition. After reviewing Howell's employment history, education, and medical history, including the restrictions assigned by her treating physicians, Brawner determined that Howell had "skills in being able to carry out medical treatment and personal care as prescribed by a physician, being able to maintain records, charting records, both manually and via computer, [as well as] the ability to perform various clerical tasks, answering the phone setting up appointments, charting records." (Ex. 13 at 9-10) Brawner further determined that the restrictions imposed by Dr. Staggs after Howell's injury at Hilltop Nursing Home had resulted in a fifty-seven percent loss of access to the job market for positions that she would have otherwise been qualified to perform. (Ex. 13 at 21) Brawner then testified that Howell had lost access to eighty three percent of the job market, or an additional twenty six percent, as a result of the restrictions imposed following the injury at Neshoba. (Ex. 13 at 22) Brawner performed a vocational evaluation of Howell. Thereafter, he identified eighteen jobs through a labor market survey and tendered those jobs to Howell. (Ex. 13 at 16) Based on his evaluation, Brawner opined that Howell's wage earning capacity ranged from $7.83 per hour or $313.00 per week to $12.85 per hour or $514.00 per week, the amount she was actually earning at the Choctaw Health Center. (Ex. 13 at 18)

As of the date of the hearing, Howell had worked full time as an LPN for Choctaw Health Center earning $12.85 per hour or $514.00 per week since December 2005. (T. 29) Howell worked in the outpatient clinic, where she pulled patient charts and administered medications, including injections. (T. 30-31) She enjoyed this job. (T. 44) Howell was classified as a "temporary" rather

than "regular" employee. (T. 32) As a "temporary" LPN, Howell did not receive benefits from the clinic. (T. 29) She further claimed that the "regular" positions received higher pay. (T. 45) In addition, Howell's "temporary" classification reflected the fact that the center had modified her job duties to accommodate her physical restrictions. Howell testified that a "regular" LPN position at Choctaw Health Center required "lifting up to 80 pounds and being able to perform vigorous activities." (T. 32) However, even before Howell's injury at Neshoba, Dr. Staggs had imposed a twenty to thirty pound lifting restriction as a result of her injury at Hilltop. (T. 18) Thus, Howell did not present any evidence establishing that, prior to the Neshoba injury, she would have qualified for a "regular" LPN position at Choctaw Health Center. Although Howell claimed that her job with Choctaw Health Center is a temporary one, she admitted that the center has never advised her that the job would terminate in the future. (T. 34) Since obtaining employment with the center, Howell had not applied for any other jobs tendered by Bruce Brawner. (T. 37)

SUMMARY OF THE ARGUMENT

The evidence established that Howell's July 29, 2003 injury resulted in no loss of wage earning capacity. Howell's post-injury earnings have exceeded her pre-injury wages, thereby raising a presumption of no loss of wage earning capacity. Howell presented insufficient hearing evidence to show that her higher earnings were not a reliable indication of her post-injury wage earning capacity. Instead, the evidence showed that her post-injury earnings were consistent with her actual earning capacity. Thus, Howell failed to rebut the presumption of no loss of wage earning capacity.

Even if Howell were entitled to permanent disability benefits as a result of the subject injury, the Commission did not award benefits in accordance with the evidence or the relevant statutes. The Commission determined Employer and Carrier were entitled to apportionment as a result of Howell's pre-existing disability. The evidence showed that her pre-existing occupational disability resulted

68 2/3% of Howell's post-injury loss of access to jobs globally. Thus, the Employer/Carrier are entitled to reduce the benefit that would otherwise be payable by this percentage, thereby allowing Howell a permanent, partial disability benefit of no more than $31.44 per week.

ARGUMENT

A. Substantial Evidence Does Not Support the Commission's Determination That Howell Suffered a Loss of Wage Earning Capacity as a Result of the July 29, 2003 Injury.

Mississippi Workers' Compensation Law defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." Miss. Code Ann. § 71-3-3(i). In a claim for permanent disability benefits, "'[t]he burden is on the claimant to prove both medical impairment and loss of wage earning capacity.'" *Lane Furniture Indus. v. Essary*, 919 So. 2d 153, 158 (Miss. Ct. App. 2005) (quoting *Lanterman v. Roadway Express, Inc.* 608 So. 2d 1340, 1347 (Miss. 1992)).

If a claimant's actual post-injury wages equal or exceed her pre-injury wages, a rebuttable presumption arises that the claimant has experienced no loss of wage earning capacity. *Gen. Elec. Co. v. McKinnon*, 507 So. 2d 363, 365 (Miss. 1987). *See also, Cooper Tire & Rubber Co. v. Harris*, 837 So. 2d 789, 793 (Miss. Ct. App. 2003). To rebut this presumption, the claimant must present evidence showing that her post-injury earnings are an unreliable indicator of her post-injury wage earning capacity. *McKinnon*, 507 So. 2d at 365. Proof of such unreliability may include evidence such as "[i]ncrease in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings." *Howard Indus., Inc. v. Robinson*, 846 So. 2d 245, 256 (Miss. Ct. App. 2002). *See also,*

McKinnon, 507 So. 2d at 365. Evidence of a physical impairment is not in itself sufficient to establish a compensable disability or loss of wage earning capacity under workers' compensation law. *See Cox v. International Harvester Co.*, 221 So.2d 924, 924-25 (Miss. 1969) (affirming Commission's denial of disability benefits despite evidence leaving "no doubt that claimant's ability to perform his work activities had been limited to some extent as a result of his injuries" based on Claimant's failure to rebut presumption of no loss of wage earning capacity).

Mississippi courts have found that the claimant did not present evidence sufficient to rebut this presumption in several cases. In *Guardian Fiberglass, Inc. v. LeSueur*, for example, the claimant received a nine percent permanent disability rating to the body as a whole and a permanent restriction against lifting more than fifty pounds. 751 So. 2d 1201, 1203 (Miss. Ct. App. 1999). Despite these restrictions, the claimant returned to work for his pre-injury employer, which accommodated his restrictions, and his post-injury wages equaled or exceeded his pre-injury earnings. *Id.* at 1205. In an attempt to rebut the presumption of no loss of wage earning capacity, the claimant argued that he received no promotions post-injury because of his lifting restriction and that his only post-injury raise resulted from a plant-wide pay increase. *Id.* at 1204, 1205. The employer effectively countered the claimant's failure to promote argument by presenting testimony establishing that the claimant had never applied for a promotion post-injury. *Id.* at 1204. The evidence also showed that the claimant "work[ed] substantially similar hours each week since the accident as he did before the injury, his wages [were] proportionate to his job, and that his maturity, education, and training levels [were] the same as they were prior to his injury." *Id.* at 1206. The claimant's post-injury performance evaluations also continued to be satisfactory, just as his pre-injury evaluations had been. *Id.* at 1205. In light of this proof, the Court of Appeals affirmed the Commission's determination that, except for the plant-wide raise, "no other compelling fact exist[ed]

to discount the reliability of [the claimant's] current earnings" and that the claimant had not, as a result, established any loss of wage earning capacity. *Id.* at 1205, 1206.

The claimant also failed to rebut the no loss of wage earning capacity presumption in *Winters v. Choctaw Maid Farms, Inc.*, 782 So. 2d 155 (Miss. Ct. App. 2000). The *Winters* claimant had received a post-injury raise as a result of a union negotiated, company-wide pay increase. *Winters*, 782 So. 2d at 158. Even so, no evidence indicated that the employer would have reduced the claimant's post-injury wages to a level below her pre-injury earnings absent the union's involvement. *Id.* at 161. The global nature of the pay increase also "negate[d] the idea that the wages were given out of sympathy." *Id.* No evidence linked the claimant's increased earnings to increased working hours; in fact, the claimant testified that she typically worked only eight to nine hours per day and "had no real occasion to do overtime." *Id.* Neither did the evidence show that the claimant's post-injury job position was a temporary one; the claimant believed that her physical ability to perform that position would continue. *Id.* The claimant attempted to rebut the presumption by arguing that others working in the same job position performed tasks that her restrictions prevented her from performing. *Id.* However, viewing the evidence as a whole, the court determined that this fact did not render the Commission's decision arbitrary and capricious. *Id.*[1]

In the instant case, the parties stipulated that Claimant Howell suffered a ten percent permanent partial impairment rating to the body as a whole per Dr. Winkelmann and that her pre-injury average weekly wage equaled $462.18. This impairment rating alone does not establish a

[1] The claimant failed to rebut the presumption of no loss of wage earning capacity in the following cases as well: *International Paper Co. v. Kelley*, 562 So. 2d 1298, 1302-1303 (Miss. 1990); *Agee v. Bay Springs Forest Prods.*, 419 So. 2d 188, 189 (Miss. 1982); *Smith v. Picker Serv. Co.*, 240 So. 2d 454, 456-57 (Miss. 1970); *Cox v. International Harvester Co.*, 221 So. 2d 924, 927 (Miss. 1969); *Wilcher v. D.D. Ballard Construction Co.*, 187 So. 2d 308, 310-311 (Miss. 1966).

compensable disability, however. Bruce Brawner, vocational rehabilitation expert, testified by deposition that Howell's post-injury wage earning capacity ranged from $313.20 to $514.00 per week. Howell presented no evidence to contradict Brawner's assessment of her wage earning capacity. Thus, the uncontested evidence showed that Howell's pre-injury earnings were squarely within the range of her post-injury wage earning capacity.

Moreover, Howell's actual post-injury earnings have exceeded her pre-injury earnings. At the time of the hearing, Howell earned $514.00 per week, over $50.00 more than her average weekly wage before the injury. As a result, a presumption of no loss of wage earning capacity arose, and Howell must overcome this presumption by showing that her actual post-injury earnings were an unreliable indicator of her earning capacity. Howell's proof failed to do so. The hearing evidence instead indicated that Howell's post-injury earnings were a reliable indicator of her earning capacity.

For instance, the evidence established that Choctaw Health Center had continually, rather than intermittently, employed Howell as a LPN since December 2005. Although Howell characterized her employment as "temporary," she unequivocally testified that she worked forty hours per week and that the center had not informed her of any date upon which the job would end. (T. 33-34) Howell also agreed that the clinic expected her to show up every week. (T. 34) Furthermore, after accepting employment with Choctaw Health Center, Howell took actions consistent with a belief that her new employment would continue: she did not complete any additional applications for job positions submitted by the vocational rehabilitation specialist. (T. 37) In ending her job search, Howell tacitly announced her belief that this job would be ongoing, despite any "temporary" label attached to it. This evidence did not establish that the job's higher hourly rate resulted merely from the temporary and unpredictable character of post-injury earnings. Such

evidence did, however, establish that, since December 2005, Howell had *steadily and predictably* earned higher wages at Choctaw Health Center than those she earned prior to her injury.

Neither did the evidence suggest that Choctaw Health Center paid Howell a wage disproportionate to her capacity out of sympathy for her. Howell indicated that her "temporary" LPN position differed from the "regular" LPN positions held by other employees in that her position was modified to accommodate her work restrictions. (T. 32, 45) According to Howell, a "regular" LPN position requires "lifting up to 80 pounds and being able to perform vigorous activities." (T. 32) Howell further testified that her "temporary" or modified LPN position did not offer her the benefits associated with a "regular" position. (T. 45) She also claimed that individuals working in "regular" LPN position received higher pay. (T. 45) This testimony reveals that Choctaw Health Center in fact paid Howell proportionately to her capabilities, as Howell claimed that "regular" or unmodified LPN positions offered higher earning potential than did "temporary" or modified duty LPN positions. Thus, her post-injury employer's sympathy could not account for her increased post-injury wages.[2]

The hearing evidence also failed to show any other reason suggesting Howell's post-injury wages did not reliably indicate her earning capacity. Howell had not received any additional training since her injury. She began working for Choctaw Health Center just over two years after she

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[2]Neither can Howell credibly argue that, but for the instant injury, she could obtain one of the higher paying "regular" LPN positions with her current employer. The evidence undeniably established that Howell could not have worked as a "regular" LPN for Choctaw Health Center even before her July 29, 2003 injury at Neshoba. As a result of her first injury at Hilltop Nursing, Howell was restricted from lifting more than twenty to thirty pounds. (T. 18) Howell could not, therefore, have performed the duties of a "regular" or unmodified LPN position, which duties include lifting up to eighty pounds and vigorous activities, before her July 29, 2003 injury at Neshoba. (T. 32) Howell's post-injury employment situation is actually no worse than it would have been had she not been injured at Neshoba: prior to the instant injury, Howell still would have qualified only for a "temporary" or modified LPN position at Choctaw Health Center because of her preexisting disability and restrictions from Dr. Staggs. This fact provides further evidence that Howell has not experienced any additional loss of wage earning capacity as a result of the subject injury.

voluntarily quit her employment with Neshoba; thus, Howell's greater maturity as an LPN also cannot reasonably account for her increased earnings at the center. Furthermore, Howell testified that she worked only forty hours per week at Choctaw Health Center and that she had not worked any overtime. (T. 32, 45) Accordingly, her higher earnings at the center did not result from a longer than usual work week.

As this analysis of the hearing evidence shows, Howell failed to demonstrate that her medical impairment had caused her to experience any loss of wage earning capacity. Howell's post-injury earnings had instead exceeded her pre-injury earnings. Howell failed to present evidence sufficient to overcome the resulting presumption of no loss of wage earning capacity. Therefore, substantial evidence does not support the Commission's decision to award her permanent disability benefits, and this Court should reverse that decision.

B. Alternatively, Substantial Evidence Does Not Support the Commission's Calculation of Benefits or Its Method of Apportioning Those Benefits.

As discussed in the previous section of this Brief, Employer and Carrier deny that Howell has experienced any loss of wage earning capacity. However, even if this Court were to affirm the Commission's determination regarding loss of wage earning capacity, the Court should find that neither substantial evidence nor the relevant statute supports the Commission's calculation of benefits or its method of apportioning those benefits.

Where apportionment is appropriate, the Mississippi Workers' Compensation Act provides that "the compensation which, but for this paragraph, would be payable, shall be reduced by that proportion which such preexisting physical handicap, disease, or lesion contributed to the production of the results following the injury." Miss. Code Ann. § 71-3-7 (1972). The Commission affirmed the Administrative Judge's determination that apportionment was required in this case and that thirty

percent of Howell's loss was attributable to her preexisting disability. (R. 76) It also affirmed the award of $123.25 as an apportioned amount of permanent disability benefits. (R. 76) In their respective Orders, neither the Commission nor the Administrative Judge provided any detailed explanation regarding how they calculated the apportionment percentage or the benefit amount. However, the uncontested evidence regarding Howell's preexisting disability, her pre-injury wages, and her post-injury wage earning capacity did not support this apportionment percentage or benefit amount.

In contrast to the thirty percent assigned by the Commission, the evidence showed that Howell's preexisting disability accounted for more than sixty-eight percent of her current loss. Howell testified that, as a result of her previous injury at Hilltop Nursing Home, Dr. Staggs imposed a twenty to thirty pound lifting restriction. (T. 18) Howell worked under these restrictions during her employment with Neshoba. (T. 39) Bruce Brawner testified by deposition that Howell's preexisting occupational disability limited her from fifty-seven percent of jobs globally. Brawner further testified that, after the subject injury, Howell's medical impairment and restrictions limited her from eighty-three percent of jobs globally. Based on this evidence, the limitations on Howell's access to jobs globally increased by twenty-six percent after the subject injury. The Commission should have calculated a fair apportionment based upon this twenty-six percent increase in Howell's loss of access to all jobs.

Such a calculation would begin with the evidence showing that, for every one hundred jobs for which Howell is qualified, her current medical restrictions disqualify her from eighty-three jobs. The calculation would then account for the uncontested evidence that Howell's preexisting disability accounts for 68 2/3% of the loss of access and that the subject injury accounts for only 31 1/3% of

the loss of access.[3] A calculation based on this evidence and the provisions of Mississippi Code Annotated Section 71-3-7 requires the Commission to reduce by 68 2/3 % any disability benefit awarded to Howell. Although neither the Administrative Judge nor the Commission explained how the award calculated the $123.25 apportioned benefit, this amount is not supported by the evidence, and it cannot reasonably equal the 31 1/3 % of Howell's loss allegedly attributable to Claimant's injury at Neshoba.

The Administrative Judge apportioned only thirty percent of Howell's loss to her preexisting disability.[4] As discussed above, Employer and Carrier contend that this percentage is not accurate. Nevertheless, the Administrative Judge could not have logically arrived at the $123.25 benefit amount using even her stated apportionment percentages. Under her holding, Howell's entire, or unapportioned, benefit would equal $176.07, making the total loss of wage earning capacity equal to $264.13.[5] Thirty percent or $52.82 of that benefit would be apportioned to the preexisting disability, leaving seventy percent or $123.25 of the benefit attributable to the instant injury. These figures simply are not supported by the evidence. The measure of Howell's disability is her loss of

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[3]These percentages are calculated as follows:

83 jobs out of every 100 jobs = Howell's total loss of access

57 of these 83 jobs (or 68 2/3 %) = Howell's loss of access attributable to her preexisting disability

26 of these 83 jobs (or 31 1/3 %) = Howell's loss of access attributable to her current injury

[4]Judge Dixon likely based her apportionment on Dr. Winkleman's opinion that Howell's preexisting condition accounted for thirty percent of her impairment and that the "new" injury accounted for seventy percent of the impairment. (R. at 44) However, Dr. Winkleman's apportionment related to Howell's *medical impairment* rather than to her *occupational disability*. Brawner, a vocational rehabilitation expert, assessed Howell's loss of wage earning capacity, thereby translating Dr. Winkleman's apportionment of the medical results of Howell's injuries into an apportionment of the occupational disability resulting from those injuries. Howell offered no testimony from a vocational expert to counter Brawner's conclusions.

[5]The total benefit of $176.07 would equal 66 2/3% of the loss of wage earning capacity: $176.07 divided by .6666 equals $264.13.

wage earning capacity; at most, such loss is measured by the $148.98 difference between Howell's pre-injury wages ($462.18) and the low end of her current wage earning capacity ($313.20). Given such loss of wage earning capacity, Howell's entire, unapportioned benefit would equal 66 2/3 % of that amount or $99.32. The Judge's apportionment determination would further reduce this amount by thirty percent to $69.52. The Administrative Judge clearly erred in awarding an apportioned benefits of $123.25 because such benefit exceeds the highest unapportioned benefit Howell could potentially receive under the undisputed evidence.

If this Court should determine that the instant injury caused Howell any additional disability, the Court should require any award to be calculated in accordance with the hearing evidence and the relevant statutory provisions. Such a calculation would begin with a maximum benefit amount of $99.32 and would reduce that amount by 68 2/3 %, the portion of Howell's loss attributable to her preexisting disability. This calculation would result in a permanent disability benefit of $31.44 at the most. Any award in excess of this amount is not supported by substantial evidence and is contrary to the provisions of Mississippi Code Annotated Section 71-3-7.

CONCLUSION

Sally Howell failed to demonstrate a loss of wage earning capacity as a result of her injury at Neshoba County General Hospital. Her post-injury wages exceeded her pre-injury earnings, and she presented insufficient evidence to rebut the presumption of no loss of wage earning capacity by showing that these higher wages were an unreliable indicator of her post-injury wage earning capacity. Therefore, the Commission's Order is not supported by substantial evidence, and this Court should reverse that Order.

Alternatively, if the Court decides that permanent disability benefits are warranted, this Court reverse the Commission's Order affirming a benefit amount of $123.25 because such amount is not

supported by substantial evidence and is not in accordance with the statute. The Court should instead fairly apportion benefits in accordance with the hearing evidence and the relevant statutory provisions. The uncontradicted evidence showed that Howell's preexisting disability resulted in 68 2/3% of her current loss of access to jobs globally. Thus, this Court should reduce the benefit that would be payable but for apportionment by this percentage, thereby allowing Howell a permanent partial disability benefit of no more than $31.44.

Respectfully submitted this the 8th day of January, 2008.

NESHOBA COUNTY GENERAL HOSPITAL AND
MISSISSIPPI HOSPITAL ASSOCIATION PUBLIC
WORKERS' COMPENSATION GROUP

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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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Dated this the 18th day of January, 2008.

ANDREW D. SWEAT
JENNIFER H. SCOTT